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The Rule of Law: “A” Relation Between Law and Morals

ALANI GOLANSKI*

H. L. A. Hart allowed that “there are many different types of relation between law and morals.” But he mostly, and sparingly, focused on law’s role in facilitating human survival, necessitating the legal system’s “minimum content of natural law.” Hart’s minimum-content view, in service of his concern to separate law and morals, spilled over into his laconic pronouncement on “legality,” typically deemed synonymous with the rule of law. He claimed that, if the legal system is to fulfill its social control function while abiding by legality, it will have to enact rules that are “within the capacity of most to obey.” This minimal expression has influenced slim and formal conceptions of the rule of law ideal and, as argued here, counts as the sort of reductive misapprehension that he himself so masterfully refuted with respect to the concept of law itself.

Taking issue with such a thin view of the rule of law, this Article’s starting premise is that the concept affords “a” critical relation between law and morals by providing both legal officials and ordinary citizens with a construct by which to evaluate legal systems in progress. Because a legal system’s central features are both duty-imposing and power-encouraging, those are the features naturally appropriate for the rule of law appraisal. Unappreciated in the academic literature, this in turn suggests that, within conceptual constraints discussed, the rule of law project implicates a moral inquiry into the legal system’s impacts upon both the capacity of the people to comply with law’s commands and their capabilities — whether political, economic, or within some other adjectival category defining life’s lived qualities and conditions — to partake of the powers and entitlements sought to be conveyed by legal norms.

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INTRODUCTION.....	209
I. SANCTIONS ARE ONLY A PART OF LAW’S STORY	212
II. LOCATING THE CONCEPT OF THE RULE OF LAW	218
III. THE RULE OF LAW FRAMES AN APT RELATION BETWEEN LAW AND MORALS.....	222
IV. CONCLUSION	228

INTRODUCTION

H. L. A. Hart begins chapter nine of *The Concept of Law* by saying that “[t]here are many different types of relation between law and morals and there is nothing which can be profitably singled out for study as *the* relation between them.”¹ He allows that conventional and social group morality, as well as a more rigorously practiced and “enlightened” moral criticism, have both “profoundly influenced” the development of law.² Most saliently, legal systems, but also institutions generally, will as a “natural necessity” incorporate a “minimum content of [n]atural [l]aw” in service of the human propensity toward survival.³

This minimum content of natural law includes certain substantive prohibitions. Human beings are vulnerable creatures, of bounded capabilities as well as limited altruism. All are tempted, at least sometimes, to pursue their own immediate interests at the expense of others’ welfare.⁴ This is “one of the natural facts which makes the step from merely moral to organized, legal forms of control a necessary one.”⁵ So law, like morality, will ordinarily proscribe such offenses as murder or unprovoked assault aimed at appropriating one’s neighbor’s assets.⁶ Given the “standing danger” that there are always some who will try to exploit and overcome merely moral constraints, “what reason demands is *voluntary* cooperation in a *coercive* system.”⁷

These sorts of considerations that draw moral values into a relation with law do not warrant the different conclusion that conformity with mo-

1. HERBERT L.A. HART, *THE CONCEPT OF LAW* 185 (3d ed. 2012).

2. *Id.* at 185, 204.

3. *Id.* at 193.

4. *Id.* at 197.

5. *Id.* at 195.

6. Ordinarily. *But see, e.g.*, Timothy Sandefur, *Is Economic Exclusion a Legitimate State Interest? Four Recent Cases Test the Boundaries*, 14 WM. & MARY BILL RTS. J. 1023, 1038 n.120 (2005) (noting that, “[i]n the period leading up to World War II, Germany enacted a complicated variety of statutes pursuing the policy of ‘Aryanization,’ whereby property was confiscated from German Jews for the benefit of Aryans”).

7. HART, *supra* note 1, at 198.

rality provides a necessary criterion of the existence or validity of law.⁸ Rejection of that conclusion is one of Hart's main legal positivist premises, his "separation thesis."⁹ Nor can there be a necessary correlation, for Hart, between legal rules and natural-law theory's ample moral standards, because "the purposes men have for living in society are too conflicting and varying to make possible much extension of the argument" that the legal system's content necessarily encompasses more than natural law's minimum content.¹⁰

Yet, for Hart, the factors that warrant an acknowledgment that legal systems generally must incorporate a minimum content of natural law spill over into his understanding of what he terms "legality."¹¹ This concept implicates the manner in which laws come into existence, as well as characteristics of the laws requisite to any legal system's abilities to effectuate social control. The central claim is that, if the legal system is to fulfill its social control function, and by close analogy abide by legality, the system's outputs will have to abide by certain formal requirements that bring enacted rules "within the capacity of most to obey."¹² Hence, the legal rules will have to satisfy certain conditions, such as being intelligible and typically not retrospective.¹³

The notion of legality is intimately related to, and often taken to be synonymous with, the idea of the rule of law.¹⁴ Hart's project conducted him

8. *Id.* at 185-86.

9. Herbert L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593 (1958), reprinted in HERBERT L.A. HART, *ESSAYS IN JURISPRUDENCE AND PHILOSOPHY* 49 (1983) (hereinafter "HART, ESSAYS").

10. *Id.* at 81.

11. HART, *supra* note 1, at 207.

12. *Id.*

13. *Id.*; cf. LON L. FULLER, *THE MORALITY OF LAW* 39 (rev. ed. 1969) (1964) (setting out certain criteria that any legal system must aspire towards, including: (1) the adoption of general rules that permit the system to avoid merely ad hoc decision-making; (2) the publication of those rules such that participants may be capable of knowing what is expected of them; and (3) the articulation of the rules such as they may be understandable). As one commentator stated of the Fuller criteria, "the desiderata that make up the internal morality of law are ultimately concerned with the possibility of obedience." Daniel E. Wueste, *Morality and the Legal Enterprise — A Reply to Professor Summers*, 71 CORNELL L. REV. 1252, 1254 (1986). Fuller's focus was also on "the ideal of fidelity to law. Law, as something deserving loyalty, must represent a human achievement; it cannot be a simple fiat of power or a repetitive pattern discernible in the behavior of state officials." Lon L. Fuller, *Positivism and Fidelity to Law — A Reply to Professor Hart*, 71 HARV. L. REV. 630, 632 (1958). Thanks to Martin Krygier for emphasizing this.

