Positivism and the Formal Rule of Law: Questioning the Connection

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Introduction

In this article I argue that the meaning of the rule of law is not necessarily or inevitably determined by the theory of law one adopts; disputes about the meaning of the rule of law are not simple re-runs of more fundamental jurisprudential disagreements. Thus, the assumption sometimes made that various forms of natural law inspired jurisprudence (such as Ronald Dworkin's) are wedded to 'substantive' or 'thick' conceptions of the rule of law, whereas positivist theory is committed to a 'formal' or 'thin' rule of law ideal, is a misleading simplification.[1] At least for positivists, the theory of law significantly under-determines which conception of the rule of law is to be preferred and how it is to be theorised.

The most sophisticated attempts to establish a conceptual relation between the rule of law and the existence of law argue that rule of law requirements are built into the bare notion of what law is. In such accounts, particular versions of the rule of law are thought to be constitutive of law; without a certain level of compliance with rule of law precepts the product is not merely defective law but an absence of law. The idea, then, is that there is some kind of internal relationship between the rule of law and law. In the traditional jurisprudential dialect(ic) of argument, natural law theorists have quite self-consciously seen a substantive (ie morally infused)

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1 For an explicit statement to this effect, see Paul Craig, 'Formal and Substantive Conceptions of the Rule of Law: An analytical Framework' [1997] *Public Law* 467. For another example of positivism being associated with a particular conception of the rule of law, see Lech Morawski, 'Positivist or Non-positivist Rule of Law? Polish Experience of a General Dilemma' in Martin Krygier and Adam Czarnota (eds), *The Rule of Law After Communism: Problems and Prospects in East-Central Europe* (Aldershot: Dartmouth, 1999) 39-54. See also, David Dyzenhaus, 'Recrafting the Rule of Law' in Dyzenhaus (ed) *Recrafting the Rule of Law: the Limits of Legal Order* (Oxford: Hart Publishing, 1999) 6.

rule of law ideal as part of what law (to be law) must be, whereas their positivist critics deny that any morally worthy ideal, including the rule of law, is constitutive of the bare existence of law or central cases of a legal system. Famously, in *The Morality of Law*, Lon Fuller made the novel claim that the formal requirements of legality constituted what he dubbed law's internal morality.[2] Although positivists have resolutely rejected Fuller's conclusion,[3] the premise of the argument—that the *formal* rule of law constraints have a constitutive relationship with law—is an idea to which some have recently been attracted.

This article is directed towards a substantial rejection of arguments inspired by this Fullerian premise. My conclusion is that positivists are not tightly wedded to a formal conception of the rule of law in consequence of the formal precepts of the rule of law being constitutive of what law, on their account, is.[4] Although the article describes the distinction between formal and substantive conceptions of the rule of law, and argues that the formal conception is both coherent and a plausible interpretation of the rule of law tradition, it does not seek to adjudicate between them. My main concern is to argue that the preferable conception of the rule of law is a matter of substantive political morality and cannot simply be derived from a jurisprudential commitment to, or rejection of, legal positivism (sections 4-6). In the concluding section of the article, I allege that viewing the rule of law ideal through the lens of jurisprudential debates about the nature of 'law' obscures more than it illuminates for those interested in the meaning and value of the rule of law in the conditions of modern government. In particular, such a focus tends to overemphasise the importance of rule of law in establishing conditions for legal 'guidance', to the exclusion of other, potentially more productive, ways of thinking about how modern forms of

2 Lon L Fuller, *The Morality of Law*, Revised ed (New Haven: Yale University Press, 1969) 33-94.

3 The conclusion that law necessarily has moral value is, of course, in direct contradiction to the positivist 'separability thesis', which holds that law and morality are not necessarily connected. See Jules Coleman, "Negative and Positive Positivism' (1982) 11 *Journal of Legal Studies* 139.

4 Glib talk of a 'positivist' account of law is dangerous, given the (growing) diversity of positivist positions in legal theory: see generally W J Waluchow, 'The Many Faces of Legal Positivism' (1998) 48 *University of Toronto Law Journal* 387. Indeed, some have suggested that the word 'positivism' means such different things to different theorists that the term should be jettisoned altogether: Kent Greenawalt, 'Too Thin and Too Rich: Distinguishing Features of Legal Positivism' in Robert P George (ed), *The Autonomy of Law* (Oxford: Clarendon Press, 1996). This article does not attempt to develop a distinctive positivist theory of law, though it is accepted that legal positivism is at least committed to the separability thesis. Beyond this, particular positivist accounts are explored to the extent they are relevant to the argument.

regulation and governance can be reconciled with the values which the rule of law has historically been designed to foster.

Before developing the central claim of the paper it is first necessary to briefly describe the meaning and value generally ascribed to the rule of law.

Dimensions of legality

The ideal of an 'empire of laws and not of men' has deep roots in both the liberal and republican traditions of thought.[5] Despite this impressive lineage it is often claimed that the rule of law remains a cluster of contested principles. Moreover, the contestable meaning of the rule of law is unlikely to be resolved by purely conceptual analysis as the most influential

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5 Andrew Altman, *Critical Legal Studies: A Liberal Critique* (Princeton, NJ: Princeton University Press, 1990) 22-56; Philip Pettit, *Republicanism: A Theory of Government* (Oxford: Clarendon Press, 1997) 174-77. It should, however, be emphasised that the rule of law has adherents outside of the liberal and republican traditions in political theory. At least since EP Thompson's valorisation of the ideal as 'an unqualified human good' (*Whig's and Hunters: The Origin of the Black Act* (New York: Pantheon Books, 1975) 266), an increasing number of Marxist-inspired theorists have sought a *rapprochement*: see, for example, Christine Synopwich, 'Utopia and the Rule of Law' in Dyzenhaus, above n 1, 178 and Olufemi Taiwo, 'The Rule of Law: The New Leviathan?' (1999) 12 *Canadian Journal of Law & Jurisprudence* 151. (See, also, William Scheuerman's fascinating study of the early Frankfurt School's legal scholars, Franz Neuman and Otto Kirchheimer, who sought to preserve what they saw as the significant achievement of bourgeois law for a social democratic order: *Between the Norm and the Exception: The Frankfurt School and the Rule of Law* (Cambridge, Mass: MIT Press, 1994). Even Allan Hutchinson, one of the critical legal studies movement's most vociferous critics of the rule of law has recently taken a more conciliatory tone: 'The fact that the rule of law has been used for reactionary purposes does not mean that it has to be or that it could not be used for more progressive ones': Allan C Hutchinson, 'The Rule of Law Revisited: Democracy and Courts' in Dyzenhaus, above n 1 197. Hutchinson's earlier assessments were more severe: 'The Rule of Law is a sham; the esoteric and convoluted nature of legal doctrine is an accommodating screen to obscure its indeterminacy and the inescapable element of judicial choice. ... [L]egal discourse is only a stylized version of political discourse.' (Allan C Hutchinson, *Dwelling on the Threshold: Critical Essays on Modern Legal Thought* (Toronto: Carswell, 1988) 40. It seems that the rule of law is becoming like the concept of democracy or equality, insofar as alternative political ideologies claim different interpretations of it, rather than line up on either side of a defend or disavow dichotomy.

accounts of the concept are grounded in divergent political theories and are not without historical antecedents.[6] Nevertheless, it is an exaggeration to suggest that the 'precise meaning' of the ideal 'may be less clear today than ever before'.[7] Although theoretical disagreement as to the meaning of the ideal continues, it is also true that most influential contemporary statements are interesting as much for their similarities as for their differences. In this section I describe what might be taken to be a developing consensus amongst legal theorists as to the *core* focus of the rule of law.[8] Ultimately, this understanding of the ideal may prove inadequate, but no theory of the rule of law will be compelling if this core focus of contemporary theorising is not, at the very least, explained away. Although the discussion cannot pass for a history of ideas, this core focus of the rule of law can plausibly claim to be an interpretation of the major concerns which have animated the development of the rule of law in political practice and theory, at least in so far as it can be seen to be a plausible and coherent rendering of the ideal.

The 'centerpiece' of the rule of law, writes William Scheuerman, 'has always been the idea that governmental action must be rendered calculable and restrained: it was the exercise of arbitrary power, of despotism as they dramatically labelled it, that worried liberals as diverse as the bourgeoisie Locke and the rabble-rousing Paine, the aristocratic Montesquieu and the state-building Madison'.[9] These authors were not anarchists: each in his own way recognised individual and communal needs for state-based law and strong legal institutions. Their primary fear was not of government *per se* but of laws and legal institutions which could not be *relied* upon. For liberals, the concern was grounded in the importance of self-directed living (freedom or autonomy); for republicans, the emphasis has been the importance not being subjected to the arbitrary will of others—the idea Philip Pettit has well captured in the notion of freedom as non-domination.[10] Though there are important differences between these perspectives, the reasoning in both has a similar structure. Indeed, one often finds the rationales being run together and that particular authors are claimed by both traditions. If law is unreliable, it will be unable to

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6 Judith Skhlar, 'Political Theory and the Rule of Law' in Allan C Hutchinson and Patrick Monahan (ed), *The Rule of Law: Ideal or Ideology* (Toronto: Carswell, 1986) 1. Thus the rule of law may well qualify as an essentially contested concept, which requires more than persistent disagreement. On the criteria for essential constestability, see Leslie Green, 'The Political Content of Legal Theory' (1987) 17 *Philosophy of the Social Sciences* 1, 17.

7 Richard H Fallon Jr, ''The Rule of Law' as a Concept in Constitutional Discourse' (1997) 97 *Columbia Law Review* 1, 1.

8 Timothy Endicott, 'The Impossibility of the Rule of Law' (1999) 19 *Oxford Journal of Legal Studies* 1, 1.

9 Scheuerman, above n 5, 68-9.

10 Pettit, above n 5.

meaningfully *guide* actions; it will inevitably be experienced as arbitrary and undermine the social conditions whereby individuals can autonomously chart their lives within whatever legal boundaries are set. If legal officials and other powerful social actors cannot be trusted or required to stick to the rules, whatever they are, it will not be the laws that rule but rather the arbitrariness of persons.

