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FAITH IN THE RULE OF LAW*

MARC O. DEGIROLAMI†

Our impulsive belief is here always what sets up the original body of truth, and our articulately verbalized philosophy is but its showy translation into formulas. The unreasoned and immediate assurance is the deep thing in us, the reasoned argument is but a surface exhibition.[1]

INTRODUCTION

For all but the most unflinching consequentialist, "instrumentalism" tends to draw mixed reviews. So it does from Brian Tamanaha. His book, *Law as a Means to an End: Threat to the Rule of Law*,[2] documents with measured diffidence the ascendancy and current reign of "legal instrumentalism," so entrenched an understanding of law that it is "taken for granted in the United States, almost a part of the air we breathe."[3] Professor Tamanaha shows that in our legal theorizing, our approaches to legal education, our understanding of legal practice, and our perception of judges, legislators, and legal administrators, law is widely believed to be "an empty vessel" that is "open with respect to content and ends."[4] Often,

* This is an essay on Brian Z. Tamanaha's *Law as a Means to an End: Threat to the Rule of Law*. BRIAN Z. TAMANAHA, LAW AS A MEANS TO AN END: THREAT TO THE RULE OF LAW (2006) [hereinafter TAMANAHA, LAW AS A MEANS TO AN END].

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1 WILLIAM JAMES, *The Varieties of Religious Experience*, *in* WILLIAM JAMES: SELECTED WRITINGS 23, 96 (Robert Coles ed., Book-of-the-Month Club 1997) (1902) [hereinafter JAMES, *The Varieties of Religious Experience*].

2 TAMANAHA, LAW AS A MEANS TO AN END, *supra* note *.

3 *Id.* at 1.

4 *Id.* at 1, 228; *see also* Lawrence B. Solum, *The Supreme Court in Bondage:*

Tamanaha seems to make the stronger claim that non-instrumental views of law strike our modern sensibilities as unreasonable (or naïve or faintly ridiculous).

Should this be of any concern? While Tamanaha ostensibly intends this book as a warning against the peril that creeping legal instrumentalism poses for the rule of law, his criticism is tempered. On the one hand, he believes that we have already traveled a fair distance toward a purely instrumental view of law and that "intellectual developments and the logic of the situation portend a worsening . . . nightmarish scenario."[5] Despite some sanguine comments about the power of "human ingenuity" to stem the instrumentalist tide, he aims to offer a "diagnosis of our worrisome time."[6] On the other hand, he cautions the reader not to take his admonitions categorically: Instrumental views of law are often sound, and "[m]ore to the point, . . . here to stay"—a fixture of the "modern condition."[7] Non-instrumental conceptions of law trade on "large mythical components" that are "patently implausible" today.[8] Notwithstanding the critical thrust of the book, Tamanaha concludes on an equivocal note, reaffirming his skepticism about non-instrumental theories and opting for circumspection, if not hopefulness, about the future trajectory of legal instrumentalism.[9]

This tension runs throughout and is understandable; after all, one comes across as either unprincipled or insufferably out of touch by weighing in too heavily on either side. But it often leaves the reader wondering what Tamanaha is about in this book. As a work tracing the development of legal

Constitutional Stare Decisis, Legal Formalism, and the Future of Unenumerated Rights, 9 U. PA. J. CONST. L. 155, 167 (2006) [hereinafter Solum, *The Supreme Court in Bondage*] (defining legal instrumentalism to mean, "roughly, . . . that the outputs of legal decision-making processes (paradigmatically, appellate adjudication) are, and should be, determined by extralegal considerations—that is by (extralegal) considerations of policy or principle").

[5] TAMANAHA, LAW AS A MEANS TO AN END, *supra* note *, at 2.

[6] *Id.* at 2, 8. Tamanaha's confidence in "human ingenuity" is somewhat at odds with his own assessment, offered only a page later, of the shortcomings of the legal realists: "Their intention was to improve the functioning of the legal system, not to undermine it. In hindsight, their main failing was perhaps excessive optimism (Holmes aside) about the human capacity to strive for and achieve the greater good." *Id.* at 2–4.

[7] *Id.* at 6.

[8] *Id.* at 4; *see also id.* at 132 ("It is late in the day of the exhausted skeptical modern age for constructing a plausible, functional non-instrumental view of law.").

[9] *See id.* at 246–50.

instrumentalism in the United States over the past two centuries in a spare 211 pages, the book is readable, nuanced, and persuasive. But the book's remaining thirty-nine pages are less effective in explaining why Tamanaha seems so fretful about the rule of law or what accounts for the seemingly ineliminable impulse to affirm a non-instrumentalist view in the face of the contrary march of history.

This Essay speculates about an answer to these questions. It argues that one source of resistance to the inexorable progress of legal instrumentalism, tacitly suggested by Tamanaha, lies in the belief that the rules that guide our lives deserve our allegiance because they represent a structure of meaning that transcends our own finitude. Our opposition to legal instrumentalism reflects *faith* in the rule of law, the belief that the law bestows worth and possibility to its adherents beyond their historical context. Faith in the rule of law exists outside of what Mircea Eliade has called "profane" time: the "evanescent duration" of time linked to an individual's own life.[10] Whether the law in fact possesses these spiritual dimensions is unknowable, so there is no way to test this faith. But the value of faith in the rule of law lies in enabling the believer to affirm an ineffable commitment to the law when rational grounds, though often available, are insufficiently powerful to sustain it.

This Essay uses Tamanaha's excellent discussion of the rise of legal instrumentalism as well as his earlier treatment of the rule of law[11] as a framework for examining the nature and strength of belief in the rule of law. It explains the significance of what Tamanaha repeatedly emphasizes is the crucial danger—our *inability to believe* that the law is anything but an instrument—by reinterpreting it as loss of faith in the rule of law. The Essay concludes by considering briefly whether there is inherent value in faith in the rule of law and what that value might be.

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[10] MIRCEA ELIADE, THE SACRED AND THE PROFANE: THE NATURE OF RELIGION 104 (Willard R. Trask trans., Harcourt Brace Jovanovich 1959) (1957) [hereinafter ELIADE, THE SACRED AND THE PROFANE].

[11] BRIAN Z. TAMANAHA, ON THE RULE OF LAW: HISTORY, POLITICS, THEORY (2004) [hereinafter TAMANAHA, ON THE RULE OF LAW]. Many of Tamanaha's claims in *Law as a Means to an End* grow out of his extended discussion of the rule of law in *On the Rule of Law*.

I. THE NATURE AND STRENGTH OF BELIEF IN THE RULE OF LAW

It is notoriously difficult to define the rule of law, so much so that some have characterized it as a "deeply ambiguous, . . . contested concept,"[12] or even an "essentially contested concept[]"—a concept that is "present to us only in the form of contestation about what the ideal really is."[13] Others have made like claims that the rule of law integrates different inessential "strands" that are "interwoven."[14]

In this vein, Tamanaha offers three plausible rule of law ideals: formal legality; restraint of government; and "the rule of law, not individuals."[15] These obviously are not the only ideals that have ever been associated with the rule of law; if Waldron is correct about the rule of law's essential contestability, it could not be otherwise. Thus, this Essay, following the emphasis in Tamanaha's discussion, does not examine rule of law models that depend on thick substantive ideals such as human equality, autonomy, or non-discrimination. Still, considering the rule of law through the prism of Tamanaha's three ideals sheds sufficient light to assess the nature and vitality of the commitment to some of the major ideas associated with the rule of law.

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[12] Margaret Jane Radin, *Reconsidering the Rule of Law*, 69 B.U. L. REV. 781, 791 (1989).

[13] Jeremy Waldron, *Is the Rule of Law an Essentially Contested Concept (in Florida)?*, 21 L. & PHIL. 137, 151 (2002).

[14] Richard H. Fallon, Jr., *"The Rule of Law" as a Concept in Constitutional Discourse*, 97 COLUM. L. REV. 1, 6 (1997).

[15] TAMANAHA, ON THE RULE OF LAW, *supra* note 11, at 114–26. Tamanaha calls them "three familiar themes that run through the rule of law tradition." One often sees a binary conceptual division, for example, between a "modest" version and a "more lofty ideal," GEORGE P. FLETCHER, BASIC CONCEPTS OF LEGAL THOUGHT 11 (1996), or, as Tamanaha himself elsewhere divides it, between "formal" and "substantive versions," which he then divides further into three sub-categories for each division. *See* TAMANAHA, ON THE RULE OF LAW, *supra* note 11, at 91; *see also* N.W. Barber, *Must Legalistic Conceptions of the Rule of Law Have a Social Dimension?*, 17 RATIO JURIS 474, 475 (2004) (dividing the rule of law into "legalistic" and "non-legalistic" categories); Radin, *supra* note 12, at 783–84 (noting that there are two contested views of the rule of law, "instrumental" and "substantive"). A.V. Dicey's famous version has three elements which reflect most of Tamanaha's themes. A.V. DICEY, INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION 187–96, 202 (10th ed. 1959) (1885).

A. Formal Legality

Stripped to its core, the rule of law is composed of several procedural ideals. These usually include generality, equality of application, predictability (if not certainty), consistency, and prospectivity.[16] Few theorists refuse to ascribe to it at least this minimum content.[17] The question then arises: What is the nature and strength of our belief in the rule of law thus understood?[18]

One possibility is that these formal qualities are inextricably intertwined with certain liberal democratic values—liberty, for example. Put simply, the argument is that to believe in one is to believe in them all. But that claim, as Tamanaha repeatedly suggests, is false. Formal legality, or what he also calls "legal liberty,"[19] stands in an asymmetrical relationship to other liberal democratic commitments. "Political liberty," or the democratic creation of laws, and "personal liberty," or restraint on the government's interference with a zone of personal autonomy, for example, often depend upon legal liberty, but the reverse is not necessarily true.[20] Legal regimes with unjust, authoritarian, and repressive laws often can affirm formal legality.[21] Still, it is well to recall H. L. A. Hart's observation that "though the most odious laws may be justly applied, we have, in the bare notion of applying a general rule of law, the germ at least of justice."[22] Consistent norm application is valuable even in the face of laws that are less than fully just.[23] But though consistency is an

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[16] *See, e.g.*, TAMANAHA, ON THE RULE OF LAW, *supra* note 11, at 119; *see also* LON L. FULLER, THE MORALITY OF LAW 38–39 (rev. ed. 1969); Lawrence B. Solum, *Public Legal Reason*, 92 VA. L. REV. 1449, 1476 (2006) (describing the "value of a stable foundation for the law" as "reflected in the great value placed on the rule of law and the associated values of predictability, stability, and certainty").