14. See, e.g., Josh Bowers, *Annoy No Cop*, 166 U. PA. L. REV. 129, 136 n.25 (2017) (using "the terms legality and rule of law almost interchangeably," noting that "the common convention is to conflate," and stating that, "the legality principle and the rule of law share the same liberal objectives"); RONALD DWORKIN, *JUSTICE IN ROBES* 169 (2006) (discussing "the value of legality — or, as it is sometimes more grandly called, the rule of law"); Jeremy

toward minimizing the perception of any necessary connection between law and morals, and his minimal expression of legality has influenced slim and formal conceptions of the rule of law ideal itself. This is how Jeremy Waldron put it:

I think Hart was inclined to see a preoccupation with legality and the rule of law as a source of confusion in jurisprudence; often one gets the impression that Hart thought that if anyone offered to talk about it, the responsible thing to do was to say something palliative and then shut down the discussion as quickly and firmly as possible. Principles of legality, Hart implied, may be among the principles we should use for the evaluation of law, but their study is not part of the philosophical discipline that tries to tell us what law essentially is.¹⁵

That is fair enough. But the impulse criticized by Waldron to sever the focus on the concept of law from an evaluation of law and legal systems should not precondition the criteria by which legal institutional action is evaluated. Limiting the rule of law evaluation to an appraisal of whether the system abides by a few, sharply delimited formal conditions is likely in inevitable tension with the general impulse to evaluate law's workings more deeply. This does not mean that just any sort of evaluation of the legal system counts as a rule of law assessment. Nor, however, does a robust concept of the rule of law as an exercise in political morality impair a "hard" legal positivist concept of law that emphatically excludes moral criteria from the identification of the existence or content of valid, positive laws.¹⁶

Waldron, *The Concept and the Rule of Law*, 43 GA. L. REV. 1, 10 (2008) (remarking that, it is "an accident of usage that the particular phrase the Rule of Law is used for this ideal. Some theorists use the term legality or principles of legality instead . . .").

15. Jeremy Waldron, *Positivism and Legality: Hart's Equivocal Response to Fuller*, 83 N.Y.U. L. REV. 1135, 1137-38 (2008).

16. Seemingly in large part to fend off Ronald Dworkin's criticisms, Hart articulated an inclusive positivist approach, acknowledging that "my doctrine is what has been called 'soft' positivism," allowing that the rule of recognition "may incorporate as criteria of legal validity conformity with moral principles or substantive values." HART, *supra* note 1, at 250; *see also* SCOTT J. SHAPIRO, LEGALITY 269-70 (2011) (distinguishing the "Ultimacy Thesis" — by virtue of which the rule of recognition is a social rule, hence legal facts are only *ultimately* determined solely by social facts, thereby otherwise allowing for moral criteria of legal validity — from the "Exclusivity Thesis," by virtue of which the social rule of recognition prescribes criteria of legal validity based solely on the social pedigree of the legal norms at issue).

The interrelated questions asked in this Article are: (1) whether the concept of the rule of law is well served by a delimited focus on whether the legal system promulgates laws capable of being obeyed; (2) whether a morally richer view of the rule of law fits the concept's use and formulation; and (3) whether, even if extending beyond traditional formulations, a rule of law inquiry broader than Hart's capacity-to-obey test should be seen as conceptual overreach? The answers argued for here aspire toward both releasing the rule of law construct from its formal-equality fetters and accentuating the construct's potential for improving the moral landscape endured by those for whom legal arrangements reinforce impairment of their capabilities to exercise powers that the legal system otherwise confers or encourages.

I. SANCTIONS ARE ONLY A PART OF LAW'S STORY

Hart's circumscribed view of legality is advanced these days as a rampart against a totalizing inflation of the rule of law concept, as recently expressed on the digital essay platform *Aeon* by the rule of law scholar John Tasioulas.¹⁷ Tasioulas admirably addresses threats to the quality of public reason posed by the misuse of important concepts, such as "health," "democracy," and "human rights," and in particular by promiscuously extending those concepts to include a range of desiderata that depart from the distinct values at stake.¹⁸ But when he homes in on analogous misuse of the rule of law, Tasioulas confines the concept, in his view both as traditionally

17. John Tasioulas, *The Inflation of Concepts*, AEON (Jan. 29, 2021), <https://aeon.co/essays/conceptual-overreach-threatens-the-quality-of-public-reason> [<https://perma.cc/8HYJ-QZ2R>] [hereinafter Tasioulas, *Aeon* essay]. In this *Aeon* essay, Tasioulas conveys for a broader audience some of the ideas he sets forth in his instructive chapter *The Rule of Law*, in THE CAMBRIDGE COMPANION TO THE PHILOSOPHY OF LAW 117 (John Tasioulas ed., 2020) [hereinafter Tasioulas, *The Rule of Law*]. In that chapter, he sets out two methodological constraints that, in his view, have typically characterized rule of law theories, namely, pluralism (the rule of law as but one among many evaluative standards for assessing laws and legal institutions) and coherence (the rule of law as the expression of an underlying ethical commitment, which Tasioulas identifies as principally respect for the rational autonomy of those subject to the law). *Id.* at 119. His *Aeon* essay mostly unwinds the first of these methodological prongs, which motivates his distillation of the primary rule of law concern to that centered on the Hartian capacity to obey. Although the second, autonomy-centered, prong might be reconceived in conjunction with the pluralism constraint to allow for a more elastic rule of law concept that responds to collective group interests (*cf.* Jennifer Nedelsky, *Reconceiving Autonomy: Sources, Thoughts and Possibilities*, 1 YALE J.L. & FEMINISM 7 (1989)), Tasioulas's current approach appears to hew to conventional liberal concerns, hence focusing on individual subjects' capabilities to plan, predict, and anticipate "how the law is liable to impinge upon their potential decisions" Tasioulas, *The Rule of Law*, *supra*, at 121.

18. Tasioulas, *Aeon* essay, *supra* note 17.

understood and as currently in effect until further notice, within Hartian parameters of “a range of formal and procedural requirements that enable people to comply with the law.”¹⁹ And here, Tasioulas means “the law” to be understood as the particular law then being promulgated.

The question in this Part is whether the Hartian concept of legality suitably fits our notion of the rule of law. I propose that Hart’s limited view of legality, and thereby of the rule of law, counts as the sort of reductive misapprehension that he himself so masterfully refuted with respect to the concept of law itself.

In large measure, Hart famously aimed the opening chapter of *The Concept of Law* at dismantling the earlier legal positivist theses of Hobbes, Bentham, and particularly John Austin, thinkers for whom law consisted primarily in a system of commands, threats, and sanctions. Austin’s classic 1832 series of lectures, marshaled as *The Province of Jurisprudence Determined*, deemed the commands of a sovereign, enforceable through sanctions, as law’s core element.²⁰ A person’s obligation arose from her having been ordered to do something by a superior under apprehension of suffering sanctions upon noncompliance.²¹

While recognizing that the issue of the “necessary connection” between law and morality was historically prior to the pronouncements by Austin and Bentham paring law’s essence to orders backed by threats, and that indeed their “command” view reacted against the linking of law and morals, Hart’s initial focus, in “unhistorical” order, was on commands.²² The idea of a command coincides with, and makes sense only given, the attendant notion of obedience. If law is a system of commands and orders backed by threats of sanction, then it would seem appropriate to evaluate the workings of the legal system in progress from the vantage point of subjects’ capabilities to obey such commands.

