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# Dissent and the Rule of Law

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ABSTRACT

*Both the right to dissent and the "rule of law" are celebrated and frequently invoked values. Yet widespread popular dissent, such as that seen in the recent Black Lives Matter protests sparked by the police killing of George Floyd and others and a strong backlash against protestors by some political leaders, has deeply challenged the compatibility of those values. This tension raises deep theoretical questions about the essential concept of the rule of law, questions that have not yet been addressed by legal theorists. Consensus is greatest with respect to some of the formal characteristics of the rule of law, and formal definitions of the rule of law focus on formal properties of governance by law, primarily properties associated with the legality principle. Yet many reject the formal definition as overly neutered, contending instead that if it is to mean anything, the concept of the rule of law must not merely restate formal principles of legality, but instead must also include some substantive content, such as a minimum respect for private property or basic human rights.*

*While both sides of this debate make important points, I contend in this Essay that there is a critical middle ground between the two positions. While the concept of the rule of law may not necessarily incorporate the entire spectrum of civil and political rights, the very logic of the rule of law demands respect for and adherence to a core set of substantive values beyond the merely formalistic properties of legality identified by legal philosophers like Joseph Raz. At the same time, the concept of the rule of law is not, as the formalists correctly argue, infinitely pliable. It cannot be made to stand for all things thought desirable by critics and interlocutors in political debate. But the parameters of the rule of law concept need not be arbitrarily drawn. Rather, they are inherent in the concept itself.*

*What we discover when we examine what lies at the intersection of the formalist and substantivist approaches is a core set of overlapping*

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*principles that are substantivist in nature, but necessary to the formalist rule of law project. This key substantive component is toleration of and respect for the practice of dissent.*

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## INTRODUCTION

In the wake of the brutal police killing of George Floyd on May 25, 2020, in Minneapolis, crowds of people took to the streets and squares in big cities and small towns across the nation in a showing of mass protest not seen since the Vietnam War.[1] While the early days of the protest movement bespoke a nation united in outrage at the seemingly unending stream of police killings of black and brown persons, political reaction quickly built in opposition to the protest movement. President Trump threatened to call out the military to suppress the demonstrations, posting on Twitter that "when the looting starts, the shooting starts."[2] Black Lives Matter protesters and other civil demonstrators were arrested on a mass scale.[3] State legislatures passed laws that essentially immunized drivers

1. *See* Derrick Bryson Taylor, *George Floyd Protests: A Timeline*, N.Y. TIMES, Sept. 7, 2021, https://www.nytimes.com/article/george-floyd-protests-timeline.html.

2. *Id.*

3. Anita Snow, *AP Tally: Arrests at Widespread U.S. Protests Hit 10,000*, AP NEWS, June 4, 2020, https://apnews.com/article/american-protests-us-news-arrests-minnesota-burglary-bb2404f9b13c8b53b94c73f818f6a0b7.

from legal liability if they drove their vehicles into street marchers.[4] In the name of law and order, many state and local governments essentially declared war on protest itself.[5] The ensuing battle over the right of demonstrators to insist that they be heard has, once again, cast a harsh light on the status of dissent in American politics. Reactionary politicians, in the name of the law, have moved to stifle popular dissent on grounds that dissent threatens the rule of law itself. So who is right? Does the practice of dissent threaten the viability of the rule of law? Are these values consistent with one another, or are they in tension?

The question of the proper role of dissent in the conception of the rule of law is not only of concern to civil advocates. It is also of fundamental concern to legal theorists. After all, the "rule of law" is much celebrated and frequently invoked and almost universally held out as an ideal of government. Yet, while there is wide agreement with respect to its minimum content, the rule of law remains an essentially contested concept. Consensus is greatest with respect to some of the formal characteristics of the rule of law, and formal definitions of the rule of law focus on formal properties of governance by law, primarily properties associated with the legality principle, such as the requirements that laws be clear, stable, publicly available, generally applied, and prospective.[6] Some theorists—whom I refer to as "the formalists"—contend that this minimal formal definition marks the substantive boundaries of the concept. Yet many—whom I refer to as "the substantivists"— reject the formal definition as overly neutered, contending instead that if it is to mean anything, the concept of the rule of law must not merely restate formal principles of legality but instead must also include some substantive content, such as a minimum respect for private property or basic human rights.

The formalists object to the expansion of the rule of law concept beyond the basic bundle of legality principles because, they argue, doing so confuses different types of moral or political goods. What are, and what are not, fundamental civil, political, or human rights is a matter for political debate, and people may reasonably disagree about what types of political goods, rights, and liberties are sufficiently important to count as

4. Reid J. Epstein & Patricia Mazzei, *Republicans Sharpen Penalties for Protesters in Flurry of Bills*, N.Y. TIMES, Apr. 22, 2021, at A1, https://www.nytimes.com/2021/04/21/us/politics/republican-anti-protest-laws.html.

5. Sophie Quinton, *Eight States Enact Anti-Protest Laws*, PEW (June 21, 2021), https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2021/06/21/eight-states-enact-anti-protest-laws.

6. *See, e.g.*, Joseph Raz, *The Law's Own Virtue*, 39 OXFORD J. LEGAL STUD. 1, 3 (2019).

"fundamental" or "basic" rights. The rule of law cannot be made to stand for all things desirable, or it loses independent content.[7]

While both sides of this debate make important points, I contend in this Essay that there is a critical middle ground between the two positions. While the concept of the rule of law may not necessarily incorporate the entire spectrum of civil and political rights, the very logic of the rule of law idea demands respect for and adherence to a core set of substantive values beyond the merely formalistic properties of legality identified by legal philosophers like Joseph Raz. At the same time, the concept of the rule of law is not, as the formalists correctly argue, infinitely pliable. It cannot be made to stand for all things thought desirable by critics and interlocutors in political debate. But the parameters of the rule of law concept need not be arbitrarily drawn. Rather, they are inherent in the concept itself.

As I argue here, what we discover when we examine what lies at the intersection of the formalist principle of legality and the substantivist embrace of a conception of rule of law that includes a much richer palette of essential attributes is a core set of overlapping principles that are substantivist in nature, but necessary to the formalist rule of law project. This key substantive component is what makes toleration of and respect for the practice of dissent an intrinsic element, and perhaps the most telling signpost, of the rule of law.