[17] *See, e.g.*, TAMANAHA, ON THE RULE OF LAW, *supra* note 11, at 91–93. In these pages, Tamanaha effectively criticizes as empty the notion of the rule of law as merely "rule *by* law." *Id.*

[18] I assume in this Essay the perspective of a citizen of a liberal democratic state.

[19] *See id.* at 34–35 (describing "legal liberty," or "the freedom to do whatever the laws do not explicitly proscribe," as "the dominant theoretical understanding of the rule of law in modern liberal democracies").

[20] *See id.* at 37.

[21] *See id.* at 37, 120 ("One limitation of the rule of law understood in these [formalist] terms is that it is compatible with a regime of laws with inequitable or evil content.").

[22] H.L.A. HART, THE CONCEPT OF LAW 206 (2d ed. 1994).

[23] *See* Kent Greenawalt, *"Prescriptive Equality": Two Steps Forward*, 110 HARV.

important component of justice, "justice" here refers merely to a kind of even application.[24] And the cost of consistent application of substantively unjust laws may be considerable: While a repressive state that commits to formal legality enables its subjects to organize their affairs predictably, formal legality may legitimate the state's iniquities and render its oppression more efficient.[25]

A second response might be that we have reason to affirm legal liberty because political and personal liberty, borrowing Tamanaha's locution, both depend on legal liberty for their fullest expression. Thus, we must affirm legal liberty for, as it were, overtly "instrumental" reasons[26]—because those virtues often secure what we really value, liberal democracy and individual rights.[27] This response, however, overlooks the common case of conflict between legal liberty and the other liberties.[28] The champion of personal liberty may often damage her cause by affirming legal liberty.[29] Behind the tension between legal and personal liberty stands another between the

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L. REV. 1265, 1268 (1997) [hereinafter Greenawalt, *"Prescriptive Equality"*] ("[G]iving a form of treatment to one equal is a reason to give the same treatment to another equal.").

[24] Professor Leslie Green notes:

> Equality *is* an allocative principle, and the steadfast treatment of like cases alike under such a principle is therefore a kind of justice, namely, *formal* justice. Naturally, that doesn't establish anything about the relationship between law and substantive justice—it doesn't say anything about the justice of the laws themselves—but it does say something about the justice of *applying* the laws whatever they may be.

Leslie Green, The Germ of Justice 16–17 (Nov. 2005) (unpublished manuscript on file with the author), http://www.law.upenn.edu/academics/institutes/ilp/2006papers/green-germofjustice.pdf. Professor Green, however, argues that "formal justice" is not a distinct category of justice at all and that what is at stake in the allocative "germ of justice" is in reality merely the "form of justice." *See id.* at 17–19. I thank Gur Bligh for calling this essay to my attention.

[25] TAMANAHA, ON THE RULE OF LAW, *supra* note 11, at 120.

[26] *See* Radin, *supra* note 12, at 784–87 (arguing that the value in formal legality lies in the fact that rule of law ideals such as generality and consistency are "essential for the efficacy of any system of legal rules").

[27] There might of course be other, or different, substantive values. The idea is to explore the extent to which formal legality might be supported as instrumentally useful in achieving other social purposes. See TAMANAHA, LAW AS A MEANS TO AN END, *supra* note *, at 71, for an argument that the legal realists would have supported formal legality for instrumental reasons.

[28] *See* TAMANAHA, ON THE RULE OF LAW, *supra* note 11, at 36–38.

[29] Late nineteenth century contract law, for example, witnessed a tension between legal and personal liberty. *See* MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1870–1960: THE CRISIS OF LEGAL ORTHODOXY 36, 112 (1992).

permanence of legal rules and the development of law to account for social change.[30] While some stability in the law is necessary, no one believes that a legal system should be frozen in amber for eternity.[31] Legal change is valuable and everyone has reasons, compelling in their eyes, for seeking to weaken, expand, or modify the scope of formal legality. Litigants (and their lawyers), of course, have no *obligation* to refrain from making claims inconsistent with formal legality. But the question here is not about obligation, but the nature and strength of the commitment to formal legality.[32] The impulse toward legal change suggests that a crucial source of destabilizing pressure on the commitment to formal legality comes from litigants themselves, the agents of legal change.

A third and somewhat related possibility is that while I might recognize that adherence to formal legality in a particular case might not be in my self-interest, it is better for the greater number of people or "society as a whole" if I hew to it nevertheless. Again, the issue is not my obligation to uphold formal legality (assuming I am not a government official) but about how best to describe the nature and strength of my belief in this aspect of the rule of law. The trouble with this response is that it assumes a substantive commitment to support my belief in the rule of law whose basis derives from something other than formal legality. So that if I judge that following a rule does not advance the public good, my commitment to formal legality may be destabilized.

The essential difficulty for formal legality, therefore, is that if there are *insufficiently powerful independent reasons* to affirm

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[30] *See* Frederick Schauer, *Formalism*, 97 YALE L.J. 509, 542 (1988) ("Because rule-bound decisionmaking is inherently stabilizing, it is inherently conservative, in the nonpolitical sense of the word. By limiting the ability of decisionmakers to consider every factor relevant to an event, rules make it more difficult to adapt to a changing future.").

[31] *See* Fallon, *supra* note 14, at 30 ("It is hard to imagine anyone insisting that rules, regardless of either their origin or their content, are both necessary and sufficient for the Rule of Law.").

[32] *See* Kent Greenawalt, The Rule of Law and the Exemption Strategy 12 (unpublished manuscript on file with author). Compliance with legal rules *may* indicate some level of belief in the rule of law, but the fact that someone "follows the rules" may simply betoken an instrumental commitment. *See* KENT GREENAWALT, LAW AND OBJECTIVITY 185 (1992) [hereinafter GREENAWALT, LAW AND OBJECTIVITY] ("Citizens may consider compliance with rules from a prudential perspective, what is in their own long-term interest, or from a moral perspective, what should they do overall.").

it—that is, reasons that have their own compelling force whatever other commitments vie against it—then commitment to the rule of law is often in jeopardy when measured against our instrumental interests. The reasons for belief in formal legality must be sufficiently compelling to overcome whatever instrumental interest opposes them. There will, of course, be situations in which our belief in formal legality *is* strong enough to overcome an opposing instrumental interest. When the reasons for commitment to that interest are weak, belief in formal legality "pulls against" the interest and may be sufficiently powerful to overcome it.[33] But the allegiance to formal legality is often comparatively weak when measured against the welter of forces opposing it. Moreover, from a systemic vantage point,[34] since consistency and generality are themselves virtues of formal legality, the rule of law suffers as a whole each time someone decides that she is more committed to her own ends than to an ideal with unclear instrumental benefits. If two outcomes may be given "a logical form,"[35] but one advances my ends while the other is more congruous with formal legality, and I lack a compelling reason to choose the latter, the prospects for formal legality appear in doubt.

The usual response to these points, suffused as they are with the somewhat musty whiff of the indeterminacy debate of the last century, often focuses on the role of judges. Many have persuasively argued that the judiciary confronts "hard" cases rarely and that most are relatively determinate and present few occasions to deviate from formal legality, especially for judges who are "faithful" to the rule of law.[36] Lawyers know which arguments can be made to courts with some modicum of plausibility, and the fact that most decisions are not appealed

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[33] *See* Greenawalt, *"Prescriptive Equality," supra* note 23, at 1270–71. Similarly, if the instrumental interest is compatible with formal legality, then the belief in formal legality may "reinforce[]" the commitment to the instrumental interest. *See id.* at 1270.

[34] *See* Solum, *The Supreme Court in Bondage*, *supra* note 4, at 181 ("The natural domain of decision for the choice between instrumentalism and formalism extends across the entire practice of law . . . . [W]e are choosing a practice to apply to a whole domain.").

[35] *See* Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 466 (1897).

[36] *See, e.g.*, GREENAWALT, LAW AND OBJECTIVITY, *supra* note 32, at 38–39; Lawrence B. Solum, *On the Indeterminacy Crisis: Critiquing Critical Dogma*, 54 U. CHI. L. REV. 462, 494–95 (1987).

(and that those that are often yield unanimous decisions)[37] is some evidence that while legal doctrine may "underdetermine" outcomes, it is not radically indeterminate.[38]

To be sure, judges play an important role in shaping the law. But other actors must be considered as well because the dynamism of law in democratic states renders belief in formal legality increasingly fragile.[39] While lawyers and judges may know by a kind of acculturative tradition when a brief or an opinion "will not write,"[40] most people are not judges or lawyers. What they usually want from their interactions with the legal system is instrumental success. Lawyers, of course, want success as well, but that desire may to some degree be channeled through their professional conditioning, a kind of practical knowledge that includes knowing how to be a persuasive advocate while operating within the side-constraints of formal legality.[41] Non-lawyers have no such conditioning. Similarly, while it is true that a lawyer may predict when a client's wishes fall too far outside the range of outcomes that a court is likely to embrace, the lawyer always has powerful incentives to seek to expand that range.[42] In other words, when formal legality gives way to change in the law it is usually the client's interest,[43] not the judge's, that will have been the agent of the change, and the lawyer that will have been its instrument. When Tamanaha writes that "situations initially thought to involve an easy case could be transformed into a problematic one, with sufficient

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[37] GREENAWALT, LAW AND OBJECTIVITY, *supra* note 32, at 38–39.

[38] *See* Solum, *supra* note 36, at 494–95 (arguing that although the outcome of litigation is not, in all but the "easiest" cases, "rule-bound," it is "rule-guided").

[39] *See* William N. Eskridge, Jr., *Pluralism and Distrust: How Courts Can Support Democracy by Lowering the Stakes of Politics*, 114 YALE L.J. 1279, 1294 (2005) ("Pluralist democracy is dynamic and fragile. It is dynamic because the nature, composition, and balance of politically relevant groups shift over time. It is fragile because it depends on the *commitment* of all politically relevant groups to its processes." (emphasis added)). On legal scholars' preoccupation with the relationship of the judiciary to the rule of law, sometimes to the exclusion of other relevant groups, see generally Stephen Macedo, *The Rule of Law, Justice, and the Politics of Moderation*, *in* THE RULE OF LAW 148, 160 (Ian Shapiro ed., 1994).

[40] *See* TAMANAHA, ON THE RULE OF LAW, *supra* note 11, at 89.

[41] *See* ANTHONY T. KRONMAN, THE LOST LAWYER 109–62 (1993).

[42] The "frivolous legal argument" is the usual example. *See* Jack M. Balkin, *Idolatry and Faith: The Jurisprudence of Sanford Levinson*, 38 TULSA L. REV. 553, 566–67 (2003).