Scheurerman's statement, emphasising restraint and calculability, usefully points out two broad dimensions which can be extracted from the rule of law tradition and which figure prominently in contemporary discussions of the ideal.[11] The first dimension can be thought of as involving an *extensional* thesis. It responds to the question: how far should the rule of law extend? The extensional thesis thus concerns the *scope* of the ideal. Although it has received various renditions, it reduces to the requirement that those exercising social power should act only within a legal framework so that their actions can be said to be legally authorised. Although this dimension picks up on the liberal and republican impulse to establish institutional restraints on government, it is important to note that this dimension of rule of law thinking has not directly sought to place substantive restraints on what government can and cannot do.[12] Rather, we get, for example, Dicey's more limited insistence that government be subject to the same law and courts as are citizens,[13] and the common law suspicion of government action without a legal warrant.[14] The basic idea is that a necessary, though not sufficient, condition for the legitimacy of government regulatory activities is that they must be legally authorised; it is not sufficient to legitimate governmental action merely by reference to the common good, majority support or whatever.[15] It is in this sense that Aristotle's (and later Harrington's) famous opposition of the rule of law to that of 'men' has been understood.

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11 See also Altman, above n 5, 22-7; and Pettit, above n 5, 174-5.

12 While this dimension of rule of law theorising does respond to a fear of tyranny, this need not be extrapolated into a general fear of government. As Martin Krygier argues, many liberals have recognised that government not only can do much good but can also cause great harm by leaving the field to other 'private' modes of regulation: *Between Fear and Hope: Hybrid Thoughts on PublicValues* (Sydney: ABC Books, 1997) 99-130.

13 Albert V Dicey, *Introduction to the Study of the Law of the Constitution*, first published 1885, 10th ed, E C S Wade (ed) (London, Macmillan, 1959) 193. Note, of course, that Dicey's notion is less general than the idea that government must operate within a legal framework.

14 *Entick v Carrington* (1765) 19 St Tr 1030.

15 Andrew Altman, 'Fissures in the Integrity of Law's Empire: Dworkin and the Rule of Law' in Alan Hunt (ed), *Reading Dworkin Critically* (New York: Berg, 1992).

The second dimension to the rule of law tradition has received much emphasis in recent jurisprudential writings, most notably by Fuller, Rawls, Raz and Finnis. It concerns an *explication* thesis, insofar as it seeks to explain what it means for legal regulation to take a rule of law *form*. The second dimension to the rule of law tradition responds to the question, 'what form should legal authorisation and legal rules take?' The answer given is the now familiar set of formal constraints on law-making, law-application and law-enforcement, which Fuller termed 'law's inner morality'[16] or, less provocatively, the 'principles of legality'.[17]

The questions of what exactly is entailed by the principles of legality and the requirement for legal authorisation indubitably involve much disputation. It is worth noting, however, that where there are significant disagreements about the specific set of constraints comprising the explication thesis of rule of law, these tend to concern the desirability of making *substantive* additions to a number of *formal* constraints. Indeed, the most influential recent statements of rule of law desiderata are remarkably similar, despite originating from very different jurisprudential habitats.[18]

Very briefly, these accounts can be summarised as follows. Laws must be prospective and exhibit a requisite degree of publicity, clarity, stability and coherence (at least in the sense of being comprehensible and non-contradictory).[19] As Locke argued, absent these characteristics laws would not enable people 'to be able to know their duty, and be safe and secure within the limits of the law'.[20] The explication thesis, then,

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16 Fuller, above n 2, 46.

17 Ibid 197.

18 For example, the conceptions of Fuller, Raz, Finnis and Rawls must at least qualify as complementary understandings, even if the details are not consistent in all respects. See, Fuller, above n 2; Joseph Raz, *The Authority of Law* (Oxford: Clarendon Press, 1979); John Finnis *Natural Law and Natural Rights* (Oxford: Clarendon Press, 1980); John Rawls, *A Theory of Justice* (Cambridge, Mass: Belknap Press, 1971).

19 Most modern accounts begin with Fuller's influential treatment. Fuller, above n 2, 46-91. Fuller listed eight desiderata which, in combination, he held to comprise an internal morality of law. To comply with law's internal morality, Fuller held that directives must, to a degree at least, be (1) general (2) promulgated (3) prospective (4) clear (5) non-contradictory (6) within the realm of the possible (7) constant through time and (8) enforced by officials congruently with their stated terms. Although 'generality' appears in Fuller's list of rule of law desiderata, it is normally thought to be exhausted by the first dimension of the rule of law, that is, in the requirement that all, including government officials, be subject to (potentially unequal) laws. In this sense, generality is concerned with the application of legal rules (that there be *rules*) rather than their actual content. See further text at notes 20-25.

20 John Locke, *Second Treatise of Government*, CB Macpherson (ed)

emphasises the 'knowability' or calculability of law: if law does not conform to Fuller's precepts, legal regulation (and the requirement that government actions be legally authorised) will not avail in restraining government as it will not be calculable. Thus, while the two dimensions are logically distinct, they are inter-connected: the formal constraints on law will not avail if government is not required to act of a *legal* basis. Binding officials by the law, so the reasoning goes, is only going to be helpful if we know something of the bonds that bind both them and us. Without the rule of law desiderata, the law could not have normative influence; it could not guide citizen or legal official; and the threat of arbitrary governance would emerge.

Although the constraints associated with the second dimension of rule of law thinking place real limits on what legal officials can do, they do not do so by reference to the substantive content to be poured into legal norms, nor by reference to the process by which legal norms are to be filled with a particular content (eg dictatorship or democracy). It is in this sense that the common catalogue of rule of law principles are thought to be formal or content-independent constraints. It is also in this way that, while substantial compliance with the precepts is considered by many as necessary for a just or democratic legal system, few have thought it a sufficient condition. As there is no obvious reason that prospective, clear, stable, evil directives cannot be followed just as meticulously as good ones, justice also requires substantially good laws.

'Generality' is also routinely listed as an additional basic requirement of the rule of law. Indeed, it is sometimes suggested that this principle stretches so far as to demonstrate the ideal's concern for substantive equality. Generality requires that legal rules should *apply* to everyone. However, what it means for laws to (equally) apply to all is open to two different interpretations. Most, though not all, defenders of the rule of law interpret 'generality' along Diceyan lines: namely, that all, including government officials, are to be subject to the laws though the laws themselves may countenance marked inequalities between individuals and groups.[21] Generality, on this view, amounts only to what is variously called formal or legal equality. And while this notion of generality (and thus the rule of law) can be seen to align itself with Locke against 'extemporary dictates',[22] it is normally thought to lack the resources to ground judgments impugning the particular discriminations between persons and groups that laws inevitably make. It is true that the requirement of generality can, as Cass Sunstein puts it, help to 'flush out illegitimate reasons for

(Indianapolis: Hackett Publishing Company, 1980) 73.

21 See, eg, Geoffrey Marshall, *Constitutional Theory* (Oxford: Clarendon Press, 1971) 137-9.

22 Locke above n 20, 72.

legislation'.[23] But much more than the notion of generality is required in order to 'ascertain whether there are relevant similarities and relevant differences between those burdened and those not burdened by legislation'.[24] So while the requirement that there be general rules can, in some instances, assist us to see the basis of particular distinctions between classes and categories of persons, it falls well short of a substantive theory of equality.[25]

We can thus see that all the familiar requirements as to the shape laws should have to be rule of law compliant can plausibly be seen in content-independent or formal terms. And although more substantive readings of rule of law desiderata have been offered, these typically acknowledge the importance of the formal aspects of rule of law principles, though this salience is subjected to other more fundamental values which the ideal is said to serve.[26] Much more remains to be said about the meaning and importance of each component of the ideal, how they relate to one another, and whether the formal conception is in fact preferable to thicker rule of law theories. Although these issues cannot be discussed here I do want to explain briefly why I think the formal conception is at least a plausible and coherent rendering of the rule of law ideal—given my claim that the formal conception of the rule of law forms the core of the ideal.

Making sense of a formal and partial ideal

The basic intuition underlying many critiques of the formal rule of law is that it undermines the ideal's accepted moral value and thus institutional importance. Incontrovertibly, liberals and republicans value the rule of law for moral reasons; indeed, it is also true that many believe that the ideal is of universal moral value in the sense that it is a necessary part of any just legal system.[27] The common objection to a formal interpretation is that it

23 Cass R Sunstein, 'Problems with Rules' (1995) 83 *California Law Review* 953, 979.

24 Ibid 980.

25 Ibid 980. Cf F A Hayek's interpretation of the generality requirement, where the rule of law requires that there be 'general rules that apply equally to everybody': *The Constitution of Liberty* (Chicago: University of Chicago Press, 1971) 153. Henry S Richardson writes that the 'absurdity of Hayek's interpretation ... reminds us of what the generality requirement really comes to: a ban on laws aimed at particular individuals, as opposed to classes of individuals (owners, promisors, the rich) who are, by the legislators, treated as relevantly "alike"': 'Administrative Policy-making: Rule of Law or Bureaucracy?' in Dyzenhaus (ed), above n 1, 314

26 See, eg, Ronald Dworkin, A *Matter of Principle* (Harvard: Harvard University Press, 1985) 9-32.

27 EP Thompson's, above n 5, elevation of the ideal to 'an unqualified human

turns the principles of the rule of law into mere requirements of efficiency. This, of course, was the basis of HLA Hart's critique of Fuller's internal morality of law argument. Fuller had argued that, as the formal rule of law constraints were (a) internal to law and (b) of necessary moral value, it therefore followed that (c) law necessarily has moral value. Hart acknowledged that to function effectively (to efficiently guide behaviour) law's directives must satisfy, to some degree, formal rule of law conditions. But this, *contra* Fuller, did not constitute anything like an internal *morality* of law. For Hart, the rule of law conditions could only be viewed as an internal 'good' of law in the functional sense of that word. Law, as with any rule-governed human practice, has certain goods internal to it, but Hart saw no reason for thinking that these goods are of necessary moral worth, let alone great moral worth. As Hart observed, we might also think about the internal morality of poisoning—murder too has a functional scale of excellence. Hart's conclusion, therefore, was that the rule of law is 'unfortunately compatible with very great iniquity'.[28] The challenge of Hart's 'efficiency' critique of Fuller's internal morality of law argument can thus be stated very simply: the rule of law is as necessary to do evil as it is to do good. Can this sombre view of the rule of law be made consistent with the high moral value placed on it by liberal and republican political theorists?