Dissent, the Essay argues, is an essential attribute of the rule of law and one that has been largely overlooked by rule of law scholars. Yet its importance to the rule of law concept cannot be overstated. Without this substantive content, the rule of law ideal lacks virtually any practical value.

This is true for several reasons. First, while dissent itself is not an inevitable feature of law or legality, the potential for dissent is conceptually intrinsic to the legality virtues universally associated with the concept of rule of law. Many attributes of formal legality are predicated on core notions of rational debate and deliberation, practices which presuppose the possibility of dissent. Second, these principles in turn presuppose the existence of rational disagreement. The rule of law concept is grounded in a fundamentally pluralistic conception of legal and moral truth, one that recognizes and celebrates the multiplicity of perspectives, opinions, and competing legal interpretations and moral commitments that define any vibrant political community. As Madison observed in Federalist Number 10, "As long as the reason of man continues fallible,

7. *See* JOSEPH RAZ, *The Rule of Law and Its Virtue*, *in* THE AUTHORITY OF LAW 210, 221 (1979) [hereinafter THE AUTHORITY OF LAW].

and he is at liberty to exercise it, different opinions will be formed."[8] Even if it were possible for vibrant moral and political communities to exist without rational disagreement about core legal, moral, and political commitments, that is, even if we were to hypothesize a community of, say, angels who were completely unified in their view of moral and political truth, to function under a robust rule of law such communities would still require at least the possibility of dissent to ensure that the community's ongoing moral and political commitments remain, to borrow from Dworkin, the best that they can be.[9]

The argument proceeds as follows. Part I sets forth the competing conceptions of the rule of law in the literature, aiming to clarify the nature of the dispute between the formalists and the substantivists. Part II then introduces the concept of dissent and makes the case that the legality principles on which the formalist definition is predicated necessarily presuppose both the potential and practice of dissent. Part III traces the development of the rule of law concept in greater depth, and explores the relationship between reason, deliberation, and dissent. Part IV argues that dissent is an internal attribute of law, and one that no state purporting to adhere to rule of law values can dispense with. Finally, Part V argues that dissent is a not only an aspect of legal practice but also a political requirement undergirding the rule of law. States and regimes that reject the political practice of dissent, and which fail to tolerate that political practice, cannot claim to adhere to rule of law principles no matter how regular or predictable they are in the promulgation and enforcement of legal norms.

## I. THE FORMALIST-SUBSTANTIVIST DEBATE

### *A. The Formalist Position*

While conceptions of the rule of law have varied since the early Greeks introduced it, a strain of formalism that runs from A.V. Dicey,[10] to Friedrich von Hayek,[11] to Joseph Raz has been predominant.[12] According to Hayek, the ideal of the rule of law,

8. THE FEDERALIST NO. 10, at 78 (James Madison) (Clinton Rossier ed., 1961).

9. *See generally* RONALD DWORKIN, LAW'S EMPIRE (1986).

10. A.V. DICEY, INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION (8th ed., LibertyClassics 1982) (1915).

11. F.A. HAYEK, THE POLITICAL IDEA OF THE RULE OF LAW (1955); FRIEDRICH A. HAYEK, THE ROAD TO SERFDOM (1944).

12. THE AUTHORITY OF LAW, *supra* note 7. Lon Fuller's influential book, THE MORALITY OF LAW (1964), is also an important component of this lineage.

> [s]tripped of all technicalities . . . means that government in all its actions is bound by rules fixed and announced beforehand—rules which make it possible to foresee with fair certainty how the authority will use its coercive powers in given circumstances and to plan one's individual affairs on the basis of this knowledge.[13]

Raz takes up Hayek's approach and contrasts this minimalist definition with more expansive ones that conceptualize the rule of law as a commitment to a robust set of civil and political rights. Such expansive definitions, he argues, risk diluting or clouding the core meaning of the rule of law. The rule of law, he says, "is not to be confused with democracy, justice, equality (before the law or otherwise), human rights of any kind or respect for persons or for the dignity of man."[14] Even grossly undemocratic and unjust political systems, Raz argued, might "conform to the requirements of the rule of law better than any of the legal systems of the more enlightened Western democracies."[15] This does not make them better political systems, Raz conceded, but it does put them in greater "conformity to the rule of law."[16] In short, Raz argued, the rule of law simply "has no bearing on the existence of spheres of activity free from governmental interference and is compatible with gross violations of human rights."[17]

More recently, Raz has expanded on this limited, formalist conception of the rule of law, explaining that the rule of law in his view is but one "virtue" of many to which the law should conform.[18] Raz identifies five principles that he finds common to most conceptions of what it means for a government to operate under the rule of law. When we say that "Government is by law," Raz explains, we mean that it operates by laws that are (1) reasonably clear, (2) reasonably stable, (3) publicly available, (4) consisting of general rules and standards, that are (5) applied prospectively and not retroactively.[19]

These formal values serve the Hayekian purpose of permitting individuals to predict how their preferred courses of action will be greeted

13. FRIEDRICH A. HAYEK, THE ROAD TO SERFDOM 72 (1944). Hayek cites to Dicey as a principal expositor of a narrower conception of rule of law focused principally on "the absolute supremacy or predominance of regular law as opposed to the influence of arbitrary power . . . ." *Id.* at 72 n.1 (quoting A.V. DICEY, INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION 198 (8th ed., Macmillan and Co. 1915)).

14. THE AUTHORITY OF LAW, *supra* note 7, at 211.

15. *Id.*

16. *Id.*

17. *Id.* at 220–21.