[43] In this context, the "client" includes anyone—whether a public or private actor—who wishes to accomplish some end that requires the use of the state's legal machinery.

motivation and skill exercised by lawyers or judges who wished to obtain a different outcome,"[44] he gestures toward a crucial difficulty for commitment to the rule of law but overemphasizes the role of the judge. Those who are not "law-conditioned"[45]—that is, most people—may not feel a sufficiently strong allegiance to formal legality to overcome the commitment to their actual interests and ambitions.

In fact, many of the contemporary examples of legal instrumentalism that Tamanaha deplores—the influence of lobbyists on lawmakers,[46] the pitched ideological battles over the appointment of judges,[47] the Enron scandal,[48] the stultifying conditions in which many young lawyers work,[49] and the recent attempt by the federal government to justify torture[50]—are exemplars of the clash between belief in the rule of law and the instrumental interests of non-lawyers.[51] Even the explosion of "cause litigation," which fuses the role of client and attorney, bespeaks the decay of belief in the law-conditioned professional's formal legality. Measured against the virtues of formal legality, the "cause lawyer's" interests seem quite compelling. Tamanaha criticizes Lambda Legal, for example, not because it aims to "vindicate public norms" but because it "ha[s] not fully articulated the sense in which [its] activities indeed advance the public interest, taking seriously and responding to the views of the many people who disagree."[52] But if it is often doubtful that formal legality can do the work that Tamanaha demands of it, then some other rule of law ideal must be grounding this criticism.

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[44] TAMANAHA, ON THE RULE OF LAW, *supra* note 11, at 87.

[45] *See* KARL N. LLEWELLYN, THE COMMON LAW TRADITION 19 (1960). Llewellyn describes the "law-conditioned" rather lyrically as those who come to "*think* like lawyers, not like laymen" and for whom "[c]ases have authority, dictum can be and is marked off from holding, strict 'system' is unfamiliar and uncomfortable, [and] 'freedom' is an underlying drumbeat and slogan that informs not merely life but law." *Id.*

[46] *See* TAMANAHA, LAW AS A MEANS TO AN END, *supra* note *, at 190–211.

[47] *See id.* at 172–89.

[48] *See id.* at 146.

[49] *See id.* at 136–38.

[50] *See id.* at 148–49.

[51] Naturally, lobbyists, politicians, and businesspeople may also be lawyers. But success in their respective endeavors depends far less on attention to formal legality than it does for judges and lawyers.

[52] *See id.* at 170.

B. Restraint of Government

The rule of law has often been conceived as limiting government power. Fear of tyranny is the animating principle. The solution takes the shape of institutional mechanisms that allocate and diffuse power—such as the constitutional enumeration and separation of powers[53]—and vaguer affirmations that "there [a]re certain things the government or sovereign c[an]not do,"[54] or, as Isaiah Berlin had it in his celebrated essay, "there must be some frontiers of freedom which nobody should be permitted to cross."[55]

The question here is, again, the nature and power of this belief. Tamanaha identifies three "pre-modern" manifestations of it: (1) rulers themselves frequently affirmed their allegiance to the law through oaths or other public proclamations; (2) it was "widely understood or assumed"—whether on the basis of customary, natural, or divine law—that government actors operated within universally applicable legal superstructures;[56] and (3) "as a matter of routine conduct" or "mundane regularized conformity," those in power understood that they were legally constrained.[57]

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[53] The fear of the abuse of power, as famously described by Montesquieu, requires the separation of powers between the legislative and the two "executive" departments (the executive and the judicial). CHARLES DE SECONDAT, BARON DE MONTESQUIEU, THE SPIRIT OF THE LAWS bk. XI, ch. 6 (1748), *reprinted in* 38 GREAT BOOKS OF THE WESTERN WORLD 1, 68–71 (Robert Maynard Hutchins ed., Thomas Nugent & J.V. Prichard trans., Encyclopædia Britannica, Inc. 1952) ("The political liberty of the subject is a tranquility of mind arising from the opinion each person has of his safety. In order to have this liberty, it is requisite the government be so constituted as one man need not be afraid of another."); *see also* THE FEDERALIST NOS. 10, 51, at 42–43, 268 (James Madison) (George W. Carey & James McClellan eds., Liberty Fund, Inc. 2001) (arguing that since factionalism inheres in human nature and is one of the "diseases" of government, "[a]mbition must be made to counteract ambition"); JUDITH N. SHKLAR, POLITICAL THOUGHT AND POLITICAL THINKERS 24–25 (Stanley Hoffmann ed., 1998) ("All that was needed for the Rule of Law in Europe . . . was a properly equilibrated political system in which power was checked by power in such a way that neither the violent urges of kings nor the arbitrariness of legislatures could impinge directly upon the individual in such a way as to frighten her and make her feel insecure in her daily life.").

[54] TAMANAHA, ON THE RULE OF LAW, *supra* note 11, at 96; *see also* TAMANAHA, LAW AS A MEANS TO AN END, *supra* note *, at 218.

[55] ISAIAH BERLIN, TWO CONCEPTS OF LIBERTY (1958), *reprinted in* LIBERTY 166, 210 (Henry Hardy ed., 2002).

[56] This is not quite how Tamanaha phrases it, but he discusses this "general understanding" as rooted in divine, natural, or customary law, all of which make claims about the law's universally binding quality.

[57] TAMANAHA, ON THE RULE OF LAW, *supra* note 11, at 115–16.

The first of these manifestations may have roots in pre-modern social systems but it is alive and well today. Tamanaha quotes from a motley troupe of political actors, each of whom publicly praises the restraint of government ideal.[58] While he acknowledges the need for skepticism about the sincerity of many of these encomia, he nevertheless is impressed that, at least as a matter of public form, virtually every contemporary political figure supports the rule of law.[59] Tamanaha is undoubtedly correct that the restraint of government ideal carries at least a basic and possibly universal meaning. Despotic regimes in which rulers have unbridled discretion to make decisions on a whim and without any accountability—one thinks, for example, of the dictatorships of Idi Amin or Saddam Hussein—clearly are inconsistent with the restraint of government ideal.[60] But beyond that basic understanding, there are few ascertainable substantive beliefs in the statements Tamanaha quotes about which any of the speakers could be sincere. The commitments behind these expressions are obscure, even as rhetorical devices, and that is what makes them frustratingly superficial.[61] Tamanaha suggests that the simple fact of affirmation is meaningful, but if the rhetoric of allegiance has only a minimum core meaning that can with any confidence be imputed to the speaker, it is difficult to know exactly what to make of these proclamations.

The rhetorical vitality of Tamanaha's first pre-modern manifestation of the restraint of government ideal often depends

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[58] *See id.* at 1–2.

[59] *See id.* at 3.

[60] *See* Kent Greenawalt, The Rule of Law and the Exemption Strategy 4 (unpublished manuscript, on file with author) ("A regime in which all disputes were taken before a ruler who dispensed justice according to his sense of the moment would not satisfy the rule of law.").

[61] Well-worn, demagogic political statements such as, "We need to fight for a better tomorrow for our children!" or "We're winning the war on terror!" are roughly as substantial as, "Only a government that subjects itself to the rule of law has any moral right to demand of its citizens obedience to the rule of law." TAMANAHA, ON THE RULE OF LAW, *supra* note 11, at 2 (quoting the President of Zimbabwe, Robert Mugabe, in a 2002 speech); *see also* Hendrik Hertzberg, *Desolation Rows: The Execution of Saddam Hussein*, NEW YORKER, Jan. 15, 2007, at 21 (reporting that after the execution of Saddam Hussein, a White House statement noted that the hanging represented "the Iraqi people's determination to create a society governed by the rule of law"). Each statement carries a vague meaning—respectively, something about providing for children's futures, public safety, and restraining government—but more substantial meanings are difficult to discern.

on the preexistence of the second manifestation.[62] A commonly understood conceptual framework for what an official intends by pledging allegiance to the rule of law—that the state may never transgress certain individual rights (Tamanaha's "personal liberty"),[63] that the customs of the people are inviolable[64] and restrain the arbitrary exercise of state power, that law is a "science" founded on certain immutable principles,[65] that the data of social science have an inherent moral valence to which law must conform,[66] and so on—represents some set of substantive commitments against which the sincerity of the rhetoric of rule of law affirmations may be measured.[67]

Tamanaha adequately accounts for the importance of the second pre-modern manifestation, but he is somewhat dismissive of the rhetorical power of non-instrumental theories, seeing in them something more.[68] It should be noted that rhetorical efficacy alone is no mean feat. Given the social and economic stresses on them by the mid-nineteenth century,[69] it was an impressive achievement for non-instrumental theories to

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[62] *See* STEPHEN M. FELDMAN, AMERICAN LEGAL THOUGHT FROM PREMODERNISM TO POSTMODERNISM 78–80 (2000) (describing how in mid-nineteenth century judicial opinions, principles of natural law "would only rarely be referred to, [but] they always remained significant as a foundation for the legal system—a foundation of principles that could fade into the background only because so many American judges, lawyers, and jurisprudents willingly agreed on and accepted the idea of broad natural law principles").

[63] *See* TAMANAHA, LAW AS A MEANS TO AN END, *supra* note *, at 13.

[64] *See* OLIVER WENDELL HOLMES, THE COMMON LAW 31–33 (Howe ed., 1963).

[65] *See* TAMANAHA, LAW AS A MEANS TO AN END, *supra* note *, at 15–16.

[66] *See* HORWITZ, *supra* note 29, at 210 ("The [twentieth century] turn to social science was part of this general effort to find alternative forms of legitimation amid the decline of religious belief and the disintegration of an orthodox Darwinian paradigm."); *see also* DUNCAN KENNEDY, A CRITIQUE OF ADJUDICATION (*FIN DE SIÈCLE*) 112 (1997) ("Much in the current state of legal theory in the United States is explained by the realists' choice to attempt to reground the rules of law in a combination of fine-grained policy analysis and larger theories of coherence.").

[67] This is the case, of course, even if we bracket the question of the truth of the underlying commitments. For Berlin's statement of this idea, see BERLIN, *supra* note 55, at 210 ("What these rules or commandments will have in common is that they are accepted so widely, and are grounded so deeply in the actual nature of men as they have developed through history, as to be, by now, an essential part of what we mean by being a normal human being.").

[68] *See* TAMANAHA, LAW AS A MEANS TO AN END, *supra* note *, at 20 ("As myths cum ideals . . . [non-instrumental theories] extended beyond the realm of rhetoric to establish standards of accountability and norms that affected the behavior of legal officials.").