Sometimes attempts are made to avoid Hart's critique by alleging that his arguments are limited to logical possibilities and ignore the issue of whether a tyranny has any self-sufficient reason to comply with the rule of law. According to Finnis, '[a]dherence to the Rule of Law ... is *always* liable to reduce the efficiency for evil of an evil government, since it systematically restricts the government's freedom of manoeuvre'.[29] The

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good' goes a step further in the praise lavished on the rule of law. Compare Jeremy Waldron, 'The Rule of Law in Liberal Theory' (1989) 2 *Ratio Juris* 79 with Joseph Raz, 'The Politics of the Rule of Law' (1990) 3 *Ratio Juris* 331.

28 HLA Hart, *The Concept of Law*, 2nd ed (Oxford: Clarendon Press, 1994) 207; and HLA Hart, Book Review—The Morality of Law' (1965) 78 *Harvard Law Review* 1281, 1283-8.

29 Finnis, above n 18, 274 (emphasis added). See also Neil MacCormick, 'Natural Law and the Separation of Law and Morals' in Robert P George (ed), *Natural Law Theory: Contemporary Essays* (Oxford: Clarendon Press, 1992) 122-123, who argues that Hart's position overlooks 'the possibility that some ways of organising human affairs can have [moral] value ... even in situations where there are [overriding] countervailing moral values ... There is always something to be said for treating people with formal fairness ... It is a mark of a world gone mad that one can welcome something itself evil (arbitrariness on top of wickedness as a partial mitigation of the greater evil.' But Hart was not welcoming arbitrariness. Rather he argued that given a law with evil purposes, evasion of that law may well be preferable to

trouble with this response is not only that Finnis does not adequately support its empirical premises, but that a closer reading of Hart reveals an often unnoticed argument to the effect that evil regimes *may well* do best to uphold the rule of law—an argument identifying a self-sufficient reason for evil governments to comply with the rule of law. Waldron's recent resuscitation of Hart's argument is worth quoting at some length:

> Fuller's internal morality is of a kind which is not only not necessarily associated with justice [it does not rule out the pursuit of evil given its functional relation to rules], but may well ... exacerbate the unjust features of a given legal system. A system of exploitation which operates through general standards of conduct addressed to classes of person may have the feature that it is adminstrable impartially and efficiently by officials who have no particular enthusiasm for the injustice it embodies. It may secure their cooperation simply on the basis of offering a steady career with the formal satisfactions of bureaucratic predictability ... A chaotic Nazi-like system may work (to the extent that it does) by associating itself with the hitherto repressed visceral hatreds and resentments of a whole population and by relying especially on the quick-footedness or ideological intensity of an enthusiastic few—Nazi judges, party members, storm-troopers, etc. but the legalistic pursuit of evil has the advantage of being in a position to coopt those who pride themselves on their scrupulous adherence to formal ideals and who are, in many ways, the very same people whose cooperation one would also secure if the legal regime were pursuing justice.[30]

In the end, whether or not Finnis or Hart has the better of this debate cannot be determined by philosophical argument. But does not the very possibility that the rule of law combined with unjust laws may (even if not Hart's, *may well*) make things worse leave the defender of the moral value of the formal rule of law in significant trouble? I think not. Those who defend the formal rule of law are entitled to insist that the ideal has real and significant value in most, if not all, real world circumstances. (They can

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even-handed compliance. So while Hart may agree with MacCormick that there is always something to be said in favour of formal fairness, MacCormick has not given us reasons for rejecting Hart's view that assiduous application of the rule of law may make things worse in some circumstances.

30 Jeremy Waldron, 'All We Like Sheep' (1999) 12 *Canadian Journal of Law & Jurisprudence* 169, 182-3. See also Leslie Green, 'The Concept of Law Revisited' (1996) 94 *Michigan Law Review* 1687, 1700-2.

also, of course, admit that the ideal is never enough to secure justice.) To be sure, the ideal can only be given contingent, as opposed to necessary, value; but that will not automatically reduce the ideal's actual importance. Indeed, defenders of the formal ideal may still coherently argue that it is a necessary condition for justice or democracy as this claim is simply not the same as claiming that compliance with the rule of law necessarily promotes justice or democracy.[31]

So the short response to the criticism that the formal view cannot account for the value of the ideal is this: although the value of the rule of law may be contingent, it may be no less important for that fact alone. While the formal account must reject any universal pretensions of the ideal—its importance will vary from time to time and place to place—surely this does not mean we cannot give an adequate account of its importance and value. Indeed, seeing the rule of law as having a different moral valency depending on context is surely a way to breathe life into the ideal. Finnis has rightly noted that none of Fuller's principles can 'be understood as merely a characteristic of a meaning-content', as 'all involve qualities of institutions and processes'.[32] The formal view thus usefully emphasises that the rule of law, even if a necessary component of any complete theory of justice, will only help in achieving the laudatory goals envisioned for it in the appropriate institutional and cultural context.[33]

A second common objection to the formal view is that formal accounts are really substantive accounts in disguise. According to Richard Fallon:

> [A] sound theory of the Rule of Law, although emphasizing formal over substantive requirements, could not wholly exclude substantive content. It is impossible even to make sense of the ideal of the Rule of Law without reference to values or purposes that it

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31 These two distinct claims are sometimes elided. To argue that the second claim follows from the first is to fall prey to what philosophers call a scope fallacy: the move from claim 1 (the ideal necessarily is a condition for justice) to claim 2 (the ideal necessarily furthers justice) trades on an ambiguity as to the scope of 'necessarily'. While we may think that doing justice must include complying with the rule of law, the possibility raised by rejecting claim 2 is that compliance with the ideal is consistent also with increased injustice in some circumstances. This does not, however, mean that a just society can do without the rule of law if one sees it as a necessary part of a complete theory of justice: see Waldron, 'The Rule of Law', above n 27, 93-4. In the end the mistake involves a confusion of two separate questions: Is compliance with the ideal necessary for justice? Does compliance with the ideal promote justice contingently or necessarily?

32 Finnis, above n 18, 271.

33 I return to this issue below, see text at notes 37-44.

> serves. And those values or purposes, once specified, inevitably furnish the ground for contestable arguments that the Rule of Law could be most fully realized only if the substantive law assumed a particular content. In extreme cases underlying values or purposes will even provide plausible foundations for arguments that particular substantive content is either necessary to or incompatible with the Rule of Law.[34]

The idea seems to be that the rule of law will inevitably contain content-dependent (ie substantive) elements merely in virtue of the fact that it is an ideal—valued, that is, for substantive moral reasons. This argument, however, is misconceived. It is true that formal accounts of the rule of law do value it for substantive reasons. (What other reasons could there be?) But this does not turn them into substantive conceptions. Fallon's argument has the following structure: (1) the rule of law is valuable because it promotes value V; (2) achieving value V also requires the content of specific laws to be X; therefore (3) the rule of law requires, in at least some cases, law's which promote or protect value X. But that value V is promoted by the rule of law does not imply that the rule of law must be interpreted in a way which *ensures* V is promoted by the law nor that the content of the law does not contradict value V. So while values justifying compliance with the formal rule of law may also require law to comply with other ideals, there is no reason why those other ideals must (as a matter of logic) be read into the rule of law ideal itself.[35] We can thus say that the rule of law, on the formal view, is also a *partial* ideal. More is required to secure its justifying values than it alone can secure but there is nothing incoherent about that. The distinction between formal and substantive conceptions cannot be dissolved by pointing out that the value of the formal conception rests on substantive justifications.

Thus the formal conception of the rule of law is a coherent one—in terms of its status as an ideal and insofar as it does not necessarily collapse into a substantive conception. Whether or not there are other reasons to jettison a formal conception for a substantive one is a much larger debate which I do not seek to resolve in this article. But to render my conclusion that the formal conception remains a coherent account of the rule of law

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34 Fallon, above n 7, 54.

35 Craig has responded to TRS Allan's version of the argument as follows:

> It is one thing to affirm, correctly, that the formal conception of the rule of law is based on some general abstract substantive values which relate to human autonomy. It is quite another matter to conclude that therefore the rule of law must be taken to encompass specific substantive freedoms, such as liberty.

Craig, above n 1, 482. See also TRS Allan, *Law, Liberty and Justice* (Oxford: Clarendon Press, 1992).

more plausible, it is helpful to emphasise two significant ways in which even formal conceptions of the rule of law acknowledge that the ideal goes beyond the scope and formal shape laws are to have if they are to guide action and, to that extent, promote autonomous action and guard against arbitrariness and domination.

Both dimensions of rule of law thinking—the explication thesis and the extension thesis—imply or assume that there be adequate institutions and appropriate cultural capital through which the rule of law can be given concrete expression in any given community. Most centrally, the formal account acknowledges that the rule of law is premised upon institutions capable of ensuring that any confidence placed in legal regulation is not misplaced. Fuller captured this idea in his last desideratum, that there be a 'congruence between official action and declared rule'.[36] Martin Krygier generalises the point: 'citizens must also be able to have reasonable faith that interpreters and enforcers of the law will construe it with fidelity to its publicly known terms and independently of extra-legal pressures to bend or ignore it'.[37] Although defenders of the formal conception of the rule of law are fully aware of the institutional and social pre-requisites for any flourishing of the ideal in a given community, they are reluctant to build too many of these requirements into the conception of the rule of law itself. So whereas the rule of law is often, on the formal account, thought to include an independent judiciary, principles of procedural fairness, equitable access to courts, and judicial review, most theorists would stop short of including freedom of speech and the press, or a general culture of democratic contestation, even though these too make significant contributions to the values associated with the ideal.