18. Raz, *supra* note 6, at 1.

19. *Id.* at 3.

by legal authorities, and thereby help people conform their conduct to the law, enhancing the ability to plan their activities in ways which maximize their liberty. In Raz's view, any "thicker" conception of the rule of law simply muddies the waters, confusing the virtue of rule of law with other moral and political virtues that may be necessary for good government but are severable from the independent good of the rule of law.[20] More than anything else it seems, Raz objects to the contention that to respect the rule of law, a government must act "consistent with international human rights norms and standards."[21] This, Raz argues, simply confuses things. While the panoply of values recognized as international human rights may well express unambiguously important moral virtues that any good state should comply with, they are, he argues, separate virtues from those captured by the phrase "rule of law."[22]

### *B. The Substantivist Position*

In contrast to the formalists, the substantivists offer a much more robust conception of the rule of law. They argue that some collection of fundamental rights is inseparable from the rule of law, rightly construed. As Dworkin, a leading substantivist, put it, the formalist conception of the rule of law can be likened to the view that all the law requires is that one follow the rules set forth in a rule book,[23] but the substantivist conception (which Dworkin argues must include recognition of individual rights) demands more. The rule of law, in Dworkin's view, "is the ideal of rule by an accurate public conception of individual rights. It does not distinguish, as the rule- book conception does, between the rule of law and substantive justice; on the contrary it requires, as part of the ideal of law, that the rules in the rule book capture and enforce moral rights."[24]

20. *Id.* at 10–11. Lon Fuller is also often cited as a chief architect of the "thin" conception of the rule of law. *See* LON FULLER, THE MORALITY OF LAW (1969); *see also* Mila Versteeg & Tom Ginsburg, *Measuring the Rule of Law: A Comparison of Indicators*, 42 L. & SOC. INQUIRY 100, 104 (2017) ("The thin version of the RoL is commonly associated with Lon Fuller's classic definition, which stipulates eight procedural requirements for the RoL . . . .").

21. Raz, *supra* note 6, at 11 (quoting U.N. Secretary-General, *The Rule of Law and Transitional Justice in Conflict and Post-conflict Societies*, 4, U.N. Doc. S/2004/616 (Aug. 23, 2004)).

22. Although I think Raz is convinced of the theoretical truth of this argument, he might also, perhaps, take this position because he is convinced that even nonliberal regimes might be persuaded to follow basic rule of law principles and that convincing them that they may do so without adopting the whole slate of Western liberal norms is a more realistic way to encourage political progress. But this is just speculation on my part.

23. Ronald Dworkin, *Political Judges and the Rule of Law*, 64 PROC. BRIT. ACAD. 259, 261–62 (1978).

24. *Id.* at 262.

Other substantivists focus less on protection of individual rights and more on protection of the legal process, a conception of rule of law which has come to be known as the "legal process" approach.[25] As Frank Pasquale explains, while formalist "approaches emphasize the 'rule' side of the rule of law, the Legal Process approach emphasizes 'law' as its core component. Law as a social institution is multifaceted and embedded in particular political systems and traditions, such as rights to appeal and explanations for decisions."[26] Either way, the substantivists contend that the rule of law concept must necessarily include recognition of the basic formalist criteria but also adherence to at least a basic slate of fundamental civil and human rights.

The substantivist view has assumed a prominent place among policymakers and advocates. The 2004 report of the Secretary-General of the UN on 'The Rule of Law and Transitional Justice in Conflict and Post-conflict Societies,' for instance, which was sharply criticized by Raz, describes the rule of law as

> [A] principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards. It requires, as well, measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness and procedural and legal transparency.[27]

The "thickest" conception of the rule of law also includes the commitment to democracy and basic social welfare entitlements as critical aspects of the rule of law.[28]

As noted above, formalists reject the thick version of the rule of law as mixing apples and oranges. Legality, they contend, is its own virtue, and whether a regime respects some arbitrarily chosen set of human rights is simply a separate question. Formalists further argue that identification of any greater set of political norms beyond the core legality principles is inevitably arbitrary. Indeed, the Hayekian critique suggests that pursuit of

25. Richard Fallon distinguishes the formalist and substantivist approaches to rule of law from the legal process approach. *See* Richard H. Fallon, Jr., *"The Rule of Law" as a Concept in Constitutional Discourse*, 97 COLUM. L. REV. 1, 5 (1997).

26. Frank Pasquale, *A Rule of Persons, Not Machines: The Limits of Legal Automation*, 87 GEO. WASH. L. REV. 1, 45 (2019).

27. Raz, *supra* note 6, at 11 (quoting U.N. Secretary-General, *The Rule of Law and Transitional Justice in Conflict and Post-conflict Societies*, 4, U.N. Doc. S/2004/616 (Aug. 23, 2004).

28. *See* BRIAN Z. TAMANAHA, ON THE RULE OF LAW 112–13 (2004).

any type of redistributive program—a pursuit inherent in many widely-recognized articulations of international human rights—necessarily undermines rule of law principles by providing government officials with overtly discretionary, and hence arbitrary, powers. Brian Tamanaha defends the formalist account on just such grounds: "The rule of law cannot be about everything good that people desire from government. The persistent temptation to read it this way is a testament to the symbolic power of the rule of law, but it should not be indulged."[29]

Substantivists counter (and as I argue below, rightly) that the formalist conception is so barren that it tolerates virtually any type of tyranny, as long as tyrannical decisions follow formally authorized procedures. Tyranny by law is still tyranny, they point out. Moreover, the values that purportedly valorize rule of law as a worthwhile endeavor—including such goods as respect for human liberty and autonomy[30]—also necessarily justify some minimum slate of individual rights at least thick enough to include respect for liberty and autonomy. Legal systems that suppress liberty and fail to respect autonomy hardly deserve the label rule of law, regardless of their adherence to formal legality principles.

The debate thus reaches a stalemate, with neither side willing to concede to the other. But might there be some way to break the stalemate? In the next section, the Essay seeks to show that the two sides do share a rational common ground: the rule of law may not mean all things to all people, but it does mean something and something more than the formalists have to date conceded. This is so because the formal principle of legality itself contains certain substantive moral and political commitments, and the concept of the rule of law makes little sense without recognizing them as such. I use the term "dissent" to capture the essence of these principles, practice and toleration of which, I argue, is essential to any regime which purports to observe rule of law norms.

## II. DISSENT: THE LINCHPIN FEATURE OF THE RULE OF LAW

### *A. What is Dissent?*

What do we mean by "dissent"? The term is used to represent a wide variety of conduct. Judges dissent when they express different or contrary views from those adopted by the majority. Protesters dissent by publicly voicing opposition to social or governmental authority. Marches, rallies,

29. *Id.* at 113.

30. *See* JOSEPH RAZ, THE MORALITY OF FREEDOM 370 (1986).

and sit-ins, such as those that characterized the civil rights protests in the 1960s or the Black Lives Matter movement today, are classic ways in which those seeking political change, or simply wishing to advocate a view, express their opposition. Those with unconventional religious views, who exercise their "freedom of conscience," dissent by expressing, or simply refusing to abandon, religious beliefs that conflict with the beliefs or practices of the majority.[31] Lawrence Solum helpfully clarifies some of the various senses of dissent by identifying three separate, though interrelated, meanings: 1) "dissent as disagreement," 2) "dissent as minority viewpoint," and 3) "dissent as criticism of established opinion."[32] The January 6, 2021, storming of the U.S. Capitol Building by persons refusing to accept the results of the 2020 election represents yet another manifestation of dissent: dissent as violent opposition to government or legal authority.