[69] *See* HORWITZ, *supra* note 29, at 65–108.

continue to ground the ideal of government restraint in the popular imagination. But Tamanaha never convincingly makes the case that non-instrumental theories in this period were more than rhetorical devices with increasingly diminishing social relevance. Indeed, the familiar and undeniable story he tells is of the breakdown of non-instrumental rhetoric. It is the relentless progression of "restraint of government" from near absolute to highly contingent ideal—a process of change whose beginning has been symbolically marked by Holmes's theoretical resting place in *The Path of the Law*[70] and which continued through the fact-oriented social insights of the legal realists,[71] the successive jurisprudence of the New Deal, Warren, Burger, and Rehnquist Courts, the emergence of the welfare state with its comparative superabundance of legislation and regulation, the "capture" of regulatory and administrative systems by private interests, and so on.[72] While it has long been charged with social control, the state came gradually to be perceived as a crucial agent of social change as well; if it is true that "[the rule of law] undoubtedly restrains power, but it also prevents power's benevolent exercise,"[73] then the virtue of restraining the state seemed to depend heavily on the context in which power was exercised rather than on any prior idea that the ideal was intrinsically valuable. With the rapid increase in the number of laws—in law's domain—came, paradoxically, the diminishment of the rule of law, as discretion in enforcement assumed ever greater

[70] *See id.* at 142. "If law is merely politics, then the legislature should in fact decide. If law is merely a battleground over which social interests clash, then the legislature is the appropriate institution for weighing and measuring competing interests." *Id.* (describing this aspect of Holmes's position in *The Path of the Law*).

[71] *See* J.M. Balkin, *Some Realism About Pluralism: Legal Realist Approaches to the First Amendment*, 1990 DUKE L.J. 375, 380–81 (1990) ("The government was ultimately responsible for the distribution of power and wealth in society when actors made use of its rules of contract, property, and tort. . . . Thus, no articulation and protection of rights could be politically neutral—any definition of rights necessarily defined the rights of others. No [legal] regime . . . was unregulated or free of governmental policy or government intervention—there were only different possible regimes and different choices about which persons to benefit at the expense of others.").

[72] *See* TAMANAHA, LAW AS A MEANS TO AN END, *supra* note *, at 60–95, 190–211; *see also* Theodore J. Lowi, *The Welfare State, the New Regulation, and the Rule of Law*, *in* THE RULE OF LAW: IDEAL OR IDEOLOGY 17, 17–58 (Allan C. Hutchinson & Patrick Monahan eds., 1987) (arguing that the ideal of government restraint is absent in the regulatory programs of the 1970s).

[73] Morton J. Horwitz, *The Rule of Law: An Unqualified Human Good?*, 86 YALE L.J. 561, 566 (1977).

importance.[74] Discretion, of course, is not the same as delegation.[75] Yet there is also a sense in which the sheer expansion of the government's reach is, apart from the question of discretion, an additional, independent threat to the restraint of government ideal. And as for the state's power of social control, it is a mark of the present instability of the restraint of government ideal that there is a pressing need to explain why state-sanctioned torture offends the rule of law.[76]

I do not wish to be misunderstood as arguing that restraint of government is no longer an ideal to which most people remain committed. There does exist a core belief that regimes in which decisions are made capriciously and laws applied unevenly do not comport with the rule of law. The separation (though less the enumeration) of powers is still regarded as a necessary feature of a properly functioning liberal democracy and the judiciary enjoys considerable independence in evaluating government conduct. Tamanaha's third "pre-modern" understanding of government restraint—the recognition that actions too far outside the aegis of positively authorized "routine conduct" may result in legal sanctions—remains an effective restraint on government actors.[77] Nevertheless, that instrumental motivation does not fundamentally alter the conclusion that, as with formal legality, the extent to which government restraint is prized depends upon the particular end that government action would advance.

C. *"The Rule of Law, Not Individuals"*

The last, and perhaps best known,[78] of Tamanaha's rule of law ideals is also the most elusive. It speaks to the belief that no one should be "subject to the unpredictable vagaries of other

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[74] *See* Fallon, *supra* note 14, at 3–4 ("[T]wentieth-century legislatures have vastly expanded the sweep of governmental regulation, and they have frequently relied on administrative agencies with vague mandates and a mixture of enforcement, rulemaking, and adjudicative powers . . . ."); David A. Skeel, Jr. & William J. Stuntz, *Christianity and the (Modest) Rule of Law*, 8 U. PA. J. CONST. L. 809, 821–23 (2006).

[75] *See* David L. Shapiro, *Jurisdiction and Discretion*, 60 N.Y.U. L. REV. 543, 546 (1985).

[76] *See, e.g.*, Jeremy Waldron, *Torture and Positive Law: Jurisprudence for the White House*, 105 COLUM. L. REV. 1681, 1739–43 (2005).

[77] *See* TAMANAHA, ON THE RULE OF LAW, *supra* note 11, at 117–18.

[78] *See* Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803). "The government of the United States has been emphatically termed a government of laws, and not of men." *Id.* at 163.

individuals."[79] The primary difficulty with this ideal has been well formulated by Margaret Jane Radin:

> The point of "the Rule of Law, not of individuals" is that the rules are supposed to rule. The easiest . . . way to achieve that in our historical and philosophical context is to assume that rules apply to particular cases in an analytical or self-applying way . . . .
>
> [But] [o]nce we admit that rules are mutable and inextricable from material social practice, we will at least experience a psychological change in the way we perceive our roles as legal actors.[80]

Tamanaha focuses especially on the danger that the rule of law in this sense may become the rule of judges, but the problem is even more basic: Tamanaha's ideal of "political liberty," the freedom of the people to make laws, sits in an uneasy relationship with the concept of "rule by rules." As Professor Paul Kahn has argued, it may be that it is an "internal, structural necessity of the rule of law" to separate the "source of law" from its "appearance"[81]—that the person of the sovereign must always be distinguished from the "permanent sovereign of the nation."[82] But, the history traced by Tamanaha puts in serious question the strength of the commitment to this ideal.[83]

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[79] TAMANAHA, ON THE RULE OF LAW, *supra* note 11, at 122.

[80] Radin, *supra* note 12, at 809. Additionally, see Jean Hampton, *Democracy and the Rule of Law, in* THE RULE OF LAW 13, 16 (Ian Shapiro ed., 1994), for a description of a crucial feature of Hobbes's "regress argument":

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

Id.

[81] *See* PAUL W. KAHN, THE REIGN OF LAW: *MARBURY V. MADISON* AND THE CONSTRUCTION OF AMERICA 181 (1997).

[82] *See id.* at 183.

[83] Professor Kahn's observation that "[w]hen critics of the Court can find no source of law outside the opinion, they accuse the Justices of putting their own will in the place of law," *id.* at 182, squares neatly with Professor Tamanaha's criticism that the Rehnquist Supreme Court "engaged in an aggressive reinterpretation of the respective powers of the state and federal governments." TAMANAHA, ON THE RULE OF LAW, *supra* note 11, at 125; *see also* TAMANAHA, LAW AS A MEANS TO AN END, *supra* note *, at 90–96 ("It is as if, owing to the cumulative impact of the Legal Realists, the 1937 revolution, the Warren Court reforms, the Burger Court continuation, and the *Roe* singularity, an essential component of judging on the Supreme Court *snapped*, an intangible but no less real sense of self-restraint.").

II. FAITH IN THE RULE OF LAW

There is, therefore, considerable cause for skepticism about the power of belief in the rule of law as Tamanaha presents it. But there is one undeveloped yet pervasive theme in the book: Tamanaha repeatedly emphasizes that the essential instrumentalist danger is that people have lost *the ability or will to believe* that law is anything other than a means to an end. "The fact of [a non-instrumental] belief," he writes, "turned out to have greater significance than its falsity."[84] Or again, as he discusses contemporary judges:

> The threat to the rule of law posed by this complex of ideas [relating to law's indeterminacy] is not that judges are incapable of rendering decisions in an objective fashion. Rather, the threat is that judges come to *believe* that it cannot be done or that most fellow judges are not doing it.[85]

Tamanaha's repeated insistence on the importance of belief itself and the effects of the steady loss of that belief—*and not* on the truth or falsity of the belief—is, I suggest, the key to the book.

To understand Tamanaha's argument, a brief excursion is necessary. Two often unstated but critical assumptions underlying the usual discussion of the rule of law must be probed: (1) the rule of law proceeds from and always depends upon "reason;" and (2) the rule of law operates within "ordinary legal time." The Essay, in this section, considers what it would mean for the rule of law to be in some measure dependent upon non-rationalistic and extra-ordinary temporal frameworks, exploring the possibility that belief in the rule of law might fruitfully be conceived as "faith." We can then understand Tamanaha's critique of legal instrumentalism by reinterpreting it as *loss of faith* in the rule of law.

A. *Reason and the Rule of Law*

Arguments connecting the rule of law and reason are ancient,[86] and legion. T. R. S. Allen, for example, has written

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[84] TAMANAHA, LAW AS A MEANS TO AN END, *supra* note *, at 19.

[85] *Id.* at 236. For similar statements, see *id.* at 35, 142–43, 150, 244, and TAMANAHA, ON THE RULE OF LAW, *supra* note 11, at 119.

[86] *See, e.g.*, ARISTOTLE, THE ETHICS OF ARISTOTLE: THE NICOMACHEAN ETHICS 198–200 (J.A.K. Thomson trans., rev. ed. 1976); ARISTOTLE, THE POLITICS 219–24, 226 (T.A. Sinclair trans., rev. ed. 1981) ("Therefore he who asks law to rule is asking God and intelligence and no others to rule; while he who asks for the rule of a

that judges are charged to expound the "common good" and to express "the collective understanding" rationally and impartially by adhering to the rule of law.[87] While the relationship between reason and the rule of law has drawn some skepticism,[88] it is undeniable that an important component of belief in the rule of law depends upon the exercise of reason. The ideals of formal legality and restraint of government, for example, are at least partially justifiable on the basis of reason alone: Almost everyone understands that equal application of laws is worthwhile in itself and that an unrestrained government with unchecked discretion is undesirable.