19. *Id.* Interestingly, as well, Hart noted the larger issue itself taken up by Tasioulas concerning conceptual overreach, criticizing John Austin’s broad conception of positive “morality,” which embraced all sorts of social rules including those of etiquette and games, as “obscur[ing] too many important distinctions of form and social function.” HART, *supra* note 1, at 301.

20. JOHN AUSTIN, *THE PROVINCE OF JURISPRUDENCE DETERMINED* 32-33, 118-19 (Wilfrid E. Rumble ed., Cambridge Univ. Press 1995) (1832). Some have argued that Hart made a bit of a straw fellow out of Austin in certain respects. *See, e.g.*, Gerald P. Wetlaufer, *Gunmen, Straw Men, and Indeterminacy: H.L.A. Hart, John Austin, and the Concept of Law*, 82 IOWA L. REV. 1487 (1997); Frederick Schauer, *Was Austin Right After All? On the Role of Sanctions in a Theory of Law*, 23 *RATIO JURIS* 1, 5 n.6 (2010) (allowing that “[a] somewhat more charitable reading of Austin, however, would give him more credit than he has received for his discussion of ‘permissive laws’. . . exceptions to the proposition that ‘laws are a species of commands’”). What’s relevant here, however, are mostly Hart’s distinctions between his understanding of law and the one he attributes to Austin.

21. AUSTIN, *supra* note 20, at 120.

22. HART, *supra* note 1, at 16-17.

Hart, however, effectively repudiated the notion of law as consisting principally in orders backed by sanctions. His principal demarcation was between laws that impose duties (those that order people to do or to refrain from doing things and then prescribe sanctions or punishments for noncompliance, most notably criminal law) and those that confer powers (many on ordinary citizens and many on legal officials in the form of “secondary” rules).²³ Rather than imposing duties that must be “obeyed,” the latter sort may be characterized as giving “recipes for creating duties.”²⁴

Attempted justifications favoring a command theory “purchase the pleasing uniformity of pattern to which they reduce all laws at too high a price: that of distorting the different social functions which different types of legal rule perform.”²⁵ These justifications, said Hart, come in two forms: first, the expansive interpretation of all legal rules as a species of coercive orders; second, the restrictive Kelsenian limitation upon the status of “legal” rules to those that impose sanctions. Regarding the first route, diluting the notion of a legal sanction to such an extent that it covers even cases, for example, in which law declines to recognize a promise lacking consideration as a “contract,” would be “absurd.”²⁶ And also defective, but from the opposite direction, is the second approach, which dilutes the status of “law” such that even rules proscribing murder, for example, are merely fragments of laws functioning as antecedents within an “if . . . then” command requiring officials to impose sanctions if certain conditions are satisfied.²⁷

While long taking its place in legal philosophy as the received view, the degree to which Hart correctly balanced law’s sanction-imposing versus power-conferring nature has been somewhat controversial. Most notably, Frederick Schauer has reasoned that, if the goal of legal philosophy is to uncover what constitutes a system of law, what in other words makes law different from other normative or prescriptive systems, then the dominant place of coercive orders and sanctions cannot be ignored.²⁸ Whereas Hart insisted that any justification, such as those just discussed, for fusing the concept of law with its sanction-creating apparatus must fail “if it is shown that law without sanctions is perfectly conceivable,”²⁹ Schauer emphasized

23. *Id.* at 26-33, 81 (writing that secondary rules “confer powers, public [and] private,” and lead “to the creation or variation of duties or obligations”).

24. *Id.* at 33. For an elegant recent analysis of the interplay between law’s duty-imposing and power-conferring features, see Matthew H. Kramer, *Hart on Legal Powers as Legal Competences*, Legal Studies Research Paper Series, University of Cambridge Faculty of Law (Apr. 2021), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3824976 [<https://perma.cc/S8DJ-AJTX>].

25. HART, *supra* note 1, at 38.

26. *Id.* at 34.

27. *Id.* at 36.

28. Schauer, *supra* note 20, at 17.

29. HART, *supra* note 1, at 38.

the importance of examining law as it exists and is experienced, hence giving far greater play to its coercive reality.³⁰

Why is law predominantly coercive for Schauer? Schauer takes seriously Hart's insistence that a theory of law that fails "to fit the facts" is defective and necessitates a fresh start.³¹ Modern administrative states embodying vast and complex regulatory schemes, however, have grown far more intrusive, and coercive, than legal systems that even Austin would have envisioned. The state increasingly claims authority over numerous aspects of citizens' lives, from consumer transactions to employment and workplace safety, treatment of the environment, and so forth.³² So Schauer finds it difficult to see why Hart trains his sights on the "puzzled man," an "ideal type" who wholeheartedly commits to the legal system's norms as best he can, rather than the likely more ordinary sanction-driven citizen, the "bad man" who will do as he must if coerced.³³

Yet Schauer's reference to an expansive regulatory system presents as a dangling modifier, failing to justify the inference to enhanced official coercion. What, in other words, warrants the assumption that regulatory schemes tilt more toward the sanction-imposing model, and less toward the power-conferring one, than does the sort of basic municipal legal system Hart addressed?³⁴ Indeed, this seems to be an empirically questionable assumption. In important respects, and some have argued predominantly,³⁵ regulatory law aims at dulling the legal system's coercive aspect by granting general permissions that install a default licensing of conduct and significant freedom from the sanction power, leastwise for certain groups of citizens positioned to engage in the relevant conduct.³⁶

30. Schauer, *supra* note 20, at 18. For Ronald Dworkin as well, of course, law's coercive character affords the principal ground of any meaningful legal theory. *See, e.g.*, RONALD DWORKIN, *LAW'S EMPIRE* 96 (1986) (suggesting that "arguments of legal theory are best understood as arguments about how far and in what way past political decisions provide a necessary condition for the use of public coercion").

31. HART, *supra* note 1, at 80.

32. Schauer, *supra* note 20, at 7-8.

33. *Id.* at 8-10.

34. HART, *supra* note 1, at 17.

35. *See* Eric Biber & J. B. Ruhl, *The Permit Power Revisited: The Theory and Practice of Regulatory Permits in the Administrative State*, 64 *DUKE L.J.* 133, 140 (2014) (finding that "general permits have become the dominant permit model in many fields of regulation").

36. *See, e.g.*, *Sierra Club v. United States Army Corps of Eng'rs.*, 990 F. Supp. 2d 9, 27 (D.D.C. 2013) (explaining that, under the National Environmental Policy Act, 42 U.S.C.A. §§ 4331 *et seq.*, "the Corps's role is limited to determining whether the project in question does or does not satisfy the terms of the general permit . . . Put another way, under the nationwide permit system, the Corps has already done an environmental review on a general categorical basis and has already given its imprimatur to discharges that result from the type of construction activity at issue under specified circumstances").