The difficulty with building any such pre-requisites into the formal conception of the rule of law is two-fold. First, the institutional and cultural struts supporting the rule of law are recognised by most as being empirically contingent: what institutions and cultural capital work here and now may be different from those required there and at a different time. So although the ideal cannot sensibly be conceived in the absence of supporting institutions and cultures, it does not depend on a single, immutable set of such institutions and cultures. Perhaps an example can help illustrate this point. Judicial review of administrative action is regularly argued as being a necessary requirement of the rule of law:

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36 Fuller, above n 2, 81.

37 Martin Krygier, 'Ethical Positivism and the Liberalism of Fear' (1999) 24 *Australian Journal of Legal Philosophy* 65, 71. Krygier also emphasises the 'soft' but 'crucial' cultural supports of the idea, including 'socialisation into the values of the rule of law, at least of the professionals who have to administer it and, commonly less self-consciously and explicitly, among large numbers of citizens'. (Ibid.)

without it, the law may be applied at the *discretion* of the government official[38] and this would involve the rule of persons, not of law.[39] Similar reasoning has been used to justify the view that, in cases where there is a written constitution, judicial review of legislation is 'axiomatic';[40] if the constitution is to rule, rather than the legislature, then a court *must* be given review powers.[41] But this conclusion is not one of logic. Rather it is based on an practical or empirical assessment about what is *necessary* for decision makers to respect their legal (jurisdictional) limits. Indeed, it is inevitable that there are some decisions in any legal system which are not themselves reviewable (for example, the decisions of final courts of appeal).[42] What this illustrates is that the absence of judicial review or any other institutional presupposition of the rule of law, counts as a deficit in the ideal only when it is practically needed to achieve conformity to the law. Indeed, judicial review may, in some cases, arguably lead to a deficit in the rule of law. If one takes the view that officials, other than the courts, are *more likely* to faithfully apply the law in particular circumstances, based on their relative expertise and experience, then it would simply not be true that the rule of law is better served by the institution of judicial review.[43]

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38 'Discretion' as used here, is in one of Dworkin's 'weak senses' of the term, ie where an official applies a standard or rule but is not subject to review: Ronald Dworkin, *Taking Rights Seriously* (Cambridge, Mass: Harvard University Press, 1978) 32.

39 For a strong judicial assertion of this argument, see *R v Shoreditch Assessment Committee; Ex parte Morgan* [1910] 2 KB 859, 880 per Farwell LJ.

40 *Australian Communist Party v Commonwealth (Communist Party Case)* (1951) 83 CLR 1, 262.

41 The classic presentation of this argument is in *Marbury v Madison* 5 US (1 Cranch) 137 (1803).

42 It is, of course, logically possible to have an 'infinite *hierarchy* of courts', so long as there are two courts with the power to reverse each other: Timothy AO Endicott, 'The Impossibility of the Rule of Law' (1999) 10 *Oxford Journal of Legal Studies* 1, 9. But it would be a very odd interpretation of the rule of law which required this absurd institutional configuration. As Endicott notes, a legal system with no finality in adjudication, 'would not carry out a basic function of the legal system' (ibid) viz adjudicating disputes.

43 This is one of the rationales used to justify the use of 'privative clauses' to oust the jurisdiction of courts to review administrative decisions. Courts generally view such clauses with a mixture of incredulity and hostility: see Mark Aronson and Bruce Dyer, *Judicial Review of Administrative Action* (Sydney: LBC Information Services, 1996) chapter 18. An analogous argument can also be made in the constitutional sphere. It might, for example, be thought that parliament may do a better job than the courts in interpreting constitutional provisions requiring the law respect moral or human rights: Alon Harel, 'The Rule of Law and Judicial Review:

The further reason for the cautious approach to the inclusion of social or cultural pre-requisites within the notion of the rule of law is that if such features are viewed as analytical requirements for satisfaction of the rule of law, then it becomes difficult to conceptualise the rule of law as a usefully *distinct* ideal to which legal regulation should aspire. So while the formal account can recognise that a culture of democratic contestation and freedom of expression are conditions under which the justifying values of the rule of law are more likely to be realised, stating these conditions as internal requirements of the ideal itself runs the risk, to invoke Raz's famous argument, of collapsing the rule of law into the rule of good law, where to explain the nature of the ideal 'is to propound a complete social philosophy'.[44] We can acknowledge the importance of these more amorphous preconditions of the rule of law, including socialisation into the values of the ideal itself, without attempting to formally build them into the concept of the rule of law. Indeed, it is because of them that *the* rule of law cannot simplistically itself be legislated into *a* rule of law—even when it is dressed formally. The existence of such socio-cultural factors are crucial in ensuring that the value of the rule of law, though contingent in theory, will be realised in practice.

Law and the rule of law: an 'inextricable' connection?

We are now in a position to return to the issue of the connection (if any) between legal positivism and particular conceptions of the rule of law. The idea that the rule of law ideal can, in some way, be derived from the concept of law would, of course, immediately raise most positivist eye-brows. Taken as attempt to provide a general and descriptive account of the nature of law, positivism claims to adopt a stance of moral and political agnosticism. Why, then, is not positivism also agnostic about the various versions of the rule of law, which, from Aristotle to Rawls, have been defended by reference to substantive moral reasons? If legal positivism is united by anything at all it is the proposition that law does not necessarily supply the moral standards for its own critique; no necessary connection binds law to morality or any other normative domain. Most positivists would insist that their answer to the question 'What is law?', does not commit them to particular moral ideals, including particular versions of the rule of law.[45] (We'll call this the independence thesis.)

Reflections of the Israeli Constitutional Revolution' in Dyzenhaus (ed), above n 1, 143-62.

44 Raz, *Authority of Law*, above n 18, 211.

45 This does not, of course, follow for those who defend positivism, not as a general descriptive or conceptual account of law, but as a fully-fledged

Paul Craig has recently challenged the independence thesis,[46] by claiming there is an inextricable connection between positivism and the *formal* conception of the rule of law and a parallel connection between Dworkin's version of anti-positivism and a more *substantive* rule of law. The central idea is that if a positivist theory of law is preferred, a formal conception of the rule of law ideal will also, inevitably, be preferred. (We'll call this the derivation thesis.) In Craig's view, disputes about the meaning of the rule of law are thus re-runs of a more fundamental dispute about the nature of law. To the extent we can resolve our more fundamental disputes about law, controversy over the meaning of the rule of law will be tamed. '[W]hat ultimately divides the formalist and the substantive conceptions of the rule of law' Craig claims to have confirmed by his analysis, 'is disagreement about the way in which we identify legal norms'.[47]

Unfortunately, Craig does not give much by way of argument to support his thesis of an 'inextricable' connection between a general and descriptive legal theory and particular conceptions of the rule of law ideal, other than to note that Raz, Craig's exemplar of a positivist jurisprude, ends up with a formal account of the rule of law, and that Dworkin, his anti-positivist, ends up with a substantive account.[48] He adds that, given Dworkin's view that legal norms are at least partially determined by what the law ought to be, 'it would be odd, to say the least, to conceive of the rule of law in purely formal terms'.[49] Indeed, Dworkin's argument against the formal rule of law is said to 'emphasise that the very meaning of the

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ethical or normative theory. For some, like Tom Campbell, positivism is best thought of as an explicitly normative theory according to which governments *should* function through the medium of 'readily identifiable mandatory rules of such clarity, precision and scope that they can be routinely understood and applied without recourse contentious moral and political judgments': 'The Point of Legal Positivism' (1998) 9 *King's College Law Journal* 63, 66. This view, 'ethical positivism', far from adopting an agnostic outlook towards the rule of law, has 'multiple similarities' with rule of law ideals. (Ibid 74-75) Indeed, ethical positivism may best be thought of as a particular, democratically inspired, interpretation of the rule of law as both are justified by reference to substantially the same set of normative reasons. The connection between positivist theory and the rule of law is not, therefore, in virtue of anything about the nature law 'as such'—the question that inspired both the positivist and natural law traditions in jurisprudence. See also, Tom Campbell, *The Legal Theory of Ethical Positivism* (Aldershot: Dartmouth, 1996).

46 Craig, above n 1, esp 479, 487.

47 Ibid 487.

48 Craig also examines the views of Sir John Laws and Trevor Allan, but considers their conceptions of the rule of law as variations on a Dworkinian theme. Ibid 479-84.

49 Ibid 477.

rule of law will be inextricably linked with one's definition of law itself and with the proper adjudicative role of the judge'.[50]

In the case of Raz, however, Craig's conclusion is reached on the basis of an analysis that establishes merely a *correlation* between Raz's legal positivism and his defence of a formal conception of the rule of law.[51] Craig gives no argument for thinking that this connection is established on conceptual rather than coincidental grounds. Indeed, the striking thing about Raz's defence of the formal rule of law, is that his expressed reason for rejecting substantive conceptions is not that they are inconsistent with positivist legal theory, but that they relegate the rule of law to redundancy. In explaining Raz's formal conception of the rule of law, Craig cites a passage which sums up Raz's reasons for rejecting substantive accounts:

> If the rule of law is the rule of the good law then to explain its nature is to propound a complete social philosophy. But if so the term lacks any useful function. We have no need to be converted to the rule of law just in order to discover that to believe in it is to believe that good should triumph. The rule of law is a political ideal which a legal system may lack or possess to a greater or lesser degree. That much is common ground. It is also to be insisted that the rule of law is just one of the

50 Ibid 479.

51 What Craig says about Dworkin's view is basically right. Although Dworkin's substantive conception of the rule of law does not collapse into a substantive theory of justice in ideal terms, it does collapse into his theory of law as integrity. Following law as integrity is, for Dworkin, to give substance to the rule of law ideal. What law *is*, according to law as integrity, is itself an ideal. Thus fidelity to Dworkin's preferred rule of law ideal simply is to accept his theory of law. The extent to which the formal rule of law is part of law as integrity is a contingent matter as Dworkin accepts that, other things being equal, the legal system will be in better shape if the formal rule of law is adhered to. But the extent to which these principles are part of the ideal of law this will be a matter of constructive interpretation, part of the process of making law the best it can be. Craig is right, therefore, to conclude that 'on Dworkin's theory there is no place for a separate concept of the rule of law as such at all'. (Ibid 478.) To the extent Dworkin defends a substantive rights-based version of the rule of law he is defending his broader theory of law; to the extent this broader theory of law picks up on what he dubs the 'rule-book' conception of the ideal its incorporation is internal to the workings of constructive interpretation, the process of making the law the best it can be. Either way, the rule of law is not an external ideal to which law aspires--it wholly constitutes, and to that extent regulates, what law is. See, Dworkin, *Matter of Principle*, above n 26. This analysis of Dworkin's approach to the rule of law is, I believe, confirmed by his own brief statement in *Law's Empire* (Cambridge, Mass: Belknap Press, 1986) 92-3.