Nevertheless, even supporters[89] of the reason/rule of law nexus must concede that it often applies to a relatively narrow class of people: those with sufficiently virtuous characters to be capable of reasoning to a just outcome.[90] Legal theorists generally have judges in mind for this role and "put enormous burdens on [judges] in their daily conduct."[91] To the extent that this demanding version of the rule of law is dependent on the commitment of the citizenry to the rule of law,[92] those whose powers of reasoning and virtuous dispositions are less developed will be less capable of reasoning consistently to it. Sometimes,

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human being is importing a wild beast too; for desire is like a wild beast, and anger perverts rulers and the very best of men. Hence law is intelligence without appetit[e]."); *see also* SHKLAR, *supra* note 53, at 22 ("The first of these models [of the Rule of Law] can be attributed to Aristotle, who presented the Rule of Law as nothing less than the rule of reason."); Kyron Huigens, *The Dead End of Deterrence, and Beyond*, 41 WM. & MARY L. REV. 943, 1033 (2000) ("Aristotle insists on the rule of law, not of men, on the ground that only governance by reason can be impartial and even-handed.").

[87] *See* T.R.S. Allen, *The Rule of Law as the Rule of Reason: Consent and Constitutionalism*, 115 L.Q. REV. 221, 239 (1999).

[88] *See, e.g.*, PAUL F. CAMPOS, PIERRE SCHLAG & STEVEN D. SMITH, AGAINST THE LAW (1996); PIERRE SCHLAG, THE ENCHANTMENT OF REASON 15 (1998) (noting that "the reason of law not only underwrites the rule of law but provides a sense of comfort and control to jurists and citizens alike," but that there is a "moment when reason is unable to furnish answers in law").

[89] *E.g.*, Lawrence B. Solum, *The Aretaic Turn in Constitutional Theory*, 70 BROOK L. REV. 475 (2005); Ernest J. Weinrib, *The Intelligibility of the Rule of Law*, *in* THE RULE OF LAW: IDEAL OR IDEOLOGY, *supra* note 72, at 59, 75.

[90] SHKLAR, *supra* note 53, at 23.

[91] *Id.* ("[T]hose who judge . . . must go beyond [their passions] to reason their way to a logically necessary conclusion. To achieve that they must understand exactly just how forensic rhetoric and persuasive reasoning work, while their own ratiocination is free from irrational imperfections. For that a settled ethical character is as necessary as is intelligence itself.").

[92] *See* Macedo, *supra* note 39, at 161–62.

when the rules are clear and their application to a particular situation is definite, they will be. But often not.

Yet even as to the individuals of excellent character, there are other reasons for doubt about the extent to which reason can support commitment to the rule of law. The application of particularistic reasoning to legal conclusions plays an important but circumscribed role in explaining why ideals such as "government restraint" or "the rule of law, not individuals," ought to be affirmed in the large by legal decision-makers. Adjudication is ultimately a matter of deciding between the claims of litigating parties, not broader questions of principle, social policy, or justice.[93] The finality of adjudication—its summary and argument-terminating form—stands in tension with the aspiration to offer a fully elaborated explanation for a ruling. Moreover, the various modes of acceptable adjudicative argumentation—for example, textual or intentional interpretive techniques, analogies from precedent, institutional and historical observations—often are incompatible with thoroughly reasoned argument.[94] H. Jefferson Powell's remark that "[c]ontemporary American judges do not impose the rule of reason on Caesar, they *are* Caesar"[95] exemplifies the modern skepticism about the relationship between the restraint of government ideal and reasoned judgment.

But perhaps this is too demanding a rendering of "reason." It may not be necessary to be wedded to purely syllogistic reasoning[96] and the unity of the virtues in order to believe that

[93] Obviously judging can as a secondary matter implicate these other concerns but it is not an especially controversial proposition that the judge's core function is to decide the rights of parties.

[94] Keith E. Whittington, *Extrajudicial Constitutional Interpretation: Three Objections and Responses*, 80 N.C. L. REV. 773, 813–14 (2002). Professor Whittington points out that the Supreme Court, like most appellate courts, is itself a majoritarian institution: "Opinions are written and rewritten so as to attract the support of reluctant colleagues, and negotiations are held, tactics are employed, and bargains are made as the agenda is set, decisions are made, and opinions are written." *Id.* at 817. For federal appellate courts, the restraints imposed by higher authority frequently stifle what might otherwise be a more developed exercise in reasoned decision-making.

[95] H. JEFFERSON POWELL, THE MORAL TRADITION OF AMERICAN CONSTITUTIONALISM 11 (1993).

[96] None of this is to deny that syllogistic or deductive reasoning continues to play an important role in structuring legal thought. *See* NEIL MACCORMICK, RHETORIC AND THE RULE OF LAW: A THEORY OF LEGAL REASONING 42 (2005). But we are interested here not in the formal structure of arguments supporting the rule

there is a connection between the rule of law and a kind of stepchild of classical reason—a commitment to principled consistency, for example.[97] Consistency is itself one of the virtues of formal legality. And it is certainly true that consistency often marks an organized, impartial, and fair mind. Yet further reflection yields the suspicion that even this more modest claim may be problematic.

Few scholars have expressed greater doubt about the nexus between reason and constitutional law and theory than Professor Steven Smith. In *The Constitution and the Pride of Reason*,[98] Smith argues that while the American founders drew on both classical and enlightenment understandings of "reason" in creating a highly detailed, legalistic Constitution, the "collapse of nature," or the widespread rejection over the last two centuries of belief in a metaphysical reality, has rendered modern constitutional discourse dependent on "conventionalist" reasoning.[99] Smith describes the consequent development of "regulatory reason," in which the conventions of the community form the raw material that the legal theorist or judge subjects to "the discipline of reasoned discourse." Often enough, this means testing the beliefs for consistency.[100] But because the regulatory reasoner lacks recourse to any standard other than convention—indeed, because inconsistency is itself sometimes a celebrated trait of conventional belief systems—the regulatory reasoner cannot point to any criterion that distinguishes beliefs that are held on the basis of reason from those that stem from "prejudice" or blind adherence to "tradition."[101] Or, at least, he cannot point to consistency for this purpose. As a result, almost any belief can be characterized as consistent with either reason or prejudice.[102]

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of law ideals, but in the connection between "reason" and belief in the rule of law—in other words, the discovery through "reason" of the rule of law ideals.

[97] *See, e.g.*, RONALD A. CASS, THE RULE OF LAW IN AMERICA 7–9 (2001) (arguing that the rule of law produces "principled predictability"); RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 249–51 (1977) (suggesting that, at the very least, morality requires consistent application of moral positions and principles).

[98] STEVEN D. SMITH, THE CONSTITUTION AND THE PRIDE OF REASON (1998).

[99] *Id.* at 84–86.

[100] *Id.* at 94–97. "The role of reason is thus to examine existing beliefs to see if they are in fact based on 'reasons,' rather than on ignorance, prejudice, and tradition." *Id.* at 97. Consistency is believed to be an efficacious method of teasing out this difference.

[101] *Id.* at 107–09.

[102] *Id.* at 110.

The regulatory reasoner's constitutional discourse collapses into a kind of sophistry, which, as it degenerates, exhibits the latter's tendencies toward flattery, ad hominem bullying, and ipse dixit authoritarianism.[103] In short, the aspiration to persuade by reason devolves into precisely its opposite.[104]

Professor Smith's project is ambitious and he may overstate his case. Nevertheless, it is not necessary to accept Smith's claims in their strongest form in order to draw from them the milder conclusion that the connection between reason and Tamanaha's rule of law ideals may sometimes be insufficiently powerful to explain the commitment necessary for sustaining the rule of law. Whether the ideals of formal legality and government restraint[105] are affirmed in any particular case will depend on a wide variety of circumstances. The better exercise of reason is likely to be *one of them* insofar as it explains why everyone has cause to condemn an unrestrained government that applies laws unpredictably and arbitrarily. But when the ideals are contested by parties whose opposing interests do not so clearly offend the rule of law, reason *alone* is hard-pressed to explain our belief in the rule of law because (1) we no longer find persuasive the classical rendering of reason, and, in consequence, we do not know which manifestations of these two rule of law ideals are congruous with reason in this strong sense;[106] and

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[103] *Id.* at 119–24.

[104] *Id.* at 123–24. Compare Berlin's elaboration of positive liberty and the difference between the "empirical" and "real" or "rational" self. BERLIN, *supra* note 55, at 191–200.

[105] The "rule of law, not individuals" requires a separate analysis. *See infra* notes 110–13 and accompanying text.

[106] Charles Taylor captures this idea in his discussion of the nature of the prevalent "framework" that structures identity:

> This is the [modern] ideal of the disengaged self, capable of objectifying not only the surrounding world but also his own emotions and inclinations, fears and compulsions, and achieving thereby a kind of distance and self-possession which allows him to act "rationally." This last term has been put in quotes, because obviously its meaning has changed relative to the Platonic sense. Reason is no longer defined in terms of a vision of order in the cosmos, but rather is defined procedurally, in terms of instrumental efficacy, or maximization of the value sought, or self-consistency.

CHARLES TAYLOR, SOURCES OF THE SELF: THE MAKING OF MODERN IDENTITY 21 (1989).

Michael Oakeshott, whose critique of "rationalism" clearly stands behind Smith's, writes:

> One important aspect of the history of the emergence of Rationalism is the changing connotation of the word "reason." The "reason" to which the

(2) the rendering of reason that we do accept, with its emphasis on exposing inconsistencies in conventional belief, is in difficult cases unable to distinguish between affirming either of these rule of law ideals on the basis of reason as opposed to prejudice or tradition.[107] Furthermore, moving to the systemic level, it is likely true that people affirm, for example, the restraint of government ideal as a general matter because they "know it to be true" in some intuitive sense,[108] even if they have no consistent allegiance to it. But it is then dubious that "reason" is responsible for that belief.[109]

There is an additional, exacerbating difficulty. Part of the reason that the "rule of law, not individuals" ideal is especially nettlesome is that it can be so readily claimed by both, or all, sides of a dispute. We can distinguish three categories of ideals: (1) those that are "present in clear and well-defined form," in

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> Rationalist appeals is not, for example, the Reason of Hooker, which belongs still to the tradition of Stoicism and of Aquinas. It is a faculty of calculation by which men conclude one thing from another and discover fit means of attaining given ends not themselves subject to the criticism of reason, a faculty by which a world believed to be a machine could be disclosed.

MICHAEL OAKESHOTT, *Rationalism in Politics*, *in* RATIONALISM IN POLITICS AND OTHER ESSAYS 5, 22–23 n.24 (Liberty Fund 1991) (1962) [hereinafter RATIONALISM].

[107] *See* OAKESHOTT, *Rational Conduct*, *in* RATIONALISM, *supra* note 106, at 99, 114.