Dissent may thus manifest itself in multiple and varied ways, and the lines between various sorts of dissent are inevitably blurry. Institutionalized and channeled forms of dissent, such as the judicial practice of writing dissenting legal opinions or the legislative practice of minority groups of legislators voicing disagreement with legislative or parliamentary policy through exercise of "loyal opposition," are both traditional forms of institutionalized dissent. Quasi-institutionalized practices of dissent range from the traditional watchdog role played by the media, the so-called "fourth estate," to the exercise of constitutionally protected rights such as petitioning the government. Private citizens engage in dissent through acts of speech, protest, and civil disobedience. Indeed, non-violent civil disobedience stands as a particularly powerful form of dissent.

Thus it seems that, in thinking about dissent, we need to consider its relationship to the manifold array of other "D words": dialogue, deliberation, disobedience,[33] disallegiance,[34] and defiance. For purposes of

31. *See, e.g.*, J.S. MILL, ON LIBERTY (Acton ed., 1972) (1859) (arguing that the very idea that individuals might possess rights against the society and thus be the first to controvert society's "claim to exercise authority over dissentient" was first conceived by "[t]he great writers to whom the world owes what religious liberty it possesses" who "mostly asserted freedom of conscience as an indefeasible right.").

32. Lawrence B. Solum, *The Value of Dissent*, 85 CORNELL L. REV. 859, 878 (reviewing STEVEN H. SHIFFRIN, DISSENT, INJUSTICE, AND THE MEANINGS OF AMERICA (1999)).

33. One can distinguish disobedience from disallegiance in that disobedience involves refusing to comply with rules promulgated by an authority that the actor acknowledges to be legitimate or at least does not challenge the legitimacy of the political system which produced the rule. Disallegiance, in contrast, represents rejection of the system itself.

34. In what seems like a quite clairvoyant diagnosis of the troubles currently besetting American democracy, Stephen Carter distinguishes between disagreement with the policies of the political community and disallegiance to the political community itself. The latter constituting, in

this Essay, the concept of dissent is used capaciously enough to embrace all peaceful and nonviolent manifestations of this conduct, including non-violent civil disobedience. Although violent opposition to government or law may also, at times, be morally justifiable, the resort to violence to express dissatisfaction or disagreement with lawful exercises of governmental or private power represents action outside the law. It itself is not lawful conduct and does not respect the established legal decision-making process. Violent opposition or protest, for purposes of this paper, constitutes something more than mere dissent. It constitutes active rebellion.

This distinction closely tracks the outlines of traditional First Amendment jurisprudence. Of course, the conundrum arises at the intersections of these concepts and in drawing the lines between mere speech and unlawful action, between peaceful civil disobedience and violent rebellion, and between suppression of protected speech and the maintenance of order. These are hard and controversial matters that are vigorously debated by citizens and scholars alike.[35] For purposes of this paper, I accept the conceptual categories and leave the policing of the boundaries to another place and time.

### *B. Dissent and Rule of Law Formalism*

Although the practice and toleration of dissent is largely ignored by legal philosophers thinking about the rule of law, a moment's reflection reveals how central it is to the core conception of any rule of law theory. Let us begin with the legality virtues. As Raz argues, the legality virtues, which he identifies as generality, clarity, stability, and publicity, form the common core of the consensus regarding the minimum criteria that any rule of law regime must feature.[36]

Take, for example, the value of generality of law. The requirement of generality means governing through laws that apply generally, that is, of governing through laws which have the character of rules rather than orders, diktats, or discretionary judgments. This conception of the rule of law was well-captured in Justice Scalia's phrase: the "rule of law as the

essence, treason, which unlike dissent cannot be allowed. As he notes, such acts of disallegiance must be rejected, for "no political sovereign could long survive were it to allow disallegiance of the many communities that it comprises." STEPHEN L. CARTER, THE DISSENT OF THE GOVERNED 17 (1998); *see also id.* at 103, 116–22.

35. *See, e.g.*, Gitlow v. New York, 268 U.S. 652 (1925) (distinguishing acts of incitement to overthrow the government from protected speech).

36. *See* Raz, *supra* note 7. *See generally* BRIAN Z. TAMANAHA, ON THE RULE OF LAW 91–102 (2004).

law of rules."[37] From a judge's perspective, deciding cases by application of rules to facts is to be distinguished from deciding each case on a "totality of the circumstances" basis. The "general" method, Scalia argues, forces judges to act with greater rigor and hence greater justice because it requires them to act consistently in similar cases or to articulate differences among cases and to justify why those differences are relevant and material to outcomes.[38]

Underlying the requirement of generality, then, is the basic precept of justice to "treat like cases alike" and different cases differently.[39] But because all cases are different in some details, the process of determining whether one case is like another for purposes of whatever rule is in question requires a discriminating selection of the critical features of both the facts and the law. The judge cannot decide whether two cases are meaningfully similar without identifying what is to be measured and clarifying the metric by which to measure similarity and difference. The metric, in turn, is provided by an articulation of the purpose(s) animating the rules, and those purposes are never fully articulated or clarified in the rules themselves. Rather, they must be identified by the actor who is applying the rule.[40] Fleshing out his own relatively formalist understanding of the rule of law, the philosopher John Rawls observed that even the minimum requirement of treating similar cases similarly requires public deliberation because it "forces [judges] to justify the distinctions that they make between persons by reference to the relevant legal rules and principles."[41] These purposes are fundamentally contested, or at least they are fundamentally contestable. One cannot decide the animating purpose

37. *See* Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175 (1989).

38. *Id.* at 1187 ("All I urge is that those modes of analysis be avoided where possible; that the *Rule* of law, the law of *rules*, be extended as far as the nature of the question allows; and that, to foster a correct attitude toward the matter, we appellate judges bear in mind that when we have finally reached the point where we can do no more than consult the totality of the circumstances, we are acting more as fact-finders than as expositors of the law.").