> virtues by which a legal system may be judged and by which it is to be judged. It is not to be confused with democracy, justice, equality (before the law or otherwise), human rights of any kind or respect for persons or for the dignity of man.[52]

This is a simple yet powerful argument.[53] While Raz accepts and, indeed, emphasises that the rule of law is an ideal, his motivation for offering a formal reading of the ideal is not to diminish its moral import, but to preserve it as a distinct ideal.[54] To be sure, he acknowledges the ideal cannot *guarantee* morally good laws, but this is merely to admit the ideal's status as such is contingent; it does not, as argued in section 3, undermine its status or importance as an ideal in any important sense.

Now, the striking thing about Craig's attempt to associate Raz's positivism with his formal conception of the rule of law is that it does not confront the obvious objection that the two positions are defended quite independently of one another. (As I explain below, Raz actually down-plays any purported association.) Craig's analysis does not, then, clarify why a

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52 Raz, *Authority of Law*, above n 18, 211. In fact, redundancy threatens from both directions. Raz also rejects a reading of the concept of the rule of law which would hold that 'every state must be a *Rechtstaat*—if one understands by '*Rechtstaat*' a state that has a legal system': Hans Kelsen, *Introduction to the Problems of Legal Theory*, trans Bonnie L Paulson and Stanley L Paulson (Clarendon Press: Oxford, 1992) 105. This would be to equate the rule of law with the bare existence of law, which, for the positivist, is to deny the concept its ideal status. Such a reading would deeply misconceive the use of the concept in political theory. To the extent a positivist insists that the rule of law is simply the existence of an effective legal system they do not establish a conceptual connection between their legal theory and the concept of the rule of law in political theory, but deny that such a connection can be made. Note that Kelsen added the following to the view expressed in the above quotation: 'Of course, one must not confuse this concept of the *Rechtstaat* with the concept of a legal system having a particular content, namely, a legal system comprising certain institutions, such as individual liberties, guarantees of legality in the functioning of organs, and democratic methods of creating law. To perceive a 'true' legal system only in a system of norms fashioned along these lines is a prejudice of natural law.' For Kelsen, 'the law qua ideal subject-matter is a system, and therefore an object of normative-legal cognition' the justification of which goes beyond the purview of his 'pure theory' of law. (Ibid.)

53 Though one might question whether a concept of the rule of law which incorporates or overlaps with elements of other ideals such as those Raz catalogues necessarily results in the ideal collapsing into a complete social philosophy. It is not clear why an ideal may not be partial and substantive.

54 Raz also wants to take some of the rhetorical punch out of the rule of law arguments by emphasising that once the rule of law is seen in formal terms it becomes clear that it will not necessarily trump other values or ideals.

positivist, who like Raz defends positivism on conceptual or descriptive grounds, could not, consistent with such a defence, prefer a thicker, more substantive conception of the rule of law. What would stop such a theorist from, for example, believing that only a substantive version of the ideal fully captures the historical impetus behind its defence[55] and, that, though the law need not comply with that ideal as a conceptual matter, it should strive to do so? Nor is it clear, from Raz's argument, why such a positivist would be tied in any strong sense to the formal conception.

In the next two sections I ask whether any reasons are available to justify Craig's statement of the derivation thesis despite his failure to articulate them. In approaching this question I first ask: what, if anything, about a positivist theory of law might plausibly preclude a substantive account?; and second, what, if anything, might demand or entail a formal conception? My argument will conclude that, at least for a Hartian or Razian type positivist, their positivist theory of law radically *under*-determines the question of which conception of the rule of law ideal is to be preferred.

Positivism and the substantive rule of law

I have already mentioned that central to the positivist tradition is acceptance of the separability thesis—that there is no necessary connection between law and other normative fields such as morality, politics or religion. Does a substantive version of the rule of law threaten this commitment? I see no reason why it does, so long as the rule of law is perceived as setting out *regulative*, not *constitutive*, rules concerning the identification of law.

It is first necessary to clarify what it means to contrast a reading of the rule of law which considers it as a regulative as opposed to constitutive ideal of law. Any set of constraints on something, X—in this case, law—can be constitutive or regulative. Rule of law constraints are constitutive of law if one holds that something is a law only if it conforms to the constraints. If the rule of law is constitutive of law, then it is an analytically true thesis that law must conform to those constraints. Contrariwise, if the constraints are regulative they represent an ideal to which law should seek to aspire but, while still being law, may fail to satisfy.[56] On both views the

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55 TRS Allan, 'The Rule of Law as the Rule of Reason: Consent and Constitutionalism' (1999) 115 *Law Quarterly Review* 221, for example, suggests that there is an emphasis in rule of law thinking on curbing government powers by reference to purposes and procedures which can only be explained by a substantive conception.

56 Cf John Searle, *Speech Acts* (Cambridge: Cambridge University Press, 1969) 34: 'Regulative rules regulate a pre-existing activity, an activity whose existence is logically independent of the rules. Constitutive rules

rule of law constraints continue to function as an *ideal*; the acceptance that the constraints are constitutive ones, simply shows that law necessarily furthers the ideal. It is also possible for constraints to be partially constitutive, where compliance is necessary only to a certain threshold or degree.

To accept that a substantive (content-dependent) rule of law was internal to or constitutive of the very existence of law would be to accept an essential connection between law and morality. If law includes content-dependent criteria for legal validity and those criteria are of moral value, then resisting the conclusion that the law is of moral value is impossible. But so long as the positivist insists that the rule of law is an external or regulative ideal they will have no reason on account of their legal theory to reject a substantive account of that *ideal.* As positivist authors regularly insist, they are not, in their account of law, offering also a theory of adjudication. The positivist is thus no more barred from arguing for a substantive conception of the rule of law, taken as a regulative ideal, than they are from making a case for democracy or equality or some other explicitly normative ideal. It may be that there is something about particular purportedly positivist accounts of the existence of a legal system or the criteria for establishing validity of particular laws which shows that the elements of, for example, justice or democracy which are part of a substantive conception of the rule of law also form a necessary part of what law is. For example, one might ask whether there is anything about Hart's rule of recognition or Raz's conception of legal authority that entails such a result. I see no reason to think there is, though it is worth excluding one point of potential confusion.

For some positivists ('inclusive' or 'soft' positivists), legal validity may be partly determined by conformity to a substantive conception of the rule of law *if* it is included in the legal system's ultimate rule of recognition; for others, ('exclusive' or 'hard' positivists), the tests for legal validity cannot contain moral criteria such as those which may be part of a substantive rule of law. An example of an inclusive rule of recognition could run something like: 'No norm is law, *inter alia*, unless it complies with the substantive rule of law' where the substantive rule of law is 'an accurate public conception of individual rights'.[57] Does this mean that the inclusive legal positivist sees substantive versions of the rule of law as constitutive of law in our sense? No it does not. Even inclusive positivists insist that whether moral criteria are part of a legal system's rule of recognition is a matter for contingent determination by a (non-moral)

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constitute (and also regulate) an activity the existence of which is logically dependent on the rules.'

57 Dworkin, *Matter of Principle*, above n 26, 11-2.

conventional social rule whose existence is a matter social fact:[58] any internal relation between the rule of law and legal validity is not thus a constitutive one, even though it is a contingent element of the criteria for legal validity within a particular jurisdiction. So while for some positivists, substantive components of a conception of a rule of law *may* be part of the rule of recognition and determinations of legal validity, this does not indicate a constitutive connection.[59] The rule of law remains a regulative ideal. To the extent it is incorporated within the ultimate rule of recognition of a particular jurisdiction, then it might be concluded that the legal system goes well according to that ideal. As the inclusive positivist does not see law as necessarily constituted, in part or whole, by any substantive requirements of the rule of law, we have no reason for thinking she is thereby precluded from accepting Raz's argument, or any argument, against substantive versions of the rule of law.

Positivism and the formal rule of law

At first look it seems we are going to be able to say something similar in answer to questions about connections between positivist accounts of law and a formal conception of the rule of law. To the extent the formal conception also presents itself as a regulative ideal, the question of whether to accept it is a matter for substantive, separate argument. The quick answer would thus be that positivism neither precludes nor entails adherence to the rule of law, even in its formal version. Things, however, are more complex than this quick answer acknowledges. Plausible arguments have been developed for the position that, on some positivist conceptions of law, law is (as Fuller suggested) necessarily characterised by particular formal characteristics, and that these characteristics take us a considerable way in arguing that the formal rule of law is constitutive of law or the legal system (as understood in these accounts). In short, some influential positivist accounts of the nature of law are arguably committed to the thesis that law, to be law, must comply with the at least some of the formal rule of law

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58 Jules Coleman, an inclusive positivist, writes: '[A] particular rule of recognition ... is a social fact about that community ... its truth does not depend on substantive moral argument ... [D]etermining which norms are part of a community's law may well involve substantive moral argument given a particular rule of recognition; that that rule is a rule of recognition, however, is a social fact about the community that does not require moral argument for its truth': 'Rules and Social Facts' (1991) 14 *Harvard Journal of Law and Public Policy* 703, 722.