[108] Some scholars claim that the Warren Court reached the correct result in *Brown* and other important civil rights cases in much the same intuitive manner, but for reasons that in retrospect have seemed unpersuasive. *See, e.g.*, MARK TUSHNET, RED, WHITE, AND BLUE: A CRITICAL ANALYSIS OF CONSTITUTIONAL LAW 131–33 (1988) ("Earl Warren had humane instincts, not a systematic philosophy."). For two early statements of "intuitive" adjudication, see Herman Oliphant, *A Return to Stare Decisis*, 14 A.B.A. J. 71, 159 (1928) ("With eyes cleared of the old and broad abstractions which curtain our vision, we come to recognize more and more the eminent good sense in what courts are wont to do about disputes before them. . . . From this viewpoint we see that courts are dominantly coerced, not by the essays of their predecessors but by a surer thing,—by an intuition of fitness of solution to problem,—and a renewed confidence in judicial government is engendered.") (footnote call number omitted), and Joseph C. Hutcheson, Jr., *The Judgment Intuitive: The Function of the "Hunch" in Judicial Decision*, 14 CORNELL L.Q. 274 (1929) ("[G]eneral propositions do not decide concrete cases. The decision will depend on a judgment or intuition more subtle than any articulate major premise." (internal quotation marks omitted) (quoting S. Pac. v. Jensen, 244 U.S. 205, 221 (1917) (Holmes, J., dissenting))).

[109] Certainly this is not "reason" in the sense that John Stuart Mill, for example, an avowed critic of intuitionism, intended. *See, e.g.*, JOHN STUART MILL, *The Subjection of Women*, *in* THE BASIC WRITINGS OF JOHN STUART MILL 123–24 (Modern Library 2002).

which case "controversies tend to center on strategies and implementation, and the weight that the ideal should have against other competing values;"[110] (2) those that are contested, or "deeply" contested, in which case the meaning of the ideal is in dispute but the rival camps will not be able to claim that the ideal has no core or essential exemplars and can admit of almost any rendering;[111] and (3) those that are "essentially contested," in which case the meaning of the ideal is "present to us only in the form of contestation about what the ideal really is."[112] The ideal of "the rule of law, not individuals" belongs to the third category. While it is believed to have something vaguely to do with respect for the law and leeriness of individual power:

> [W]e disagree on how this can be done, and whether it can ever be done completely. We also disagree on the precise nature of the danger posed by human power in its unmitigated form, and on the values that would be served by introducing law into the picture. We disagree about the ailment, the medicine, and the character of the cure.[113]

B. *Time and the Rule of Law*

The second tacit assumption worth exploring in reconstructing Tamanaha's "belief" argument involves the relationship between the rule of law and time. Though the interactions of law and time have received some limited scholarly attention, recent writings have generally discussed the question of law's ability to structure our perceptions and uses of time.[114] Scholars therefore have tended to focus on how time can be manipulated to "serve our interests," whether as the legal instrumentality of individuals, groups, or institutions.[115]

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[110] Waldron, *supra* note 13, at 151. Professor Waldron cites the principle of "wealth maximization" as an example in this category. *Id.*

[111] I would count the prohibition against "cruel and unusual punishment," for example, in this category, as well as the restraint of government rule of law ideal.

[112] Waldron, *supra* note 13, at 151.

[113] *Id.* at 159; *see also supra* note 80 and accompanying text.

[114] Thus, Professor Todd Rakoff discusses the power of law not only to allocate one's time to particular activities, but also to synchronize the events and regularize the rhythms of one's daily existence. TODD D. RAKOFF, A TIME FOR EVERY PURPOSE: LAW AND THE BALANCE OF LIFE 163–64 (2002). Likewise, in her review of Rakoff's book, Professor Orly Lobel emphasizes that time is often an instrument of the powerful to impose legal structures with unevenly distributed benefits and burdens. Orly Lobel, *The Law of Social Time*, 76 TEMP. L. REV. 357, 372 (2003) (book review).

[115] *See, e.g.*, Lobel, *supra* note 114, at 372 ("Any account of the relation between

Far less has been written about time's influence on our perception of law. The kinds of questions suggested by this relationship might include: In what kind of temporal structure does law exist? Is that structure best conceived as a linear progression, a cyclical return, a combination of the two, or something else? Do different conceptions of time structure and affect different features of law? Assuming law does exist within some conception(s) of time, what sorts of practical insights about our lives "under" the law follow from situating it within one or another temporal framework? A full treatment of these questions would take this Essay too far afield from its immediate aim, which is to explore how time shapes our understanding of Tamanaha's three rule of law ideals. My contention here is that there are two temporal orders within which law[116] is situated—"ordinary" and "transcendent" legal time—and that to believe in the rule of law is to affirm the existence of transcendent legal time.

Ordinary legal time includes the finite, generally irreversible episodes of any person's lifetime as governed by law and the "inherit[ed] . . . dominant temporal culture that stresses the linear, infinite nature of time."[117] More concretely, ordinary legal time is, first, legal "industrial clock time"[118]: It is the time governing one's daily, legal interactions (the time frame in which a lawyer bills hours, files timely motions, and meets client deadlines, or in which a non-lawyer appears for depositions, writes and signs a will, makes contracts and timely performs obligations, and so on) and the time controlling various sorts of legal rules, such as the right to a speedy trial, statutes of limitation, claim and issue preclusion, excusable neglect rules,

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law and time must identify the winners and losers of battles over particular constructions of time."). Another legally constructed account of time appears in Professor Jed Rubenfeld's discussion of how the "writtenness" of the Constitution enables "a people [to] achieve[] self-government not by conforming governance to the authoritative democratic will at any given time, but by laying down and holding itself to its own democratically-authored foundational commitments over time." JED RUBENFELD, FREEDOM AND TIME: A THEORY OF CONSTITUTIONAL SELF-GOVERNMENT 168 (2001).

[116] For this purpose, it makes no difference whether we are dealing with constitutions, statutes, or common law.

[117] *See* Carol J. Greenhouse, *Just in Time: Temporality and the Cultural Legitimation of Law*, 98 YALE L.J. 1631, 1642 (1989).

[118] *See* Rebecca R. French, *Time in the Law*, 72 U. COLO. L. REV. 663, 705–07 (2001).

and the doctrine of laches.[119] This facet of ordinary legal time is generally irreversible[120] and always finite in that it operates only during an individual's lifetime. Second, ordinary legal time consists in the existence and operation of laws before, throughout, and after an individual's lifetime. In this second sense, it is the time of the "positive law"—the aggregate of existing laws that forms part of a state's legal deposit and that is perceived as an infinite, linear extension or continuity.[121] It is "the sum total of all that has been done and not yet undone" in law.[122] Ordinary legal time in both of its aspects presupposes an instrumental orientation. That is, ordinary legal time operates within the larger domain of personal, social, or political interests. The first facet of ordinary legal time organizes and limits the ways in which interests are realized or frustrated. The second supplies a set of rules for the achievement of ends and the rules can be modified as the ends change.[123]

But the law also possesses a "self-totaliz[ing]" or "mythic dimension" that exists outside the instrumentalities of ordinary legal time.[124] This "transcendent" legal time is cyclical as well as reversible[125] and constantly reaffirms the "distinctions between law and interests, the ephemeral and the enduring, the political and the sacred."[126] In his classic work, *The Sacred and the Profane*, the religious historian Mircea Eliade distinguished

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[119] *See id.*

[120] *Cf. id.* at 707–08 (describing how legal operations can sometimes expand, contract, or even reverse ordinary clock time, such as statutes that redefine the length of one day for the purpose of standardizing service of process requirements).

[121] *See* Greenhouse, *supra* note 117, at 1642.

[122] PAUL W. KAHN, THE CULTURAL STUDY OF LAW: RECONSTRUCTING LEGAL SCHOLARSHIP 43 (1999) [hereinafter KAHN, THE CULTURAL STUDY OF LAW].

[123] Professor Cathleen Kaveny has written that the philosophy of the "billable hour," for example, is characterized both by "treat[ing] time as instrumentally valuable, rather than intrinsically valuable" and by "its tendency to create the illusion of an endless present" in which lawyers see their "entire lives as nothing but a monotonous extension." M. Cathleen Kaveny, *Billable Hours in Ordinary Time: A Theological Critique of the Instrumentalization of Time in Professional Life*, 33 LOY. U. CHI. L.J. 173, 181, 189 (2001).

[124] *See* Greenhouse, *supra* note 117, at 1640.

[125] Reversible both in the sense that the rules of stare decisis can control outcomes and that past decisions can be overruled. *Id.* at 1642–43.

[126] *Id.* at 1640; *see also* French, *supra* note 118, at 709–10 ("[W]ith its ability to reverse history, the [Supreme Court] itself is viewed as timeless and enduring; it transcends daily politics in Washington D.C. (or at least tries to) and much of its mythological magic comes from its perceived elevated and transcendent role in government.").

between "profane" and "sacred" time by positing that the latter is a "primordial mythical time made present"[127] and thus, by its nature, reversible. Sacred rituals and ceremonies reactualize a mythic "beginning" which is "indefinitely recoverable, indefinitely repeatable."[128] The "beginning" is not to be found in a historical moment because no time can precede the "appearance of the reality narrated in the myth."[129] Transcendent legal time is "sacred time" for law, creating fissures in the linearity of ordinary legal time in which a mythic, legal "beginning" is recalled and reactualized in legal rituals. Its orientation is non-instrumental because it denies the comparative power of any interest in the context of its own mythology.

To believe in the rule of law is in part to affirm transcendent legal time, a time apart from the ordinary legal time of individual interests and the infinite progression of linear, positive law without beginning or end. When invoked, the rule of law breaks the continuity of ordinary legal time to recall and reaffirm the "beginning" of law which precedes states, subjects, and even the exemplars of law itself.[130] The ideals of "restraint of government" and "the rule of law, not individuals" are thus removed from the push and pull of ordinary legal time and situated in the realm of myth. To invoke the rule of law is implicitly to affirm that the value and permanence of all individual ends, no matter how worthy, are subordinate to the mythology of the law. Some may object that this evokes too nearly the classical, metaphysical idea of the law discredited by the legal realists and their epigones. But one need not necessarily believe in a "brooding omnipresence in the sky" or a "heaven of legal concepts" to recognize that human beings often rely on mythologies, rituals, and other less than fully rational belief systems to support their essential commitments. Indeed, the rule of law may not exist outside the memory of a particular political community:

> The divine enters the community through an act of law giving. Through maintenance of law, the order of the community becomes a continuing representation of the divine. . . . Thus,

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[127] ELIADE, THE SACRED AND THE PROFANE, *supra* note 10, at 68.

[128] *Id.* at 69.

[129] *See id.* at 72; *see also* MIRCEA ELIADE, THE MYTH OF THE ETERNAL RETURN 34 (Willard R. Trask trans., Princeton Univ. Press 1954) (1949).