Even when the regulatory rule imposes a clear sanction against discouraged conduct, the sanction may appear more as the term of a bargain than as punitive coercion for the affected population. In *Playing By The Rules*, Schauer himself recalls the £5 British Rail fine for pulling the emergency stop cord in the absence of an actual emergency, summoning P. G. Wodehouse's Bertie Wooster who concluded that the £5 was well worth the cost in exchange for the thrill to be gained.³⁷ Regulatory citations typically fine the violating party, the amounts published, and the risk calculable.

In some contexts, agencies charged with imposing punitive measures also often view the availability of a sanction as bargaining leverage.³⁸ Possession of bargaining leverage admittedly carries coercive weight, but the dynamic engendered between the state and actors who can expect their rule violations to trigger bargaining is quite different from the dynamic that exists between the state and those subject to the certain imposition of sanctions costly enough to deter the discouraged conduct. Those in the former group might experience a certain license, rather than coercion, even if conditional on not being found out in the monthly inspection.

It cannot be denied that, to a large extent, even permissions imply restrictions, and under a regulatory scheme these are typically sanctionable. What is ignored, however, whether by Austin, Hart, or Schauer, is the law as it exists and is experienced from the perspective not of the actor subject to punitive coercive power but conversely from the perspective of those who stand to benefit, or see themselves as standing to benefit, from the normative framework engendered in the administrative scheme. Prudential considerations informed by apprehension over sanctions suffuse law's normativity. But this is compatible with reemphasis upon an Hohfeldian outlook that reinstates the centrality of law's power-conferring features.³⁹ One entity's violation of some coercive, regulatory prescription often engenders the right among many to petition for redress.⁴⁰

37. FREDERICK SCHAUER, *PLAYING BY THE RULES: A PHILOSOPHICAL EXAMINATION OF RULE-BASED DECISION-MAKING IN LAW AND IN LIFE* 9 (1991).

38. See generally Ezra Ross & Martin Pritikin, *The Collection Gap: Underenforcement of White-Collar Fines and Penalties*, 29 *YALE L. & POL'Y REV.* 453, 479-80, 479 n.165 (2011) (explaining that, "from the agency's perspective, this trade-off between fine collection and rule compliance achieves the greatest good," but opining that "a 72% violation abatement rate still does not explain (let alone justify) a mere 1-5% fine collection rate").

39. Wesley Newcomb Hohfeld famously taught that, when limited to "a definite and appropriate meaning," the notion of a legal right is "invariabl[y] correlative" to that of a legal duty. Wesley N. Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 *YALE L.J.* 16, 38 (1913).

40. E.g., *Minerley v. Aetna, Inc.*, 801 F. App'x 861, 863 (3d Cir. 2020) (addressing the class action filing against Aetna for allegedly violating "a New Jersey regulation that forbids insurers from seeking subrogation and reimbursement"); *Cordoba v. DIRECTV*,

This is to say that people experience law's coercive aspect from two directions. The rules dissuade me from driving beyond the speed limit, on pain of penalty, which I often find frustrating; but at the same time those very rules protect me from other drivers who might otherwise endanger me by their own speeding. The law protects me not only by threatening to impose official sanctions directly against negligent drivers, but also by affording me the right to seek compensatory damages or equitable relief against those whose violations inflict harm on me. So, law interacts with the people, and people experience law, from both directions, and undeniably in a richer sense than merely in relation to the potential for sanctions. Nor is it obvious or necessarily the case that the sanction- and duty-imposing side of this divide is logically prior to, or must be privileged over, the power- and right-conferring side.

Also usefully addressed is Schauer's claim that, apart from Austin's notion that the threat of sanction provides law with its normative force and authority, hence giving rise to the idea of legal obligation,⁴¹ law's ubiquitous resort to sanctions is what distinguishes a legal system from other institutional reality. So Schauer continues that, "if we are looking for how law is different from other rule systems, then the legitimate sanctions that law has available to it may serve this distinguishing function, and in that sense may well be essential components of legal duty, rather than being essential components of all duties."⁴²

If this were the case, such that law somehow uniquely incorporates or applies legitimate sanctions in order to enforce its norms, then it would be reasonable to infer that in people's experience of law that aspect is accentuated as the core defining feature. No one can deny that a legal system's commands and sanctions are prominent and give rise to profound prudential considerations. But it would be a mistake to conclude that in the everyday

LLC, 942 F.3d 1259, 1266 (11th Cir. 2019) (concerning a class action lawsuit arising from broadcast service providers' alleged violations of federal telemarketing regulations).

41. Schauer, *supra* note 20, at 4. As is well understood, Austin explained that positive law is set by the sovereign to members of "an independent political society" offering habitual obedience to that sovereign. AUSTIN, *supra* note 20, at 165-67. Hart countered that the notion of habits of obedience, involving regularities of behavior such that deviations don't necessarily provide grounds for criticism, fails to support law's normativity. HART, *supra* note 1, at 55-57. See also Jules L. Coleman, *Rules and Social Facts*, 14 HARV. J.L. & PUB. POL'Y 703, 705 (1991) (explaining that, from Hart's perspective, while social rules "correspond closely to Austin's 'habits of obedience'," such habits "lack a normative dimension"); Charles L. Barzun, *The Forgotten Foundations of Hart and Sacks*, 99 VA. L. REV. 1, 57 (2013) (adding that H.L.A. Hart's "internal aspect" of rules imbues legal rules with the very sort of normativity — by which the rules are taken as reasons for decision-making and as normative criteria for critically evaluating one's actions — that is deemed to signify a theoretical advance over Austin's command theory).

42. Schauer, *supra* note 20, at 16.

life of the people these overwhelm law's other features, all things considered. And one reason that law's sanctions do not swallow the rest in common experience is precisely that, *pace* Schauer, legitimate sanctions are not a feature that distinguishes law from other rule systems.

Institutions and social groups generally, private as well as public entities, all generally summon and impose sanctions or hold out the threat of sanctions as leverage toward keeping their affairs running smoothly. These entities and groups are legitimate overall, and so are their sanctions. Conditions of employment, for instance, routinely require some level of attendance and productivity on pain of penalty. In *Playing By the Rules*, even Schauer includes mere criticism as a sanction constituting a reason for action. Alongside "Driving in excess of 55 miles per hour is prohibited," he readily marshals, by my paraphrase, "You shouldn't eat that" stated to an observant Jew about to eat pork, and "No Dogs Allowed" posted presumably in a private establishment.⁴³ Threat of sanctions is the widespread reality of social and institutional life. But so are other characteristics, notably the promise held out by institutions for empowering its members and participants in certain ways.⁴⁴

II. LOCATING THE CONCEPT OF THE RULE OF LAW

Why does our understanding of the nature of law, or of some central aspect, implicate our concept of the rule of law? *The rule of law*, for example, might count as a state of affairs, or collection of properties, that simply holds when certain conditions are met, within or without the legal system. Martin Krygier, for example, has compellingly questioned the "state monopoly" over rule of law considerations, expanding the project to arbitrary expressions of power wielded from within the full array of society's "networks, nodes, fields, and orderings . . ."⁴⁵

Then, too, Lon Fuller's eight criteria by which he sought to describe law's inner morality, as well as normatively to set out features that any legal system must aspire towards,⁴⁶ have been taken to lay out the main at-

43. SCHAUER, *supra* note 37, at 122-27.

44. Of course, not all exercises of powers engendered by law's norms are necessarily beneficial for the norm subject. As Kramer points out, in Hohfeld's scheme, in which a legal power consists in the capability to effectuate changes in legal relationships, one can exercise such a power by making oneself liable to undergo arrest, for example. Kramer, *supra* note 24, at 1.