39. Jeremy Waldron, *Stare Decisis and the Rule of Law: A Layered Approach*, 111 MICH. L. REV. 1, 4 (2012) (noting that justifications that are adduced for stare decisis, including "the quest for constancy and predictability in the law, and the importance of generality and treating like cases alike" … "resonate with rule-of-law ideas."). Specifically, Waldron argues that the principle of treating like cases alike must flow from a broader requirement demanded by the principle of generality. That is, the reason for respecting the principle of treating like cases alike is that it requires the judge to "cite a general norm or establish it as law (or as though it were law or she were making it law) and use that as the basis of her decision in the case." *Id.* at 20. But for a critique of the usefulness, and perhaps even coherence, of the concept of treating like cases alike, *see* ANDREI MARMOR, LAW IN THE AGE OF PLURALISM 183–96 (2007).

40. *See* FREDERICK SCHAUER, PLAYING BY THE RULES (Clarendon Press 1991).

41. JOHN RAWLS, A THEORY OF JUSTICE 237 (1971).

of a rule without taking sides or choosing which of the multiple potential purposes that might be pursued should be selected in each particular case.

Just as rule-purposes are contestable so are facts. The facts never identify themselves.[42] Rather, they are created by "fact-finders": physical evidence is adduced and interpreted, testimony is judged more or less credible, apparent logical inconsistencies are evaluated in terms of whether they create signal or noise, and all the raw data is translated and simplified into contestable narratives that form the background on which adversarial accounts are predicated.[43]

All this is to say that the application of rules to facts requires a series of critical choices, and these choices are, at minimum, open to rational debate. Unless we assume both infallible factfinders and infallible interpreters, we must assume that both aspects of legal decision-making give rise to at least the possibility of disagreement and, thus, the possibility of dissent.

Just as the dictates of reason demand the practice and toleration of dissent, so too do most other attributes of widely shared conceptions of the rule of law presuppose the possibility of dissent. Laws must be general in the sense that they apply to all, at least all who fall within the class governed by the law. Laws must be clear so that those subject to them can direct their conduct accordingly, without fear of surprise that a government actor will declare their conduct to be a violation of it. Laws must be stable so that citizens can make reasonable plans based on the law. Rapidly changing laws make compliance as difficult as laws that are opaque or inscrutable. And laws must be public, in the sense that those subject to them must have a fair opportunity to know what they require. Secret laws, like inscrutable or constantly changing laws, provide no reasonable basis for actors to incorporate in the formation and execution of their life plans.

All of these basic characteristics of law hailed by the formalists, of course, are themselves matters of degree.[44] The extent to which actual law conforms to them will always be subject to debate. What, exactly, does it mean for a law to be general? Laws do not literally apply to all people, everywhere, and at all times. Laws, by definition, operate through the creation of classes of subjects. Whether classes have been defined in a manner that adequately conforms to the dictates of the basic rule of

42. Jerome Frank provides a classic realist discussion of the past, present, and future uncertainty, and epistemological contingency of the factual record. *See* JEROME FRANK, COURTS ON TRIAL (1949) (see especially chapter three, "Facts Are Guesses").

43. *See* NEIL MACCORMICK, RHETORIC AND THE RULE OF LAW 13 (2005) ("The proper interpretation and application of legal rules, and the proof and interpretation of facts relevant to law-application can be hugely problematic.").

44. *See* ANDREI MARMOR, LAW IN THE AGE OF PLURALISM (Oxford Univ. Press 2007).

justice—that likes be treated alike and things not alike be not so treated—is a permanently contestable question. Similarly, whether a law is sufficiently clear in its terms, whether amendment or repeal of a law will upset reasonable expectations or reliance interests, or whether the requirements of law are adequately communicated to its subjects so as to satisfy publicity requirements have been, and will always be, contested questions about which debate and disagreement is the norm.

One might well point to typical modern practices in any number of areas of activity subject to legal regulation and question whether any of the formal criteria are actually being met. Are the laws regulating the emission of pollutants really "clear"? Or are they clear only with assistance from professionally trained lawyers, and then in some cases only after complex and extended litigation? Are they stable? Laws do change periodically, but to the extent that prohibitions on ex post facto laws prevent enforcement of punitive changes in the law on actors, even frequent changes in them may not in themselves create overly worrisome deterrents to planning. And what about the stability of enforcement? It seems obvious that even where the law itself is reasonably clear and stable, decisions about when and whether to enforce the law may well be subject to substantial discretion. Think traffic laws. When police only pull over one in ten speeders, it is far from certain whether the decision to exceed the speed limit on any occasion will result in legal sanctions.[45] The publicity requirement is subject to similar objections. First, while the laws are "public" in the sense that they are formally accessible, most people in fact do not know the precise content of the law. Buried in legal codes thousands of pages thick, the laws are for many persons practically as inaccessible as "the practice of Caligula who 'published the law, but it was written in a very small hand, and posted up in a corner, so that no one could make a copy of it.'"[46] To actually know the content of the law, one must hire the legal equivalent of an acrobat trained to shimmy up Caligula's marble columns to inspect them. So whether law actually is, or even needs to be, clear, stable, and public to satisfy our intuitions regarding rule of law norms is an open question.

45. As Richard Greenstein has explained, the variability of enforcement of speed limits may be consistent with rule of law principles because some sets of legal rules, such as traffic laws, might be enforced based not on the plain meaning of their provisions but rather based on a shared conception of the underlying purposes of the traffic rules. "Understood this way, the failure to prosecute those who drive five miles per hour over the literal posted limit appears as an exercise of interpretive authority, treating the speed limit more as a standard than as a pure rule." *See* Richard K. Greenstein, *Toward A Jurisprudence of Social Values*, 8 WASH. UNIV. JURIS. REV. 1, 28 (2015).

46. Screws v. United States, 325 U.S. 91, 96 (1945) (quoting SUETONIUS, LIVES OF THE TWELVE CAESARS).

As with the dictates of reason itself, deliberation regarding whether a law, or the law more generally, complies with these norms is essential to any fair assessment of whether the norms have been satisfied. There is no neutral, objective, external standpoint from which to judge whether these norms have been met that does not provide an opportunity for the airing of views regarding how they arguably have fallen short in some key respect.[47]

But setting aside such worries, can there be any doubt that, like the generality requirement, these formalist aspects of the rule of law cannot be actualized without open and vigorous public deliberation? When is a law too vague or opaque to meet minimum standards of clarity? How often may the laws or regulations be subject to modification before they lose their essential character of stability? How obscure may legal commands be before they may no longer be considered public? And when, and to what extent, does arbitrary and capricious enforcement of the laws become so pernicious that it undermines the essential values that allow a regime to claim the mantle of the rule of law?