[130] *See* KAHN, THE CULTURAL STUDY OF LAW, *supra* note 122, at 49 ("Thus, the American conception of law's rule always locates the origin of law in acts beyond law.").

> following the law links the present moment back to a divine beginning.... Every legal decision ultimately traces its authority back to this appearance of the sacred.[131]

The rule of law, then, appears to the political community as a break in the linearity of ordinary legal time[132] to reaffirm the extraordinary origin.

The two temporal legal orders are not closed systems because some features of law are situated in both. The doctrine of stare decisis, for example, exists in both ordinary and transcendent legal time. As a feature of ordinary legal time, its concrete components—precedents—are part of the substantive legal rules within which the achievement of interests is structured and realized. Litigants are attentive to precedent in order to make their claims more persuasive; courts use it as a means of organizing and legitimating their rulings. To the extent that formal legality guides the instrumental deployment of precedent, therefore, it exists in ordinary legal time.[133] Stare decisis, however, also exists in transcendent legal time. Professor Larry Solum rightly points out that a court "binds itself to the rule of law" in part by adopting a rigorous approach toward precedent and by submitting to the austere discipline of precedential constraint.[134] This formalist, totalizing approach to stare decisis, "a practice to apply to [the] whole domain"[135] of law, achieves its power by systematically disavowing the supremacy of legal instrumentalism in favor of the treasury of past

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[131] *Id.* at 46–47. Interestingly, Professor Kahn sees only a single order of legal time and argues that the intervention of the "sacred" "carries forward a representation of the origins, but only a representation." *Id.* at 47. Kahn therefore does not believe that the law's time, even in this manifestation, is cyclical but instead carries law forward incrementally in its "unique temporal progression" toward an end "already imagined" by the sacred origin. *Id.*

[132] Eliade refers to these moments of the "irruption" of the sacred into the profane plane as "hierophanies," manifestations of a sacred reality that "does not belong to our world." *See* ELIADE, THE SACRED AND THE PROFANE, *supra* note 10, at 11.

[133] Hence my claim that belief in the rule of law only in part reflects belief in transcendent legal time.

[134] *See* Solum, *The Supreme Court in Bondage*, *supra* note 4, at 208. Although stare decisis is the most demanding form of this self-imposed constraint, the general idea that precedents should guide decisions "by analogy and distinction" pervades all of adjudication. *See, e.g.*, Philip C. Kissam, *Triangulating Constitutional Theory: Power, Time, and Everyman*, 53 BUFF. L. REV. 269, 288 (2005).

[135] *See* Solum, *The Supreme Court in Bondage*, *supra* note 4, at 181.

judgment.[136] But while the rule of law is cyclical, it does not cycle back to previous precedents (much as, on Eliade's account, sacred time does not cycle back to previous rituals) so much as it cycles to the mythical time before the existence of the first precedent. Each time that a court binds itself to an earlier precedent, it is affirming not the value of that precedent, but the mythology of the rule of law.[137]

C. *Faith in the Rule of Law*

We now have a picture of the rule of law that depends importantly, but only partially, on "reason" and belief in which depends primarily, but not entirely, on a corresponding belief in "transcendent legal time." These qualities suggest, I will argue, that the kind of belief referenced so often by Professor Tamanaha as necessary to sustain the rule of law is "faith." Once belief in the rule of law is understood as faith, we can better contextualize Tamanaha's description of the ways in which legal instrumentalism corrodes the rule of law and his claim that our growing inability to believe in the rule of law is somehow important irrespective of the truth or falsity of the belief. The idea that faith is a component of commitment to the law has been explored by Sanford Levinson,[138] Paul Carrington,[139] Steven Smith,[140] and a few others.[141] Duncan Kennedy has described

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[136] Brian Tamanaha has pointed out to me that if the two temporal legal orders are not closed systems, then the rise of legal instrumentalism that he documents in *Law as a Means to an End* (whose power shows no signs of abating) will have significant, and likely deleterious, consequences for the continuing vitality of transcendent legal time. *See* E-mail from Brian Tamanaha to Marc DeGirolami (Feb. 23, 2007) (on file with author). I agree with him. As our understanding of law becomes more linear and instrumental, our very capacity to believe in the cyclical quality of transcendent legal time will diminish.

[137] The doctrine of retroactivity also exists in both ordinary and transcendent legal time. Binding a litigant to a decision that issues well after his legal interest arose clearly affects his ability to achieve the interest; but the justification for retroactivity depends upon a belief that law exists beyond, or outside of, ordinary legal time. *See* STEVEN D. SMITH, LAW'S QUANDARY 95–96 (2004) [hereinafter SMITH, LAW'S QUANDRY].

[138] SANFORD LEVINSON, CONSTITUTIONAL FAITH 15 (1988).

[139] Paul Carrington, *Of Law and the River*, 34 J. LEGAL EDUC. 222, 226 (1984).

[140] Steven D. Smith, *Believing like a Lawyer*, 40 B.C. L. REV. 1041, 1100–35 (1999) [hereinafter Smith, *Believing like a Lawyer*].

[141] *See, e.g.*, KARL LLEWELLYN, THE COMMON LAW TRADITION: DECIDING APPEALS 4 (1960) ("[T]he man at the bar must have *confidence* on pain of feeling his own sustaining faith in his craft, in his craftsmanship, in his very office and utility as a lawyer, . . . ooze and seep away from him until he stands naked and hollow,

contemporary commitment to the rule of law as a "bad faith"—a psychologically assuaging "fairy tale" that many wish were true but whose ultimate effect is to perpetuate ideological or political structures.[142] But there is little discussion of what "faith" means in this context—that is, how faith's specific features relate to belief in the rule of law.

The philosopher Timothy Macklem offers this account of faith:

> [T]he concept of faith describes the manner in which a particular belief or set of beliefs may be subscribed to by human beings. In that sense of the word, faith exists as a form of rival to reason. When we say . . . that we have faith in certain beliefs, we express a commitment to that which cannot be established by reason, or to that which can be established by reason, but not for that reason . . . . [F]aith treats itself as a reason to believe, and to act in accordance with belief, without submitting to the conditions of reason.[143]

Faith offers a reason for belief when one does not know whether belief is rationally justified.[144] More than this, however, faith is belief despite the possibility of the lack of *any* good reason for belief—that is, belief not only when reasons for belief are unknown, but potentially unknowable. It is belief "despite the presence of good reasons not to believe."[145] Macklem's contrast between "trust" and "faith" is revealing. "Trust" is a mode of belief that depends ultimately on reasons. A person who trusts in something—usually, but not always, in something concrete such as the safety of a bridge or the reliability of an alarm clock—suspends temporarily, but not indefinitely, the reliance on reasons for trust.[146] Faith, by contrast, not only does not depend

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helpless and worthless, a nithing . . . ."); Jessie Allen, *Blind Faith and Reasonable Doubts: Investigating Belief in the Rule of Law*, 24 SEATTLE U. L. REV. 691 (2001).

[142] *See* KENNEDY, *supra* note 66, at 191–200.

[143] TIMOTHY MACKLEM, INDEPENDENCE OF MIND 133–34 (2006). Professor Macklem observes that the "rivalry between the two concepts is real, but not complete," because the consequences of belief according to either mode may be the same. *Id.* at 133; *see also* JAMES, *The Varieties of Religious Experience*, *supra* note 1, at 95 (discussing the comparative power of belief and knowledge and stating that the "inferiority of the rationalistic level in founding belief is just as manifest when rationalism argues for religion as when it argues against it.").

[144] *See* J.M. Balkin, *Agreements with Hell and Other Objects of Our Faith*, 65 FORDHAM L. REV. 1703, 1721 (1997).

[145] MACKLEM, *supra* note 143, at 136.

[146] *See id.* at 135.

on the existence or non-existence of reasons but is its own source of explanation for action: "Hence the phrase 'act of faith,' is used to describe acts where the agent has little or no conventional reason to anticipate success and which are not done *for* the reason that one calculated that one will succeed."[147]

This is, of course, a contestable interpretation of "faith," but it is unnecessary to defend it here against the immense catalogue of other formulations.[148] Rather, the point is that the Macklemian account of faith sheds light on the type of belief that Tamanaha implies sustains the rule of law. Belief in the rule of law depends on the recognition that reason, while always useful, is at times insufficiently powerful to ground commitment to the rule of law. In such cases, belief in the rule of law consists in a kind of self-abnegation or humble affirmation that the framework within which reason and ordinary legal time have meaning is limited and contingent. Whether the rule of law ideals are, in their vast conceptual and applicational complexity, "true" or "correct" is practically unknowable, so that to believe in the rule of law is to accept that the underlying foundation for and value of the belief may always remain obscure and (essentially) contestable. Or, more hopefully, the benefits of belief in the rule of law may only reveal themselves in ways which it was impossible to predict, reason to, or plan for in advance of the commitment itself. It is in sum the type of belief that James described as "the readiness to act in a cause the prosperous issue of which is not certified to us in advance."[149]

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[147] PETER OLIVER, SIONAIDH DOUGLAS SCOTT, & VICTOR TADROS, FAITH IN LAW: ESSAYS IN LEGAL THEORY 4 (2000). Macklem recognizes that "faith" and "trust" are sometimes used interchangeably in ordinary linguistic usage ("In God we trust," "to have faith in oneself," etc.) so that the contrast between the two is imperfect as a matter of convention. MACKLEM, *supra* note 143, at 134–35. Nevertheless, the distinction is real enough, for while it would be unintelligible to say that one has "trust" in one's bank if one acknowledged that there was absolutely no reason for it, it is perfectly intelligible to say that one has faith in the existence of God. *Id.*

[148] Faith, of course, is often a crucial element of various religious traditions, but the conception of faith discussed here is not derived from any particular religious tradition. Indeed, I have deliberately chosen what I take to be a highly secular conception of faith and think it would be fair to say that many religious traditions would reject this description of faith. See Smith, *Believing like a Lawyer*, *supra* note 140, at 1109, for a different conception of legal faith and its relationship to reason (but not "rationalism").

[149] WILLIAM JAMES, *The Sentiment of Rationality*, *in* THE WILL TO BELIEVE AND OTHER ESSAYS IN POPULAR PHILOSOPHY AND HUMAN IMMORTALITY 63, 90 (Dover ed. 1956) (1897).