45. Martin Krygier, *The Rule of Law: Pasts, Presents, and Two Possible Futures*, 12 ANN. REV. L. & SOC. SCI. 199, 221 (2016). *See also* Tasioulas, *The Rule of Law*, *supra* note 17, at 123 (saying that "the rule of law can also be flouted by private individuals [as when they] fail to comply with a legal system that is itself compliant with rule of law requirements").

46. *See* FULLER, *supra* note 13.

tributes of the rule of law.⁴⁷ This sort of symbiotic connection between the concept of law and that of the rule of law is highly motivated, but need not exist. Joseph Raz wrote, for instance, “The rule of law is a political ideal which a legal system may lack or may possess to a greater or lesser degree.”⁴⁸ The legal system and the rule of law are distinguishable because rule by law is different from the rule of law project; the former can exist with minimal attention to the latter, or with failing grades in the rule of law appraisal. And perhaps other systems and institutions may similarly comport with or run afoul of the rule of law in varying degrees.

The most apparent response to questions about the connection between law and the rule of law is that the type of thing we take law to be is what we mean by *law* when we talk about “the rule of law,” hence law is what *the rule of law* is about, in some way. Krygier attempts to make the case for applying the rule of law ideal expansively toward the tempering of power in non-legal settings. Perhaps a culture of tempering the oppressive use of power may radiate through other institutional contexts by virtue of the general ethos created when the rule of law is vibrantly attended to in the legal realm.⁴⁹ Seen this way, *the rule of law* retains its connection to the legal system. Possibly, however, law’s treatment of the exercise of official power is also itself dialectically constrained by the felt and structural needs of those in private power, and by the intensity of the culture of domination — versus equality of participation — propagated in pursuit of corporate interests.

Adopting Lon Fuller’s insight, legal theorists usually take the rule of law to stand for discrete attributes that a legal system ought to possess. Although Hart and Fuller debated the separation of law and morality,⁵⁰ the Hartian view of legality, shared by Tasioulas and others, appears to align with Fuller’s criteria. The idea is that, if the legal system abides by, or at least is largely successful in striving towards, a certain “range of formal and procedural requirements,” then the system will respect legal subjects’ agen-

47. See generally Jeremy Waldron, *Preface* 11 HAGUE J. ON THE RULE OF L. 251, 251 (2019) (remarking that legal philosophers writing on the rule of law “compete with one another to come up with more and more carefully formulated lists . . . , tak[ing] for granted that the rule of law requires some such list”).

48. JOSEPH RAZ, *THE AUTHORITY OF LAW: ESSAYS ON LAW AND MORALITY* 211 (2d ed. 2009).

49. See PHILIP SELZNICK ET AL., *LAW, SOCIETY, AND INDUSTRIAL JUSTICE* 35 (1969) (arguing that “[t]o extend the rule of law is to build it firmly into the life of society,” hence engendering an inquiry into “how to bring legal ideals to the ‘private’ sector of community life”).

50. Hart, *supra* note 9; Lon L. Fuller, *Positivism and Fidelity to Law: A Reply to Professor Hart*, 71 HARV. L. REV. 630 (1958).

cy by affording most people the capacity to obey the particular rules that the lawmakers promulgate.⁵¹

Conceptually, prior to assigning attributes — which must be assessed in historical context as contingent features by which law serves moral interests, whether these be sustaining subjects' agency or other desiderata — the rule of law affords subjects and officials a construct for evaluating the legal system from a moral stance. Law's central features, whichever the rule of law appraiser settles on, provide the natural focal points for any such moral evaluation. If legal systems confer powers as a central and pervasive feature, in addition to imposing requirements underwritten by the threat of sanctions, and if the rule of law is pre-theoretically a lens through which citizens morally evaluate their legal system, the rule of law virtue, theoretically developed, addresses not merely the capacity of most people to comply with laws but their capabilities to take advantage of, or benefit from, law's power-conferring features.

Brian Bix has explained that, in Hart's scheme, the separation between primary rules, which are aimed at the general population, as duty-imposing, and secondary rules, being generally rules about rules aimed at officials, as power-conferring, "is far from perfect."⁵² More can be said about how the power-conferring aspect of primary rules is even broader than these legal philosophers have contemplated. It's uncontroversial that criminal laws confer powers on public officials, for example, to alter the legal status of those accused or convicted of criminal activities.⁵³ The ways in which laws prohibiting murder, assault, and so forth, confer powers upon ordinary citizens aren't immediately obvious. But a clue toward appreciating this is found in Raz's theoretically useful distinction between the normative character of laws and their social functions,⁵⁴ by which he intended to proffer a corrective to Hart's "simplified picture of a one to one correlation between types of rules and types of functions."⁵⁵

In that analysis, Raz offers a further distinction between law's direct and indirect social functions. When law is obeyed and applied, it fulfills its functions in a causally direct manner. Legal systems pursue indirect functions, with varying degrees of success, when they can be viewed as intending to convey:

51. Tasioulas, *Aeon* essay, *supra* note 17.

52. Brian Bix, *H.L.A. Hart and the Hermeneutic Turn in Legal Theory*, 52 SMU L. REV. 167, 171 n.20 (1999).

53. See generally Miriam Gur-Arye, *Justifying the Distinction Between Justifications and Power (Justifications vs. Power)*, 5 CRIM. L. & PHIL. 293, 294 (2011).

54. RAZ, *supra* note 48, at 169-77 (offering Raz's schematized view of law's various functions).

55. *Id.* at 178.

attitudes, feelings, opinions, and modes of behaviour which . . . result from the knowledge of the existence of the laws or from compliance with and application of laws The indirect functions are most commonly fulfilled not only as results of the laws' existence and application but also of their interaction with other factors such as people's attitudes to the law and the existence in the society concerned of other social norms and institutions.⁵⁶

So if an indirect function of law is to encourage modes of behavior attendant upon attitudes and opinions concerning the law, then at the least law conveys an attitude of empowerment with respect to the favored behaviors. It is not solely that one thereby obtains a power otherwise lacking, but also that the legal system supports or conveys an endorsement of the exercise of the power. For example, not just government officials or personnel, but ordinary residents in the particular region typically hold the power to pursue a criminal complaint.⁵⁷ The legislative scheme might be arranged, or officials or government personnel conduct themselves, in such a way as to encourage residents, perhaps including undocumented immigrants, to report crimes to local law enforcement.⁵⁸ But when the system then penalizes the immigrant who has come forward for the very reason that she is now discovered to be undocumented, this official exercise of power is arbitrary by virtue of law's promulgation of irreconcilable norm messages in violation of the subject's agency and dignity interests.