Indeed, as I will argue in the next section, these formal virtues not only cannot flourish without a concomitant commitment to public deliberation, but they may not even be essential to what is really at the core of the rule of law concept. What is really at the core of the rule of law, even more than the formalist values themselves, is a commitment to public deliberation in making, enforcing, and applying the law.[48] Necessarily corollary to that commitment is the practice of dissent.

## III. RULE OF LAW, REASON, AND PUBLIC DELIBERATION

To see the centrality of public deliberation to any plausible conception of the rule of law, it helps to step back and revisit the origins of the concept. In Aristotle's classic formulation,[49] the best regime for most constitutions is one in which government is "by law and not by men." But what, exactly, does this mean?

47. *See* Elizabeth Anderson, *The Epistemology of Democracy,* Episteme 3, nos. 1–2, 8, 17 (2006) (arguing that "post-decision dissent . . . is needed not simply to keep the majority in check, but to ensure that decision-making is deliberative—undertaken in an experimental spirit—rather than simply imposed.").

48. Amartya Sen makes an extended case for the "public reasoning" in his account of what constitutes both "democratic politics in general" and "the pursuit of social justice in particular," which he identifies as "an essential feature of objectivity in political and ethical beliefs." *See* AMARTYA SEN, THE IDEA OF JUSTICE 44 (2009).

49. *See* Scalia, *supra* note 37, at 1182.

### *A. Law, Virtue, and Reason*

According to Aristotle, "law" means the rule of "reason without passion."[50] The rule of law thus necessarily means a system of government in which the rulers make decisions and exercise power in accord with the dictates of reason, unswayed by bias, self-interest, or emotion. In this formulation, the rule of law is conceptualized as a virtue or trait of character of the wise ruler. It is an attitude or disposition that must be cultivated among the governing body, whatever form—monarchy, aristocracy, or democracy—that takes. For such an enterprise to be possible, Aristotle explains, rulers must be properly educated. Their instincts must be cultivated within institutions designed to teach the skill of ruling from the vantage point of personal detachment. The rule of law, in this sense, is aspirational. It is a goal towards which government officials, lawmakers, administrators, and judges must strive.

Building on the Aristotelian formulation, if the rule of reason means anything, it means at minimum that important decisions are reasoned—that is, they are the product of rational deliberation. Deliberation, in turn, consists of the careful examination of evidence; the sifting of explanatory theories to see which are most consistent with the evidence; and the comparing and contrasting of views regarding which principles, values, and objectives are most relevant and most worth pursuing. None of this is possible without contestation: free and open debate about both ends and means.[51]

The necessity of contestation and deliberation, it should be noted, exists apart from any particular epistemological theory. It is equally necessary to both unitary and pluralistic conceptions of truth. This is easy to see with respect to pluralist views regarding truth and reason, which have captured the high ground in the epistemological debate.[52] Most theorists writing about such things acknowledge pluralism as a superior

50. ARISTOTLE, THE POLITICS OF ARISTOTLE, at 172 (Ernest Barker, trans., Oxford Univ. Press, 1948) (c. 384 B.C.E.) ("Law may thus be defined as 'reason free from all passion.'").

51. *See* MACCORMICK, *supra* note 43, at 27 ("The idea of the Rule of Law that has been suggested here insists on the right of the defence to challenge and rebut the case made against it. There is no security against arbitrary government unless such challenges are freely permitted, and subjected to adjudication by officers of state separate from and distanced from those officers who conduct prosecutions.").

52. *See* SEN, *supra* note 48. (arguing that "there can exist several distinct reasons of justice, each of which survives critical scrutiny, but yields divergent conclusions," and noting that "[t]he importance of valuational plurality has been extensively—and powerfully—explored" by a variety of writers, including Isaiah Berlin, Bernard Williams, Michael Walzer, Charles Taylor, and Michael Sandel).

epistemological theory.[53] Plainly, any rule of reason in a pluralistic universe demands free and open exchange of ideas. As philosopher John Rawls observed, "If pluralism means anything, it is that rational people's judgments, even about very basic matters, cannot be expected to agree—hence the 'burden' that judgment carries, namely that reason and rationality do not yield unique right answers on contested moral and political questions."[54]

If there are no "right answers," the holding of diverging or competing views must be accepted as the norm. Dissent is therefore an inevitable concomitant of any deliberative process based on reason in a pluralist universe. Without the freedom to put forward and maintain differing views about such things as truth, value, rights and obligations, and moral duties, decisionmakers, legislators, and executive actors will simply be unable to make reasoned decisions—that is, decisions must be based on a complete understanding of the factual context and the decisional implications at stake (or at least as complete an understanding as is practically possible). Habermas describes the process thusly: "The task is . . . to examine prima facie applicable norms in order to find out which one is most suitable to the case at hand, once the situational features of the case have been described as exhaustively as possible from all normatively relevant points of view."[55]

In his work on "public reason," John Rawls explains why any theory of justice must be predicated on pluralism:

> [A] basic feature of democracy is the fact of reasonable pluralism—the fact that a plurality of conflicting reasonable comprehensive doctrines, religious, philosophical, and moral, is the normal result of its culture of free institutions. Citizens realize that they cannot reach agreement or even approach mutual understanding on the basis of their irreconcilable comprehensive doctrines.[56]

Rawls thus suggests that the ground of argument about public concerns be constrained to avoid the clash of fundamentally irreconcilable viewpoints by mutual agreement to limit the kinds of reasons that are acceptable to

53. *See, e.g.*, SIONAIDH DOUGLAS-SCOTT, LAW AFTER MODERNITY 106 (2013) ("Many contemporary theorists believe legal pluralism to be the most convincing and workable theory of law").

54. *See* David Luban & W. Bradley Wendel, *Philosophical Legal Ethics: An Affectionate History*, 30 GEO. J. LEGAL ETHICS 337, 352–53 (2017) (commenting on Rawls); JOHN RAWLS, POLITICAL LIBERALISM 54–58 (on the "burdens of judgment"), 157–58 (1993).