59 This is not to deny or accept that the particular rules of recognition may be themselves thought of as constitutive conventions in that they define what counts as the practice of law in a particular community. See Andrei Marmor, 'Legal Conventionalism' (1998) 4 *Legal Theory* 509.

constraints. To introduce the discussion it is useful to return to Lon Fuller's point of departure in his attempt to characterise the formal rule of law as an internal morality of law.[60]

In his argument that law necessarily has moral value, Fuller's major premise was that the principles of legality are essential for (ie constitutive of) the existence of law. More precisely, he argued that 'a sufficiently gross departure from the principles of legality would result in something that was not simply bad law, but not law at all'.[61] Fuller then claimed that as the principles of legality constitute an internal morality of law, law is inevitably infused, to some degree, with moral value. Here I want to focus on Fuller's premise: sufficient departure from rule of law desiderata will result in no law. Do positivists have reason to concede this point? And would doing so demonstrate that the formal rule of law is constitutive of law?

A number of ambiguities are contained in Fuller's quoted remark that gross rule of law departures result in no law. I want to highlight one which is important for our purposes. It is not immediately clear which of the following claims is being made:

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60 Fuller, above n 2, 197.

61 Ibid. In his 'reply to critics' in the second edition of the *Morality of Law*, Fuller takes his positivist critics to agree with him on this point. For example, he asserts that 'Hart indicated his acceptance of the proposition that to bring law into existence there must be some minimum respect for what 'lawyers terms the principles of legality''(Ibid). The interpretive point here, however, is not clear cut. Clearly, Hart thought that the formal rule of law precepts were necessary if rules were invoked as an efficient means of social control. If law is to function effectively, the rules must comply with rule of law conditions. It is less clear, however, that Hart was stating anything about the issue of whether at some point otherwise valid laws lose their *validity* (status as law) if they do not comply with rule of law precepts. On this exact question, Hart does not, in his reply to Fuller, express a well thought out view, and aspects of *The Concept of Law* can be seen as pulling in opposing directions. Indeed, his comments in response to Fuller are arguably consistent with a recognition that law may be dysfunctional or even non-functional whilst retaining its status a valid law. In his response to Fuller, Hart did not need to expressly deal with this question as it was not necessary to do so given his main riposte was the argument that even if Fuller was right about the rule of law precepts role in determinations of legal validity, those precepts did not guarantee any moral worth and were 'compatible with very great iniquity': Hart, *Concept of Law*, above n 28, 207. On the issue of Hart's commitment to functionalism see the differing perspectives of: Brian Z Tamanaha, 'Socio-Legal Positivism and a General Jurisprudence' (2001) 21 *Oxford Journal of Legal Studies* 1, 5-15; Green, 'Concept of Law Revisited', above n 30, 1709-11; and Scott Shapiro, 'On Hart's Way Out' (1999) 5 *Legal Theory* 469, 502-5 and 'Law Morality, and the Guidance of Conduct' (2000) 6 *Legal Theory* 127, 167-70.

> (1) Gross failure with respect to any rule of law precept in relation to a particular directive will lead to that directive failing to be properly called a law; or
>
> (2) Gross failure with respect to any rule of law precept generally—in relation to *all* directives—will lead to something not properly called a legal system.

These alternatives concern the *scope* of the claim being made: is it directed to the question of when we may say a legal system has disintegrated and no longer exists at all (2), or is it a thesis about the legal validity of individual directives/norms within a still efficacious and existant legal system (1)?[62]

In his influential essay, 'The Rule of Law and Its Virtue', Raz briefly considers the question of whether Fuller's suggestion that rule of law precepts 'are essential for the very existence of any law' must be conceded by his own positivist account of law.[63] Raz accepts that no legal system could violate 'altogether' rule of law precepts. Law, on his account, is grounded on institutional facts which require, at the very minimum, the existence of particular legal institutions (courts) to apply the law. He argues there can be no such legal institutions unless some of the rules setting them up cleave closely to the formal requirements of the rule of law:

> In the terminology of HLA Hart's theory one can say that at least some of the rules of recognition and of adjudication of every system must be general and prospective. Naturally they must also be relatively clear if they are to make any sense at all, etc.[64]

Yet these requirements for the existence of a legal system are thought 'minimal' and 'consistent with gross violations of the rule of law'.[65] Notice that while Raz's comments thus give some support to (2), they firmly reject (1). That Raz is rejecting (1) follows from his view that even though some fundamental secondary rules of the legal system must comply somewhat to the principles of legality, even gross violations will be possible in the case

62 My purpose at this stage is not to argue for a definitive interpretation of Fuller's own claims, but to identify the possibilities so as to clarify the options from a positivist point of view. Though there is some textual support for each of the alternative readings, I think that the evidence supports an interpretation that sees Fuller's comments as concerning law as an institution or system of rules rather than law as an individual norm or directive. Thus, Fuller probably accepted something closer to claim (2) than (1). See Kenneth Himma, 'H.L.A. Hart and the Practical Difference Thesis' (2000) *Legal theory* 1, 29-34, and the discussion in below at notes 92-99.

63 Raz states he is asking the question from the vantage of his own adaptation of Hart's theory of law: Raz, *Authority of Law*, above n 18, 223.

64 Ibid.

65 bid 224.

of other rules. Thus, the existence of widespread retroactive directives will not threaten the existence of a legal system and thereby lose their status as legally valid under the system's fundamental rules of recognition.[66] When Raz writes, 'retroactive laws can only exist because there are ... prospective laws instructing those institutions to apply retrospective laws',[67] his point is to emphasise that while the rules relating to the existence conditions of a legal system cannot be retroactive, retroactive legal directives may well exist within a functioning legal system.

Moreover, Raz appears only to accept (2) in part: rule of law considerations only are necessary with respect to a particular class of rules, namely, 'at least some of the rules of recognition and adjudication'.[68] This appears to be a more confined thesis than either of the suggested interpretations of the scope of Fuller's premise. If this is what the connection between rule of law precepts and Raz's positivism amounts to, then it would make little sense to speak of a constitutive connection. It would be more accurate to speak (as does Raz) of the formal rule of law 'as an ideal, as a standard to which the law ought to conform but which it can and sometimes does violate most radically and systematically.'[69] So, despite some conciliatory gestures, Raz's discussion constitutes a rejection of Fuller's premise in its robust guises. His concept of law, according to his own analysis, does not entail an acceptance of a fully worked out formal rule of law theory in any meaningful sense. However, while he accepts that the existence-conditions for functioning rules of recognition and adjudication entail some respect for the rule of law requirements, he does not consider whether rule of law requirements may also operate as a constraint on the content of the rule of recognition such that the criteria of legal validity set out by a community's rule of recognition cannot validate legal rules that do not possess certain characteristics. In short, are there ways in which the criteria of legal validity (the content of the rule of recognition) may be constrained in ways other than by what is conceivable in terms of the mere existence-conditions for a legal system? One obvious option here is potential constraints arising out of law's purported function(s).

Raz hints at this second possibility when he cryptically writes, 'it is of the essence of law to guide behaviour through rules and courts in charge

66 Interestingly, Fuller's own discussion allows that retroactive laws may sometimes be appropriate cures for other departures from the rule of law: Fuller, above n 2, 53-4; 104. This is one consideration which leads to the conclusion that his own position was closer to (2) than (1). See below section 7.

67 Raz, *Authority of Law*, above n 18, 223.

68 Ibid.

69 Ibid.

of their application.'[70] 'Law to be law', he asserts, 'must be capable of guiding behaviour, however inefficiently.'[71] These are suggestive thoughts, but what they mean is far from clear. How they fit with Raz's earlier argument that any essential connection between the rule of law and law 'is minimal and consistent with gross violations of the rule of law' is left unelaborated. On one level, they could be read as a straightforward endorsement of Fuller's thesis, but this is precisely what Raz earlier is at pains to deny. Alternatively, Raz's caveat to his claim that law's function is to guide and that it therefore must be *capable* of doing so (ie, 'however inefficiently'), might be seen as stopping him well short of Fuller's position. As Leslie Green has noted:

> [T]o be capable of performing a function is not the same as performing it. Consider, for instance, a 'printer driver'. A computer programme is a printer driver if and only if it is capable of running a printer... What then of a driver that has a bug and will not drive anything? Does it cease being a printer driver? No, for we know it was designed for its function and, if fixed, may still perform it. Functional kinds thus need only have something like the capacity, when functioning normally, to perform their functions.[72]

Thus the force of Raz's assertion here might be limited to establishing that the rule of law is the 'specific excellence of the law' as it gives law its capacity to guide behaviour, even though law may fail, in practice, to do so.[73]

Recently, Anton Fagan has developed a sophisticated argument designed to convince Razian positivists to acknowledge openly that at least some of the formal requirements of the rule of law are constitutive of law; and that law, to be law, must conform to these principles.[74] Fagan's is a complex argument and can only be roughly summarised here. The argument, which is based on Raz's famous, though controversial, 'sources thesis' (the core of his case against both Dworkin and inclusive legal positivism), can be divided into six stages.[75] In the first three steps, Fagan is

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70 Ibid 225.

71 Ibid 226.

72 Leslie Green, 'The Functions of Law' (1998) 12 *Cogito* 117, 122.

73 Raz is over-reaching here. Any normative order attempting to guide behaviour will need to have some respect for the virtues of clarity and calculability. Thus, 'as we ascend to the more abstract level, one perhaps loses the right to claim that these [desiderata] flow from the specific nature of law': Leslie Green, 'Law's Rule' (1986) 24 *Osgoode Hall LJ* 1023, 1036.

74 Anton Fagan, 'Delivering Positivism from Evil' in Dyzenhaus (ed), above n 1, 81-112.

75 The 'sources thesis' basically holds a norm is a law only if it has a social

constructing what he dubs Raz's 'argument from moral intelligibility' for the sources thesis.