Consider the right of free speech and assembly. In many legal systems, law intends, in the Razian sense, to inculcate values that honor those rights, so as to encourage and facilitate free and open political debate and discussion, or at least to appear to do so. Constitutional speech and assembly rights thereby encourage modes of behavior by which people take advantage of their power to engage in such activities.⁵⁹ If the legal system is

56. *Id.* at 167-68. As Keith Culver and Michael Giudice explain, “[i]n attributing claims to legal systems, Raz is not simply personifying what are in fact better regarded as emergent properties of the complex collection of norms and institutions giving rise to a legal system. Rather, on Raz’s view, the claims of legal systems are found in the attitudes and practices of a class of law-applying officials and institutions.” Keith Culver & Michael Giudice, *Making Old Questions New: Legality, Legal System, and State*, in PHIL. FOUNDS. OF THE NATURE OF L. 279, 281-82 (Wil Waluchow & Stefan Sciaraffa eds., 2013).

57. *See* *Lord v. Riley*, 921 F.2d 272, 1990 WL 209862, at *1 (4th Cir. Dec. 26, 1990).

58. *See, e.g.*, Kevin R. Johnson, *Immigration and Civil Rights: State and Local Efforts to Regulate Immigration*, 46 GA. L. REV. 609, 625 n.69 (2012).

59. *See* *Int’l Soc’y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 696 (1992) (Kennedy, J., concurring) (saying that the liberties protected by the “public forum”

harnessed to stifle these activities in an arbitrary or discriminatory manner, few would object to a claim that this implicates the rule of law.⁶⁰

As an example at a more general level, citizens commonly expect the rule of law platitude *no one is above the law* to warrant an Hohfeldian correlate by which the harmed party is entitled to seek redress for abuses of official power. Hence, one scholar comments, for instance, that the doctrine of qualified immunity “in fact subverts the rule of law by exempting public officials from legal standards whenever there is a colorable claim of legal uncertainty” about whether the official’s conduct has violated clearly established and reasonably knowable constitutional rights.⁶¹

III. THE RULE OF LAW FRAMES AN APT RELATION BETWEEN LAW AND MORALS

We should disagree with both propositions conveyed in Hans Kelsen’s claim that “[a]ll the norms of a legal order are coercive norms, *i.e.*, norms providing for sanctions If we ignore this element, we are not able to differentiate the legal order from other social orders.”⁶² At the same time, a focus on the centrality of law’s power-promoting or power-conferring norms, in relation not simply to legal officials but to the ordinary citizen, does not move the ball in favor of law’s moral standing.

Legal systems might encourage and endorse subjects’ exercise of legally sanctioned powers toward good or toward wicked ends, the latter exemplified in Hart’s critique of Gustav Radbruch’s post-War conception of law by the power of citizens to denounce their neighbors or even spouses

doctrine “derive from the Assembly, as well as the Speech and Press Clauses of the First Amendment, and are essential to a functioning democracy”).

60. As an example from outside of the United States, consider the Russian regime’s arrest, prosecution, and conviction of opposition leader, Aleksei A. Navalny, and of those who support him, for their exercise of powers seemingly granted by Articles 29 (guaranteeing “freedom of thought and speech”) and 31 (guaranteeing “the right to gather peacefully, without weapons, and to hold meetings, rallies, demonstrations, marches and pickets”) of the Russian Constitution. KONSTITUTSIYA ROSSIISKOI FEDERATSII [KONST. RF] [CONSTITUTION] arts. 29, 31 (Russ.); see Anton Troianovski, *Prominent Rights Lawyer Who Took Lead on Navalny Case is Arrested in Moscow*, N.Y. TIMES, May 1, 2021, at A9.

61. Mohammad H. Fadel, *Seeking an Islamic Reflective Equilibrium: A Response to Abdullahi A. An-nacim’s Complementary, Not Competing, Claims of Law and Religion: An Islamic Perspective*, 39 PEPP. L. REV. 1257, 1269 (2013).

62. HANS KELSEN, *GENERAL THEORY OF LAW & STATE* 28-29 (Anders Wedberg trans., 2005 ed.) (1949); *but cf.* EVGENY B. PASHUKANIS, *LAW AND MARXISM: A GENERAL THEORY* 100-01 (Chris Arthur ed., Barbara Einhorn trans., 1978) (1929) (opining that “the legal norm acquires its *differentia specifica* . . . because it presupposes a person endowed with rights on the basis of which he actively makes claims”).

under rules prohibiting criticism of the regime.⁶³ The overriding moral consideration viewed through the rule of law lens is the regime's encouragement, or indeed demand, of immoral conduct by virtue of which law descends into arbitrarily depriving the critic of his agency in voicing an opinion and taking a stand.

Specific features or attributes of the system that come to be associated with rule of law values may be emphasized or bracketed, depending on the particular historical context and period in which the construct is applied.⁶⁴ Judicial independence, for example, might count as a rule of law virtue or, in other environments, as a means of judicial arbitrariness that replaces the rule of law.⁶⁵ As with Raymond Geuss's pragmatic understanding of knowledge claims, "[w]hat worked perfectly well in one context would not necessarily do so in some others."⁶⁶

Yet continuities in moral thinking will engender continuities in conceptions of the rule of law.⁶⁷ Rule of law thinking has not derived from deductions drawn from constitutional principles, but rather inductively from moralities embedded in custom and process.⁶⁸ In the spirit of the modern *rule by law not by man* truism, Aristotle acquiesced in the view that the rule of law, here meaning rule by law, "is preferable to that of any individual."⁶⁹ He insisted that law was general, systematic, legislated, and typically written, and acknowledged the thinking, at least "by some," that a sovereign's

63. HART, *ESSAYS*, *supra* note 9, at 75-76; *see generally* NEIL MACCORMICK, *INSTITUTIONS OF LAW: AN ESSAY IN LEGAL THEORY* 183 (2007) (explaining that "[l]egal power as a form of normative power is the ability of one person or agency to change the legal situation of some person or agency, creating some new duty or expansion of an existing duty, or making wrong that which was not previously wrong").