55. JÜRGEN HABERMAS, BETWEEN FACTS AND NORMS 260 (William Rehg trans., MIT Press 1996).

56. JOHN RAWLS, THE LAW OF PEOPLES, 131–132 (1999).

those "public reasons" that "satisfy the criterion of reciprocity."[57] By translating their conflicting views and preferences into a language based on shared, reasonable, overlapping areas of concern,[58] it is possible that some mutually tolerable compromises can be reached. "Citizens will of course differ as to which conceptions of political justice they think the most reasonable, but they will agree that all are reasonable, even if barely so."[59]

In a pluralistic world, dissent is inevitable. Competing and conflicting views are an ineliminable feature of any decision-making process that involves more than a very small number of stakeholders. In the judicial tradition of the United States, the dissenting opinion has become an institutionalized feature of judicial decision-making. As such, the "practice of dissent"[60] is not in tension with, nor contrary to, the rule of law;[61] rather, it is of its essence.

But even if truth and knowledge are conceptualized as unitary, rational decision-making still requires vigorous deliberation to identify, assess, and resolve upon the "one right answer." And if the "rule of reason" requires deliberation, does it also necessarily require dissent? For starters, it is clear that full, effective deliberation requires the free airing of facts and opinions that bear upon the subject of deliberation. Deliberative contexts in which free expression is stifled produces demonstratively worse results than deliberative contexts in which it is encouraged. As Cass Sunstein has explained, effective group deliberation is often impeded by group dynamics such as polarization, self-silencing, overconfidence, and groupthink.[62] These group dynamics can lead group deliberations to inaccurate, extreme, and unreasonable judgments. Wise and effective deliberation is hindered where individuals do not feel free to express their true knowledge or opinion, where groups are so like-minded that positions that conflict with majority sentiment are sufficiently uncomfortable that group members prefer conformism over accuracy. The product of such dynamics is "groupthink," a debilitating tendency by group members to

57. *Id.* at 133.

58. *See* RAWLS, *supra* note 54.

59. *Id.* at 137.

60. *See*, *e.g.*, Kevin M. Stack, *The Practice of Dissent in the Supreme Court*, 105 YALE L. J. 2235, 2245 (1996) (arguing that because dissent undermines the appearance of determinacy, it undermines the rule of law).

61. Professor Kevin Stack has argued that because dissenting opinions conflict with the ideal of the rule of law, dissents must be justified another way: as demonstrative of the deliberative process. Kevin M. Stack, *From Consensus to Collegiality: The Origins of the "Respectful" Dissent*, 124 HARV. L. REV. 1305, 1319 (2011).

62. *See* CASS R. SUNSTEIN, WHY SOCIETIES NEED DISSENT 111–44 (2003).

"minimize the importance of their own doubts and counterarguments,"[63] leading to suboptimal and potentially disastrous decisions. The most effective way to counter such defects, Sunstein suggests, is through the cultivation of "good institutions that expose hidden profiles, encourage counterarguments, and create alternatives."[64]

With deliberation, of course, comes disagreement. Perhaps in a world governed by Platonic philosopher-kings ultimate truth could be divined without deliberation, but in any setting that we can actually envision, rational decision-making regarding complex topics is simply impossible without vigorous discussion, debate, and disagreement.[65] It requires, in other words, the cultivation of a culture of dissent.

The essential role of deliberation in achieving public reason was plain to Aristotle, who defined the highest and best life as the life devoted to discussion and debate of matters of public concern. As Rawls explains, "When citizens deliberate, they exchange views and debate their supporting reasons concerning public-political questions. They suppose that their political opinions may be revised by discussion with other citizens; and therefore these opinions are not simply a fixed outcome of their existing private or nonpolitical interests."[66]

So both deliberation and disagreement are inevitable parts of a public enterprise constructed on public reason, regardless of whether one embraces a unitary or pluralist epistemology. "Reasonable political conceptions of justice do not always lead to the same conclusion; nor do citizens holding the same conception always agree on particular issues."[67] In those cases, which Rawls grants are the "normal" ones, those who lose the argument may not only present their dissenting views but continue to raise that dissenting opinion in the future for reconsideration. "Reasoning is not closed once and for all in public reason any more than it is closed in any form of reasoning."[68] Dissent, accordingly, preserves and continues the rational debate over matters of fundamental principle.

If reason—or at least public reason—is impossible without deliberation and, ultimately, dissent, law is equally impossible without them, for beginning with Aristotle, law has been defined, first and foremost, as the exercise of reason in place of or contrary to mere will, force, or passion. Nothing in the nature or practice of law suggests

63. *Id.* at 141.

64. *Id.* at 144.

65. As the political philosopher Amartya Sen puts it, "'Discussionless justice' can be an incarcerating idea." SEN, *supra* note 48.

66. RAWLS, *supra* note 56, at 138–39.

67. *Id.* at 169.

68. *Id.* at 170.

otherwise. Even in a universe where there really is only one "right answer" to even the hardest case, such "right answers" are never self-declaring. Right answers must be found. They must be justified as right, even against the strongest and most threatening challengers. To be recognized as truly right, rather than merely the preference of (or biased or partisan product of) the decisionmaker, the answer must be justified, and justification must include consideration of competing views. Like reason itself, law must acknowledge the fact of dissent, for it is only in doing so that it proves itself to be law.[69]

### *B. The Rule of Law, Rights, and Neutral Principles*

Modern legal theorists have further developed this Aristotelian idea of law. Indeed, the rule of law as the rule of reason divorced from passion is, at bottom, what Herbert Wechsler envisioned in his famous encomium to "neutral principles."[70] To Wechsler, there is a place for both will and reason in the governmental enterprise, but the courts have the special province to discipline their decision-making to methods that transcend the "ad hoc." Legislatures and the executive branch both may act on the basis of will—that is, moved by the bare desire to achieve some immediate result—but courts must act otherwise. The duty courts confront is to resolve cases by virtue of reasons that are neutral and general, reasons which "transcend any immediate result that is involved."[71] "I put it to you that the main constituent of the judicial process is precisely that it must be genuinely principled, resting with respect to every step that is involved in reaching judgement on analysis and reasons quite transcending the immediate result that is achieved."[72]

The courts, Wechsler thought, have a "special duty" to judge by neutral principles in ways that set them apart from the legislative branch. The legislative chambers stand, in this light, as the "will" of the community, and it is the Court's duty to settle the political questions rightly brought before it on the basis of reason rather than will. So the judge does this, not by looking inward to find some Solomonic wisdom to guide her decisions, but by faithfully trodding "the path through precedent, through policy, through history, to the best judgment that fallible creatures can reach in that most difficult of all tasks: the achievement of justice

69. The classic defense of liberty of thought and discussion was put forth by J.S. Mill. *See* Mill, *supra* note 31.

70. Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959).