1. Law necessarily claims legitimate authority, even if, as is normally the case, it in truth lacks it.

2. Any acceptable theory of law should make the moral acceptance of law's authority 'intelligible'. (Raz argued, against Hart, that there must be some participants within the legal system who adopt the internal point of view towards the rule of recognition for *moral* reasons, viz there must be some who accept that law has *legitimate* authority).[76] Law, to be intelligible, must therefore be *capable* of issuing authoritative directives, even if it fails in practice to do so.[77]

3. For this to be true—for law to be capable of issuing authoritative directives—it must be *possible* that, in attempting to conform to the moral reasons which apply to us, we can sometimes do better by following legal directives than by ignoring them. (This is Raz's so-called 'normal justification thesis' of authority).[78] If this were not true, authority could never conceivably be justified or legitimate.

4. At this point Fagan takes over the analysis.[79] If one accepts, with Raz, that 'a proper understanding of law must render intelligible the belief [of some] that law is morally binding', then this implies, at the very least, the possibility 'that people do better by following the law than they do by following their own judgment'. And if that is so, then it follows that a law which 'cannot possibly provide a better guide to right action than do peoples own judgments' cannot count as a law.[80]

5. Law cannot possibly provide any *guide* to right action if it does not possess the 'formal characteristics of consistency, clarity and the

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source. See Joseph Raz, 'Authority, Law and Morality' (1985) 68 *Monist* 295, 299.

76 Compare Hart, *Concept of Law*, above n 28, 203 with Joseph Raz, 'Intention in Interpretation', in George (ed), *Autonomy of Law*, above n 4, 261.

77 Why, for Raz, does law's authority need to be 'intelligible'? So one does not make a *conceptual* error in accepting its claim to authority. See Fagan, above n 74, 91. Raz's view seems motivated by the notion that without rendering the practice of following law's directives morally intelligible (though not necessarily justifiable), we would be left without an adequate account of law's normativity, that is, why it creates *obligations*.

78 Raz, 'Authority, Law and Morality', above n 75, 299 and Raz, 'Intention in Interpretation', above n 76, 256-62.

79 Raz has used these premises to reject the notion that moral criteria might be included in the criteria for legal validity, on the basis that this would be inconsistent with the notion that law might conceivably improve our own moral judgments: Raz, 'Authority, Law and Morality, above n 75.

80 Fagan, above n 74, 104.

possibility of performance'.[81] Law's claim to authority will be intelligible only to the extent at least some of the formal rule of law desiderata allow it to guide people's behaviours.

6. Last, it is acknowledged that this conclusion is too strong insofar as it rests on a significant over-simplification. Compliance with rule of law desiderata is, in most instances, a matter of *degree*. Indeed, this was one of Fuller's reasons for holding that rule of law compliance is best thought of in terms of a morality of *aspiration* as opposed to grounding strict legal or moral *duties*. Thus, while 'no one could seriously suggest that any degree of non-compliance, even the most minor, must always result in a directive not being law',[82] a certain threshold of non-compliance will result in a directive not constituting valid law as it will have no or insufficient ability to improve on subjects' judgments, which is, allegedly, 'law's function'. As law is 'functionally defined' such directives are not valid law.[83]

This is a complex argument and not all of its controversial premises and moves can be fully evaluated in this article. Quite remarkably, however, the sophistication of the argument does not have a commensurate yield in terms of what it actually demonstrates. Indeed, it does not really progress us further than Raz's cryptic comments connecting the rule of law to it being in the nature of law to guide.

I want to begin by assuming that Fagan's conclusion is right: a directive is 'law' only if it possesses at least the formal characteristics of consistency, clarity and the possibility of performance. Although Fagan allows that compliance with the rule of law desiderata is a matter of *degree*, and that his conclusions thus need modification, he does not recognise the full complexity this insight entails. According to Fuller, the principles of legality 'cannot be expected to lay out very many compulsory steps toward truly significant accomplishment'.[84] Fuller's reasons for this conclusion went further than merely pointing out that by and large compliance with rule of law precepts is a matter of degree. Fuller's further complications were three: what the individual precepts actually require is not always clear (eg is clarity best served by pages of precision or a simple though less precise rule or principle?); the principles that compose the ideal sometimes conflict with one another (eg in substituting a vague rule with a more determinant one, it might be that clarity is being achieved at the cost of a loss in stability or coherence); and, thus, the best available cure for deficits in one aspect of the rule of law may be introducing deviations in other

81 Ibid.

82 Ibid 108.

83 Ibid 109.

84 Fuller, above n 2, 44.

aspects (eg 'conferring retroactive validity on what was under existing law a vain attempt to exercise a legal power will often be seen as advancing the cause of legality by preventing a confusion of legal rights'[85]).

We can conclude then that it is not always going to be clear whether departures from particular desiderata lead to 'all-things-considered' deficits to the rule of law ideal; the precepts 'do not', as Fuller emphasised, 'lend themselves to anything like separate and categorical statement'.[86] Any claim that to be *law* a directive need comply to the letter with rule of law desiderata thus leaves many questions unanswered. This conclusion is reinforced when we recognise that the point at which a directive cannot function to guide any legal actor (an official or the regulated person), no matter how slightly, will be quite a low threshold. It also needs to be to be emphasised that even if law is unable to guide the actions of its subjects, it may continue to play a guidance role for legal officials, in, for example, determining the jurisdictional question of who is to decide a dispute. A vague legislative rule may thus have the jurisdictional function of delegating decision-making power to an administrator or court. We can see therefore that Fagan's argument only supports the proposition that law is *partially* (or perhaps, more accurately, *slightly*) constituted by some of the important formal characteristics we have associated with a formal conception of the rule of law.

So even if the rule of law is partially constitutive of law, it can be assumed that the ideal will continue to operate as a regulative ideal and, moreover, that this will be its *routine* role. Here we also need to distinguish between the idea that law must have *some* capacity to guide behaviour (given it by rule of law requirements) and working out exactly how it is that we want law to guide action. We can, for example, ask how precise or determinative we want the guidance to be, without denying it must have some guidance capacity. Thus even if one adopts a formal conception of the rule of law, the mere fact that law must comply to a certain extent with some of the formal characteristics involved, tells us very little about exactly how valuable compliance with particular aspects of the ideal is or how we are to see this value in comparison with other ideals. To say that formal characteristics of the rule of law partially constitute law is only going to shed any light if we recognise that this coexists with the routinely regulative role the doctrine plays—its role as an ideal above and beyond what is required to make sense of the very existence of legal systems or particular laws.

Thus, although Fagan's argument may call into question the stark independence thesis, we must also conclude that the derivation thesis, at

85 Ibid 93.

86 Ibid 104.

least as Craig describes it, is also misleading. In particular, disputes about the meaning and value of the rule of law are not simple re-runs of jurisprudential disputes about the meaning or nature of 'law' itself. At least for the positivist, their theory of law is not premised on any meaningful notion of compliance with the formal rule of law. Less still does the positivist theory of law determine the meaning or value to be given to the rule of law *ideal*, or tell us how to weigh or rank particular deficits. It remains the case that legal positivists have considerable elbow-room, even if persuaded by Fagan's argument, in deciding which rule of law conception is preferable. Formal and substantive conceptions do not correlate with underlying theories of law in the straightforward way imagined by Craig.

Law, legality, and guidance

Perhaps too much has, however, been conceded to Fagan's argument. Like Raz's comments about law's guidance function, Fagan's argument rests on a 'functional understanding of law, namely that the primary aim of law is to provide subjects, with a superior guide to the moral reasons that apply to them'.[87] Fagan does not suggest that there are particular features of *moral* guidance which makes the rule of law desiderata more relevant to that task than to any other form of guidance. Indeed, he writes that as a norm which lacks the characteristics of consistency, clarity and possibility of performance is 'clearly incapable of providing any guidance at all', it, '[i]nevitably then, ... cannot possibly provide a better guide to right action than do people's own judgments.'[88] So despite the elaborate argument deriving from Raz's defence of the sources thesis, Fagan's thesis also boils down to the basic intuition that it is the function of law to guide.[89]

It is no doubt true that law does serve a guidance function, or at least that when it is functioning normally it will have the capacity to guide actions.[90] But even if this is true, it is not enough to establish which of the following propositions follows: (1) that law must, as a necessary or conceptual matter, serve its function if it is to maintain its legal status, or (2) that the connection between law's existence and its function is best 'viewed as a contingent, empirical matter', so that law exists 'even when it fails to carry out its primary functions'.[91] Which of these positions is the best

87 Fagan, above n 74, 109.
88 Ibid 104.
89 It is true that Fagan's argument can be seen as providing a justification for the conclusion that it is the function of law to guide. But I must confess that the claim that law necessarily claims legitimate authority does not, to me, seem more compelling than the claim that its essential function is to guide.
90 See the discussion in Green, 'Concept of Law Revisited', above n 30, 1710.
91 Tamanaha, above n 61, 11.

positivistically conceived theoretical account of law is open to much disputation. However, although there is much to be said, from a positivist perspective, in favour of a 'socio-legal positivism'—which would hold that the separability thesis should be applied 'to functionality as well as morality' so 'there is no necessary connection between law and morality, or functionality'[92]—I want to raise a more limited point by drawing a distinction between the guidance function of law considered *as an institution or system* and law considered *as individual norms*.

Let us assume that law does have an essential function of providing guidance because its supposed claim to authority requires as much; that is, assume a Fullerian account with a Razian twist. But how are we to understand the scope of the claim that law, to be law, must serve, to some unspecified extent, such a function? Interestingly, Fuller's argument that gross rule of law departures result in no law is, I think, best interpreted as a thesis that law *as an institution* has an essential function of 'subjecting people's conduct to the guidance of general rules by which they may themselves orient their behavior'.[93] For a *system of rules* to guide, the rules must comply, generally speaking, with the principles of legality. Thus Fuller writes that total failure of any one of the desiderata 'results in something not properly called a legal system at all'.[94] He also describes his approach to the nature of law as being 'concerned ... with the ways in which a system of rules for governing human conduct must be constructed and administered if it is to be efficacious and at the same time remain what it purports to be'.[95] And as Kenneth Himma has noted, Fuller appears to acknowledge that 'a property that would be fatal to a legal system, eg a total failure of prospectivity, is not necessarily fatal to the validity of an individual norm.'[96] If, as these considerations indicate, Fuller's thesis does go to the system of law as a whole rather than individual legal norms, then the question for Fagan, is whether or not the function he attributes to be an essential function of law similarly might be better thought of as going to law as an institution. This is not, however, a question he directly addresses.