64. *See* LISA B. CRAWFORD, *THE RULE OF LAW AND THE AUSTRALIAN CONSTITUTION* 10 (2017) (saying that "certain accounts of the rule of law do not present a plausible or desirable account of Australian constitutional law"); András Sajó, *The Rule of Law*, *THE CAMBRIDGE COMPANION TO COMPARATIVE CONSTITUTIONAL LAW* 258, 260 (2021) (noting as one example of contextual variation in the rule of law "the extent to which constitutional law can penetrate private relations"); *see generally* PAUL GOWDER, *THE RULE OF LAW IN THE REAL WORLD* 3 (2016) (instructing that a normative and conceptual account of the contested rule of law concept "cannot be given wholly from the armchair," but must be "closely tied to our perceptions of specific states and institutions of the contemporary world and a particular course of history").

65. JOHN P. REID, *RULE OF LAW: THE JURISPRUDENCE OF LIBERTY IN THE SEVENTEENTH AND EIGHTEENTH CENTURIES* 99 n.37 (2004).

66. RAYMOND GEUSS, *WHO NEEDS A WORLD VIEW?* xii (2020).

67. The concept might, however, be framed differently at different times. *Cf.* JEREMY WALDRON, *THE RULE OF LAW AND THE MEASURE OF PROPERTY* 7 (2012) (disagreeing that Albert Venn Dicey in 1885 "was the first jurist to use the phrase 'the Rule of Law,' . . . except in the most pedantic sense of exact grammatical construction").

68. *See* REID, *supra* note 65, at 17.

69. ARISTOTLE, *THE COMPLETE WORKS OF ARISTOTLE* 1986, 2042 (Jonathan Barnes ed., rev. Oxford trans., 1984).

arbitrary rule, characterizing absolute monarchy, was “quite contrary to nature.”⁷⁰ And for controversies left undecided by general legislation, highly trained officials would decide “to the best of their judgment” in a way that mimicked “God and Reason alone,” so as to avoid as much emotional bias as possible in the form of desire, “spite and partiality.”⁷¹

The larger point, then, is not to derive rule of law commitments from those embedded in discrete laws or constitutions, but rather to locate the central normative impulse inhering in law and legal systems, and on that basis to say what sort of evaluation appropriately belongs to the concept of the rule of law. Law will historically instantiate its normative impulse not piecemeal but as a system, one emerging through legislation, judicial precedents, regulatory and administrative statements, constitutional commitments, and so forth. In that regard, the Hartian view of legality, in some tension with its conception of law, would seem to presuppose law’s duty-imposing characteristics as its singular normative feature. If so, legality’s evaluative function is largely limited to reckoning the capacity of most to obey law’s commands.⁷²

But if law’s power-conferring and power-encouraging characteristics are also normatively central, then the rule of law is also reasonably seen as morally evaluating the opportunity, and sufficiency of the capabilities — whether political, economic, or within some other adjectival category defining life’s lived qualities and conditions — of most to partake of the powers and entitlements sought to be conveyed.

If a “legal” norm is a norm self-consciously conveyed and instilled by the legal system, then the full array of norm types is available to law. Though limited, the full array isn’t univocal. The moral philosopher Allan Gibbard has said that “[w]e can characterize any system N of norms by a family of basic predicates ‘N-forbidden’, ‘N-optional’, and ‘N-required’. . . We can call a system *complete* if these predicates trichotomize the possi-

70. *Id.*

71. *Id.* at 2042-43.

72. HART, *supra* note 1, at 207. *But see* Kramer, *supra* note 24, at 23 (saying that, “[b]y proclaiming that the role of citizens in sustaining the operations of a central instance of a legal system can consist in mere compliance with duty-imposing laws, Hart once again strangely neglected the import of power-conferring laws”). At the same time, to avoid simplifying Hart’s views, it is well to note Matthew Kramer’s further observation that, apart from his focus on power-conferring and duty-imposing norms, “Hart was a sophisticated reader of Hohfeld, and he was therefore well aware of the existence of liberty-conferring laws and disability-imposing laws.” Matthew H. Kramer, *In Defense of Hart*, PHILOSOPHICAL FOUNDATIONS OF THE NATURE OF LAW 22, 29 (2013). Hart’s own view might have been more fine-tuned than even that. *See* HART, *supra* note 1, at 32 (saying that, in making the “very rough” duty-imposing versus power-conferring distinction, “we have made only a beginning”).

bilities”⁷³ Arguably, however, there exists a subset of N-optional norms that can be categorized as “N-discouraged” (all norms described by the N-forbidden predicate plus a subset of additional norms) and “N-encouraged” (all norms described by the N-required predicate plus a subset of additional norms), such that, with regard to those interior subsets, adherence is not compulsory, and yet some degree of social criticism for failure to adhere would be seen as reasonable. Plagiarizing is N-forbidden, not plagiarizing N-required, whereas writing in a manner that is fairly inaccessible to the target audience is N-discouraged, and that is as accessible as the subject allows N-encouraged.⁷⁴

While rule of law theorists’ concerns with formal and procedural features underlying the rule of law project are well motivated, delimiting those concerns to the capacity to obey legal rules and requirements sells the project short and fails to align with ordinary citizens’ aspirations for, and evaluative grounding in relation to, the law. Law’s coercive nature imparts heft and gravitas to its power-encouraging features. Norm subjects’ failing to exercise powers encouraged by legal norms may even be subject to social criticism, observers believing themselves justified in deeming those omissions blameworthy.

This dynamic lends credence to the view that, when the legal system both promulgates such norms and discordantly reinforces legal relations that quash the capacities of some to partake of their benefits, rule of law concerns are appropriately summoned. The capacity to engage in exercising powers encouraged and promoted by legal policy rationale and enactments, or to obtain access to remedies for impediments to such exercise, implicates broadly procedural pathways into the legal system. A disciplined focus on procedural concerns retains the distinctive values connoted by a rule-of-law evaluation.⁷⁵

Conceptual overreach as well as other abuses of the rule of law concept occur. Because the rule of law provides a construct for evaluating the

73. ALLAN GIBBARD, *WISE CHOICES, APT FEELINGS: A THEORY OF NORMATIVE JUDGMENT* 87-88 (1990) (original emphasis).

74. See generally Leslie Green, *The Forces of Law: Duty, Coercion, and Power*, 29 *RATIO JURIS* 164, 174 (2016) (describing the social power vested within legal systems “to influence people’s action and interests”); cf. Cass Sunstein, *Incommensurability and Valuation in Law*, 92 *MICH. L. REV.* 779, 785-90 (1994) (seeking to develop an anti-commodification norm to encourage more public-regarding votes and less voting in individual self-interest).

75. Although I am here including law’s formal aspects as well as the legal system’s procedural features under the umbrella term “procedural,” the distinction should be appreciated. See Waldron, *supra* note 14, at 8 (saying “[b]y emphasizing the legal process rather than the formal attributes of the determinate norms that are supposed to emerge from that process, the procedural aspects of the Rule of Law seem to place a premium on values that are somewhat different from those emphasized in the formal picture”).

legal system in progress, appropriately disciplined use of the concept is tautologically confined to appraising law rather than extra-legal factual circumstances. Hence, even an oppressive system may appear to comply with rule of law values.⁷⁶ And, as one theorist has explained, “there are reasons for thinking that law is particularly ill-suited for eliminating certain forms of domination . . . [which] can be embedded in apparently non-arbitrary systems of social control.”⁷⁷ In many instances, however, creative and deeper analyses can raise the hood to reveal deprivations of access to justice, equality of treatment, and other infirmities that can legitimately be assigned to the rule of law’s concern with the legal system’s procedural networks.