This account of faith and its connection to the rule of law brings into alignment many of Tamanaha's claims about the corrosive effects of legal instrumentalism on the rule of law. First, it explains Tamanaha's repeated but perhaps insufficiently developed insistence on the value of "pervasive belief" *tout court.*[150] The question of a belief's truth or falsity necessarily implicates the search for and vindication of reasons. Belief when reasons are unavailable seems to be just what Tamanaha has in mind when he writes that "[t]he fact of this belief [in non-instrumental ideas of the law] turned out to have greater significance than its falsity."[151] Of Lochnerian "formalist" judges, for example, Tamanaha writes:

> Whereas the conventional wisdom today . . . is that formalist judges intentionally favored capital interests, a strong case can be made that in their own minds they were doing the opposite . . . .
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> . . . .
>
> Formalist judges saw themselves as heroically staving off the threat to the non-instrumental integrity of the law posed by special interest legislation.[152]

The instrumental threat to the rule of law, therefore, "is not that it is impossible for judges to be consciously rule-bound when rendering their decisions. . . . Rather the threat comes from the *belief* that it cannot be done or the *choice* not to do it."[153] The value of faith in the rule of law, then, *might be*, as Professor Scott Altman has argued, that "law becomes more or less constraining depending on individual judges' beliefs about law, judges' role conceptions, and expectations about law held by observers in various positions of power. . . . Belief in law is thus somewhat

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[150] *See* TAMANAHA, ON THE RULE OF LAW, *supra* note 11, at 119.

[151] TAMANAHA, LAW AS A MEANS TO AN END, *supra* note *, at 19; *see also id.* at 35 ("To see law as an instrument entails perceiving and describing its nature in instrumental terms . . . . The common law . . . *was not perceived to be* instrumental in nature in the centuries' long primacy of non-instrumental view[s] of law that continued throughout the nineteenth century." (emphasis added)); *id.* at 142–43 ("Lawyers of the past . . . consistently *claimed* to aspire to both ideals—service to the client *and* service to the public good.").

[152] *Id.* at 49, 51. "Some will say that Supreme Courts have always engaged in instrumental manipulation of the law for ideological purposes, though they may have better concealed it. Perhaps, but a distinction exists between thinking that a practice is inappropriate, so it must be resisted or concealed, versus thinking that it is acceptable." *Id.* at 95.

[153] *Id.* at 244.

self-fulfilling."[154] In fact, Tamanaha has been interpreted in just this way by Professor Adrian Vermeule, who calls this view "esoteric legalism."[155] But I believe that Tamanaha may have in mind something other than a secularized version of Pascal's wager, and in the next section, I briefly explore a different value.

Second, to pinpoint faith as the type of belief that Tamanaha describes is to understand why he is so ambivalent on the merits of legal instrumentalism. He seems all-in-all persuaded that non-instrumental theories are untrue, unreal, and unreasonable: "I do not vouch for the veracity of claims that law embodied principle, reason, and the customs and order of the community."[156] It is difficult to dispute that instrumentalism brought a clear-eyed and honest appraisal of law that exposed the "enforced homogeneity" and hypocrisy of non-instrumental theories.[157] In short, if faith in the rule of law is valuable, then its value does not derive, in Tamanaha's view, from the reasonableness of its claims, but from other and quite different sources—the "nourishing, enriching, [and] containing"[158] force of the three ideals or the "foundational source of grounding, content, and limits on the law."[159]

Finally, once Tamanaha's critique of legal instrumentalism is understood to be not as much about substance as about the ways in which we perceive or believe in the rule of law, then his regret over the loss of belief becomes comprehensible. In the

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[154] Scott Altman, *Beyond Candor*, 89 MICH. L. REV. 296, 303–04 (1990). Altman explains that "[b]y 'partially self-fulfilling,' I mean something that is false, but that becomes closer to being true because people believe it." *Id.* at 303.

[155] *See* Adrian Vermeule, *Instrumentalisms*, 120 HARV. L. REV. 2113, 2125–30 (2007) (book review). Professor Vermeule writes:

> [T]he basic prescription of [*Law as a Means to an End*] is that judges and officials should all believe that they can and should abide by the law in good faith .... How are beliefs like these to be generated, where they do not already exist? A belief that law is non-instrumental ... cannot be willed into being for the sake of its beneficial effects; it can only arise as a byproduct of evidence or argument.

Id. at 2130.

To my mind, this has it exactly backwards. Belief that law is non-instrumental *cannot* be the byproduct but must be the core of the commitment to the rule of law. "Argument" and "evidence" may reinforce that belief (or not), but without the belief, argument and evidence are frequently ineffectual. *See* JAMES, *The Varieties of Religious Experience*, *supra* note 1, at 95–96.

[156] TAMANAHA, LAW AS A MEANS TO AN END, *supra* note *, at 246.

[157] *See id.*

[158] *Id.* at 249.

[159] *Id.* at 215.

normal course, after all, it would be signally bizarre for someone to bemoan the loss of belief in "patently implausible" ideas. If one assumes, however, that belief in the rule of law sometimes cannot be sustained by reason alone, and that what *can* sustain it when reason "runs out" is faith, then one may have good reason to lament the loss of that faith. This insight—that we are steadily losing the capacity to have faith in the rule of law and that loss of faith is the essential danger posed by legal instrumentalism—is Tamanaha's crucial claim.

But is he right? Certainly, Tamanaha makes a strong case by highlighting several prominent and particularly controversial contemporary examples.[160] And it hardly need be said that academic theorizing about the rule of law has been profoundly affected by the instrumentalist turn.[161] Still, for all of the well-worn predictions beginning over a century ago that law would inevitably, and rightly, evolve into instrumentalist debates about public policy, moral philosophy, economics, or some other social or political science, some argue that most people continue right along believing in the rule of law more or less as they ever have.[162] Thus, one occasionally wonders whether all of this is the legal theoretician's tempest in a teapot, a reflection of her concern to ground commitment to the rule of law in something that appears firmer, more concrete, and more reasonable than faith.[163] Those efforts are, of course, worthwhile because certain manifestations of the rule of law *are* dependent on reason and *do* operate within ordinary legal time. In fact, the "price" of faith in the rule of law is precisely that it blinds the faithful to the extent to which reasons and interests shape their commitments.[164] Doubt, then, is crucial for maintaining a vital faith because doubt perpetually tests it against the world of instrumental demands. No one stands outside of that world.[165]

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[160] *See* TAMANAHA, LAW AS A MEANS TO AN END, *supra* note *, at 147–211.

[161] *See id.* at 118–32; *see also* Solum, *The Supreme Court in Bondage*, *supra* note 4, at 165–66.

[162] *See* SMITH, LAW'S QUANDRY, *supra* note 137, at 157, 175.

[163] Steven Smith suggests that even academics may believe in the rule of law in a more metaphysically robust way than they let on in their explicit theorizing about the law. *Id.* at 164–65.

[164] *See* MACKLEM, *supra* note 143, at 140–41.

[165] *See* MICHAEL OAKESHOTT, *Religion and the World*, *in* RELIGION, POLITICS AND THE MORAL LIFE 27, 31 (Timothy Fuller ed., 1993).

> The worldly man, as I picture him, believes in the fundamental stability of the present order, or that it will merely evolve into another. . . . This belief

III. THE WAGES OF FAITH

Even if Professor Tamanaha's warnings about the deleterious effects of legal instrumentalism reflect a tacit acknowledgment of the need for faith in the rule of law, we are still left with a nagging, "So what?" Why should we continue to have faith in the rule of law? Isn't it better to let the faith die off or even speed along its demise? Here is the sketch of a response that would require a separate essay to develop adequately.

The value of faith in Macklem's account is that it enables commitment when one cannot know beforehand whether commitment would be worthwhile. This is not merely a problem about lack of sufficient information: "Rather, it is a question of activities the value of which derives in part from the very fact of commitment to that activity, so that the value of the activity is unknowable in advance of commitment to the activity."[166] Faith in the rule of law enables us to affirm certain contestable commitments—formal legality, government restraint, "the rule of law, not individuals," and likely others—which contribute to human well-being without needing to independently premeditate and explain how those commitments advance our interests in ordinary legal time.[167] "A social organism of any sort whatever, large or small," writes James,

> is what it is because each member proceeds to his own duty with a trust that the other members will simulataneously do theirs. Wherever a desired result is achieved by the co-operation of many independent persons, its existence as a fact is a pure consequence of the precursive faith in one another of those immediately concerned.[168]

To say anything more is difficult because faith's value cannot be known or reasoned to before commitment; or, more precisely,

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> implies what may be described as an external standard of value: things are imagined to have some worth apart from their value in the life of an individual; and consequently, what is prized is success, meaning the achievement of some external result. . . .
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> These beliefs—and there are few of us who are not saturated with them—are the world . . . . Nothing can be certainly free from its influence . . . .

Id.

166 MACKLEM, *supra* note 143, at 138.

167 "Independently," that is, of making the commitments themselves. For purposes of the discussion in this section, I bracket the question of the degree to which rule of law formalism is dependent upon reason.

168 WILLIAM JAMES, *The Will to Believe*, *in* THE WILL TO BELIEVE AND OTHER ESSAYS IN POPULAR PHILOSOPHY, *supra* note 149, at 1, 24.

part of the value of faith inheres in the commitment itself. Still, one might posit that whatever the value of faith in the rule of law may be, it is not an instrumental interest achievable in ordinary legal time.[169] Perhaps it is the value in believing that the dread of mortality, the paradigmatic feature of linear time, can be fleetingly abated by an ineffable commitment to the law.[170] If this sounds too grand and presumptuous for an activity—rule-following—that usually appears altogether ordinary, I can only offer in response that the sentiment of mortality is (*pace* Lucretius[171]) never eased. Ineffable beliefs of this kind probably would seem foolish or irrational to anyone wedded to an exclusively instrumentalist mode of thought. And indeed, faith in the rule of law may, in the end, be merely one more delusion among many that await the disenchantment of oblivion. But far from an exercise in arrogance, it is inspired by an expansive humility—even a pessimism—about law's instrumental capacity to meliorate the human condition, and a persistent mindfulness of the limits of human power. As delusions go, one could surely do worse.

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[169] The intrinsic non-instrumentalism of the rule of law is discussed in MICHAEL OAKESHOTT, *The Rule of Law*, *in* ON HISTORY AND OTHER ESSAYS 129 (Liberty Fund 1999) (1983).

[170] *See* ROBERTO MANGABEIRA UNGER, KNOWLEDGE & POLITICS 162–63 (1975) ("If one described the sentiment of mortality as the premonition of the finality of death and the sentiment of society as the experience of the preeminence of social rules and roles over individual desires and values, then one might say that the sentiment of mortality is fuel to the sentiment of society.").

[171] See his famously upbeat account in LUCRETIUS, DE RERUM NATURA bk. 3 (W.H.D. Rouse trans., Harvard Univ. Press 1975).