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92 Ibid 22.

93 Lon L Fuller, 'A Reply to Professors Cohen and Dworkin' (1965) 10 *Villanova Law Review* 655, 657.

94 Fuller, above n 2, 39.

95 Ibid 97.

96 Himma, above n 62, 30-1. Himma cites Fuller's comment that 'certain departures from the usual practices of lawmaking, such as those involved in retrospective and special or one-man statues, though thoroughly objectionable in most contexts, may in some cases serve the ends of legality and fairness' Lon L Fuller, *The Anatomy of the Law* (Westport, Conn: Greenwood Press, 1976) 65; see also Fuller, above n 2, 51-3. My discussion in this paragraph relies on Himma's exegesis.

Assuming that any functionalist accounts of law are plausible,[97] it can be observed that the burden for establishing whether law has any particular purpose or function is going to be much higher if one has in mind a functionalism with respect to individual norms. It is simply going to be more difficult to convince that there are universal or essential functions shared by all legal norms as opposed to there being such functions attached to legal systems. Whereas it is at least plausible that all legal systems attempt to maintain order, resolve disputes or guide conduct, it is less plausible that each and every legal norm or rule *must* also function this way: from the fact that the system as a whole has a particular function, it does not follow that each and every part of the whole also has that function.[98] Thus, if law's function of providing guidance applies to the legal system rather than individual norms, Fagan's conclusion does not follow. While we might say that a thorough-going failure in a particular desiderata or a failure with respect to basic rules of recognition/adjudication may not be consistent with the existence of a legal system at all, this simply returns us to Raz's conclusion that while the rule of law is 'a standard to which the law ought to conform' the law 'can and sometimes does violate most radically and systematically.'[99] If this is what the constitutive relation between a positivist concept of law and the formal rule of law amounts to, it can be readily accepted without undermining the independence thesis in any substantial way.

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97 Green argues persuasively against theories which see law as a functional kind, as the functions of law cannot provide the criteria by which law and legal systems can be identified. Green allows, however, that functions may operate to provide constraints on an adequate theory of law. Green, 'Functions of Law', above n 72.

98 With respect to the guidance function of law, Scott Shapiro has responded as follows. While 'one cannot, in general, conclude that a part has the function F just because the whole has the function F—this is a form of the fallacy of division—in the case of legal rules and legal institutions such an inference is sound'. Why? 'For legal rules are the means by which legal systems guide conduct. We can say that the function of legal rules is to guide conduct because they have been produced by legal institutions in order to guide conduct': Scott J Shapiro, 'Law, Morality, and the Guidance of Conduct', above n 61, 169. But this does not follow. From the fact that legal rules are produced in order to guide conduct (so the system can fulfil its functions) it neither follows (a) that *all* legal rules are produced to have a guidance function, or (b) that the functional requirements of the system are dependent on the truth of (a).

99 Raz, *Authority of Law*, above n 18, 223.

Conclusion: the relevanc of the rul of law

It cannot be assumed that debates in legal theory about the nature of law will determine how to resolve disagreements about the meaning and content of the rule of law. Positivism, this article has argued, significantly under-determines which conception of the rule of law is to be preferred and is not, as is sometimes alleged, inextricably linked to a particular approach to the rule of law. The formal rule of law should not be seen as internal to, or constitutive of, the positivist concept of law. How we are to understand and evaluate the rule of law is inescapably a matter of substantive political morality. If the arguments of this article are valid, answers to these questions are unlikely to be found by a retreat into jurisprudential analysis.

Although thinking about the claim that that law is constituted by rule of law principles (on any conception of the ideal) is not devoid of jurisprudential interest, I want to conclude by explaining why this debate has little relevance for those political and legal theorists primarily interested in the meaning and value of the rule of law in the conditions of modern governance. The reason is that we may want the relevance of the rule of law ideal to extend more generally to other forms of regulation. An approach to the rule of law which focuses on questions about whether or not particular regulatory techniques qualify as 'law' can work to obscure a important political question: namely, whether modes of regulation which may not attract the jurisprude's label of law, can be reconciled with the rule of law and the values on which its defence rests.

Even if Fagan can sustain his thesis—that only norms which are capable of having a guidance function (by virtue of formal rule of law characteristics) count as 'law'—this tell us very little about whether or not the rule of law is achievable (or of value) in the context of the modern 'regulative' or 'administrative' state. As Edward Rubin has persuasively argued, modern legislation regularly and deliberately fails to establish guides for citizens (or administrators) to conduct themselves. Many modern statutes are best thought of as an 'institutional practice by which the legislature ... issues directives to the government mechanisms that implement ... policy.'[100] Modern social and economic regulation is carried out by statutes which have a high level of what Rubin calls 'intransitivity'—an idea measured by the extent to which a statute directs the governmental implementation mechanism to develop rules or policies to achieve particular goals, as opposed to the statute itself specifying the rules for the guidance of private parties.[101] The point is that the 'guidance' provided by such statutes will often only amount to directives that the

100 Edward L Rubin, 'Law and Legislation in the Administrative State' (1989) 89 *Columbia Law Review* 369, 372.

101 Ibid 381.

governmental agency do something about a particular social problem, that is to say they will constitute a grant of jurisdiction to deal with a particular issue.

It may be that this type of legislation does not qualify as 'law' on our best philosophical account of the nature of law. But by focusing on the issue of whether or not the rule of law is constitutive of law, we can too easily miss the possibility that legislation of the sort Rubin considers may in fact be part of a regulatory *regime* which does, nonetheless, comply with rule of law requirements.[102] Although the legislation itself may not contain provisions which are rule of law compliant, administrative policies or rules made under the legislation and actually used to regulate citizens may well comply.[103] In looking at the issue of compliance with rule of law desiderata we need to consider how regulatory regimes actually operate, rather than a focus on the formal attributes of the legislative provisions which authorise regulatory activities. We must consider, that is, the possibility that there is no necessary deficit in the rule of law even if particular parts of the regulatory regime fail to provide guidance and thus qualify as 'law' under a positivist account.

Last, even where modern regulation is ostensibly in conflict with rule of law requirements, focusing on the issue of whether or not such regulation qualifies as law can lead us to miss the even more fundamental question of whether or not this necessarily threatens rule of law *values*. 'Regulation' it has been said, 'is an intimate, albeit not affectionate, process of negotiation, threat, bargaining, compromise, and confrontation that cannot be subjected to fixed, pre-established rules without becoming either excessively lax or excessively harsh.'[104] All these characteristics seem to undermine the idea that government action can be rendered calculable in advance. This is particularly so in the context of changing notions of governance and regulation which are said to have decentred the role of state-based 'command and control' regulation.[105] It may be that some such forms of regulation are simply incompatible with the rule of law ideal. But the other alternative is that there may be functional equivalents to the explication thesis of the rule of law which can work to maintain rule of law values,

102 See Richardson, above n 25, 311-15.

103 This is to suggest that Raz's famous claim that the rule of law is usefully thought of as the specific excellence of law is misconceived. See Raz, *Authority of Law*, above n 18, 225.

104 Malcolm M Feeley and Edward L Rubin, *Judicial Policy Making and the Modern State: How the Courts Reformed America's Prisons* (Cambridge: Cambridge University Press, 1998) 348.

105 See, eg, Colin Scott, 'Analysing Regulatory Space: Fragmented Resources and Institutional Design' [2001] *Public Law* 283; Jody Freeman, 'Private Parties, Public Functions and the New Administrative Law' in Dyzenhaus (ed), above n 1.

even in such regulatory contexts. By saying that the law is constituted by the formal precepts of the rule of law, we can too easily miss the issue of whether or not functional equivalents can be found to serve rule of law values in circumstances where effective regulation (regulation which achieves its social purposes) cannot, for a variety of reasons, be subjected to rules. If such a reinterpretation of the ideal is to be plausible, it must, to be sure, keep faith with the underlying values which historically the rule of law was designed to foster. But for those interested in the value of the rule of law and what it may mean in the conditions of modern government, the debate about whether the features associated with the explication thesis of the rule of law is internally related to law does not prove particularly helpful. Ideals which have no points of intersection with the reality in which we live will have limited normative utility. To generate an adequate re-conceptualisation of the rule of law we thus need to examine why guidance is emphasised in the rule of law tradition and in what circumstances it continues to have this salience; possibilities in which the provision of legal guidance is seen more clearly as a means to an end, rather than an end in itself, require further examination.

In moving beyond command and control forms of regulation, perhaps to more 'responsive' or 'reflexive' forms,[106] it may be that we can keep faith with the rule of law ideal, even where the traditional notion that regulation must guide in the instrumental way envisaged by Fuller's principles of legality is no longer possible. In particular, it would seem that renewed interest in notions of constraint and contestability—notions plausibly associated with the extensional thesis of the rule of law—may form the basis of a differentiated theory of the rule of law, where securing calculability and guidance capacity plays a more confined, contextual role. My remit in this article has not extended to an examination of these much larger questions. What can be said, however, is that so long as jurisprudential thinking about the rule of law is fixated on whether or not the rule of law establishes law's purported guidance function, it will have little to contribute the project of reconceiving the ideal in way which maintains fidelity to its underpinning values and is of relevance to contemporary techniques of governance.

106 See Ian Ayres and John Braithwaite, *Responsive Regulation: Transcending the Deregulation Debate* (New York: Oxford University Press, 1992); Gunther Teubner, 'Substantive and Reflexive Elements in Modern Law' (1983) 17 *Law & Society Review* 239.