Hence, yet perhaps somewhat paradoxically, a vigorously procedural rule of law evaluation may indeed reach non-legal contextual and factual circumstances. Both the capacities of most to obey laws that are codified or otherwise pronounced, as well as the actual capabilities of the people to partake of powers conferred and encouraged by the legal system, implicate the intersection of the legal system’s procedural outputs and the extra-legal conditions in which people find themselves. Assessing those conditions within the rule of law project is a subtle exercise, and is bound to overlap to some significant extent with larger democratic, social justice, or other concerns. Applying the rule of law evaluation to extra-legal deprivations might appear to be conceptual overreach, but conceptual clarity does not preclude an overlap.

As a recurring example these days, legal norms construct, facilitate, and thereby encourage democratic processes, including exercise of the right to vote and to run for public office. The legal system can thereby be morally evaluated, in the rule of law project, for how it treats these rights. Seeking to guard against conceptual overreach, Professor Tasioulas explains that “democracy” embodies quite a different concept than “the rule of law.”⁷⁸ But jiggering the processes by which people exercise their democratic rights so as to render them unpredictable, tampering with the independence of election arbiters, subjecting targeted groups to greater burdens even if by

76. See, e.g., Marcin Matczak, *Poland: From Paradigm to Pariah? Facts and Interpretation of Polish Constitutional Crisis*, in *NEW POLITICS OF DECISIONISM* 141, 154 (Violeta Beširević ed., 2019) (explaining that, given the Polish legal culture’s “excessive formalism,” “[p]laying lip-service to the rule of law allows Poland’s politicians to mask their attacks on the independence of the judiciary”).

77. Assaf Sharon, *Domination and the Rule of Law*, 2 *OXFORD STUD. IN POL. PHIL.* 128, 151 (2016).

78. Tasioulas, *Aeon* essay, *supra* note 17.

means of requirements formally applicable to all, and so forth, both debase the democracy and impair the rule of law.⁷⁹

The question here is what counts as a rule of law matter in the appropriately defined conceptual scheme, what sorts of concerns fall within the rule of law project, for the group appropriately seen as having something to say about this issue. In the latter regard, the concept of law differs from the concept of the rule of law. Although folk intuitions play a role in arriving at an articulation of both concepts, most who are so inclined likely look nearly exclusively to the legal philosophers for their takes on the concept of law, and appropriately so, but the same is not true for the concept of the rule of law. Ordinary communities don't weigh whether an unjust statute is law or merely immoral fiat, but appropriately shudder when they adjudge official practices to violate what citizens deem to be rule of law norms. As one example, in the wake of news about further police violence against Black citizens, a utilities project coordinator contributed an essay in Minnesota's *Star Tribune* opining that "[s]olutions can begin" with the rule of law, calling this ideal a "fundamental concept behind our American experiment."⁸⁰

Nothing prevents legality concerns reasonably originating in the public arena from being conveyed to the theoretical community. Questions addressed at a 2015 Law and Inequality Conference held by the American Constitution Society at Yale Law School included: "How does law structure markets that produce inequality? How have changes in legal procedure impeded access to the courts and exacerbated existing inequalities?"⁸¹ The implicit assumption was that, even if the legal system is not responsible for an individual's or a group's disadvantaged economic or political circum-

79. Jack Young, Chair, ABA Standing Committee on Election Law, *American Democracy and the Rule of Law* (May 1, 2014), https://www.americanbar.org/groups/public_interest/election_law/pastprogramming/lawday2014/ (asserting that, by virtue of rule of law principles, elections must be governed by predictable rules, established procedures for determining outcomes, independent arbiters, and so forth). Interestingly, Tasioulas acknowledges the "constitutive connections" borne by the rule of law in relation to democracy, including "the right to democratic political participation," but frames even these in the Hartian duty-imposing way as instances in which "the rule of law's requirements helps the law in specifying the content of human rights duties and allocating them to duty-bearers in an effective and morally feasible way." Tasioulas, *The Rule of Law*, *supra* note 17, at 127.

80. Samuel Viskocil, *Compassion, Respect for Law Can Quell the Chaos*, STAR TRIB. (Apr. 13, 2021), <https://www.startribune.com/compassion-respect-for-law-can-quell-the-chaos/600045584/> [<https://perma.cc/ULA6-UE9N>].

81. Editor's Note, *Law and Inequality: An American Constitution Society Conference at Yale Law School October 16 and 17, 2015*, 35 YALE L. & POL'Y REV. 233, 233 (2016).

stance, officials ought to engage in the project of leveling the legal playing field toward robustly-imagined procedural access.⁸²

While the content of the rule of law ideal is deeply contested, in its most reasonable and enduring guises the project inquires into how the legal system accommodates its central features. Promiscuously targeting all manner of societal inequities bearing a relation to law falls into the trap of conceptual overreach.⁸³ Yet the rule of law project implicates both community and critical moralities, and encompasses questions that include: how law presents what it does; how it structures the doing of what it does; and how its doings normatively affect what remains possible to do, both on the part of legal officials and the public. Because the implications can be far-reaching, the trick is to keep the rule of law assessment conceptually disciplined while sanctioning a potent-enough range over robustly procedural variables.

IV. CONCLUSION

If the central feature of legal systems is the promulgation of coercive duty-imposing norms, then the rule of law's core moral evaluative function is to assess whether the laws are capable of being obeyed by most people, as H. L. A. Hart posited. But if another central feature is the promulgation of power-encouraging and power-conferring norms, as Hart himself argued and over which he took Austin to task, then law's often subtle procedural impacts upon the capabilities of most people to exercise those powers, implicating their social, economic, and political lived conditions, symmetrically falls within legality's evaluative operation.

82. Cf. Alan E. Brownstein, *Harmonizing the Heavenly and Earthly Spheres: The Fragmentation and Synthesis of Religion, Equality, and Speech in the Constitution*, 51 OHIO ST. L.J. 89, 101 (1990) (noting in one limited sphere law's recognition that "[p]rivate clubs with self-selected members can serve as formidable barriers to increasing the economic and political power of disadvantaged groups by depriving them of access to the interaction networks in which many business and political decisions occur. Accordingly, the right to associate in exclusive large clubs is more limited than is associational autonomy in more intimate contexts such as the home and family") (citing *Roberts v. United States Jaycees*, 468 U.S. 609 (1984)).

83. RAZ, *supra* note 48, at 211.