71. *Id.* at 19.

72. *Id.* at 15.

between man and man, between man and state, through reason called law."[73]

The rule of law envisioned by Wechsler is, in other words, the Aristotelian notion of the rule of reason over passion, defined as the rule of judges exercising strict self-discipline through the practice of traditional judicial craft: parsing precedents, reconciling and distinguishing cases, and using the best existing methodologies to determine the meaning of statutory and constitutional text.

Wechsler's interpretation of the Aristotelian understanding of the rule of law, in turn, reached its fullest articulation in the work of Ronald Dworkin. As noted above, according to Dworkin there are two main views of the rule of law. The first is the "rule book version," which "insists, so far as possible, that the power of the state should never be exercised against individual citizens except in accordance with rules set out in a public rule book available to all."[74] The rule book version is very narrow, because it does not "stipulate anything about the content of the rules that may be put in the rule book."[75] With this, Dworkin contrasts what he refers to as the "rights" conception. The rights conception assumes that "citizens have moral and political rights" and "insists that these rights be recognized in positive law, so that they may be enforced upon the demand of individual citizens through courts or other judicial institutions of the familiar type, so far as this is practicable."[76] The rights conception of the rule of law insists on the importance of the ability of citizens to "dispute, as individuals, what those rights are."[77] The rights model acknowledges the validity of the rule book, but the rights model denies that the rule book is the exclusive source of "moral rights in court."[78] A more comprehensive account of the rights and duties to which citizens are entitled and governments are obliged can only be discerned through careful attention to the "political structure and legal doctrine of [one's] community."[79]

While more expansive than Wechsler's neutral principles, Dworkin's concept of law as integrity continues Wechsler's focus on law as a kind of intellectual rigor. Law as integrity envisions the rule of law as an exercise in principled governance by all who play a part in it, from legislators to

73. *Id.* at 16.

74. Ronald Dworkin, *Political Judges and the Rule of Law*, 64 PROC. BRIT. ACAD. 259, 261 (1979).

75. *Id.* at 262.

76. *Id.*

77. *Id.* at 263.

78. *Id.* at 268.

79. DWORKIN, *supra* note 10, at 255.

judges, to executive officers, to citizens.[80] In the paradigmatic rule-of-law state, everyone is committed to the communal moral project of building moral and political institutions that are based upon, and reflective of, the shared moral and political ideals and historical foundations of the community. It is a republic of virtue, in which the key virtue is the commitment to conform one's conduct to one's understanding of the shared principles and identity of the common project.

Of course, Dworkin's account gives a starring role to the judge, who is the embodiment of law as integrity. The name he gives his mythical judge—Hercules—unmistakably signals the significance of virtue demanded by the legal actors in his understanding of law as integrity. For Hercules is the embodiment of the man of extraordinary virtue. While mere mortal actors will never perfectly live up to the Herculean standard, the rule of law can only be approximated, in Dworkin's view, where citizens in general, and legal actors in particular, embrace the commitment to law, legal practice, and the high-minded ideals associated with it as the guiding virtue of their work.

In any conception of rule of law as the rule of virtuous rulers, dissent must be a permissible feature. Indeed, although Dworkin expressly declines to contextualize Hercules within an institutional setting, in the real world those seeking to emulate Hercules do not toil alone on a judicial Mount Olympus. Rather, a real-world judge or lawmaker seeking to take the Dworkinian obligation to practice law as integrity must confront the possibility—indeed, the inevitability—of disagreement. Would the Herculean judge, committed to her best understanding of the ideals and principles of her community, defer to colleagues whose decisions appear to her in error? Perhaps, in a spirit of collegiality, but what if those colleagues' decisions appeared to her to reflect not only incorrect interpretations of the law, but interpretations arrived at in bad faith, for reasons lacking integrity in the Dworkinian sense, to advance goals that were inconsistent with, and maybe even diametrically opposed to, her understanding of what constitutes the correct reading of relevant "past political decisions"? Plainly, the Herculean judge would not remain passive in the face of such conduct. She would dissent.

### *C. Further Essential Attributes of Formal Legality*

In a recent essay on the rule of law, Joseph Raz expanded upon his prior conceptualization of the essential attributes of the rule of law.[81] As

80. *Id.*

81. *See* Raz, *supra* note 6.

he did in his earlier work, Raz began with a definition of the rule of law grounded on the formal properties of law—the values of generality, clarity, publicity, etc.[82] In addition to these fundamental formal properties, Raz provided an expanded list of additional properties he argued were essential to the rule of law. These include:

1) The practice of giving reasons

2) Fair and unbiased procedures

3) Opportunities to present arguments and information

4) The requirement that actions taken pursuant to the law be reasonable relative to the declared reasons for the decision

5) Rule of law as part of the public culture, education and discourse.[83]

As with the formal properties discussed above, and as with the requirements of reason itself, these attributes presuppose that law will be the product of deliberative processes in an institutional context that anticipates, and tolerates, disagreement and dissent.[84]

The requirement that any rule of law regime respect "the practice of giving reasons" is a good example. Reasons need to be given to those directly affected by government actions or decisions only where it is anticipated that some will disagree with those actions or decisions. As was true with respect to public reason generally, the practice of giving reasons does not mean simply declaring a preference for a chosen resolution. "Because I said so" is not an adequate justification for an action taken pursuant to law. Indeed, such an explanation fails to distinguish the action taken or the decision made as one of reason at all, as opposed to one of passion, force, or will. Hence, the practice of giving reasons must mean the practice of giving a certain kind of explanation, one that acknowledges arguments and views to the contrary and justifies the choice made by demonstrating that it is, in some way, better than the others. This is recognized in the fourth requirement of the rule of law acknowledged by Raz: that actions not only be justified by reasons but that they "be reasonable, relative to their declared reasons."[85]

82. *Id.* at 3.

83. *Id.* at 8.

84. *See* Bernard Manin, *On Legitimacy and Political Deliberation*, 15 POL. THEORY 338, 361 (1987) ("A power that faces no obstacle will have both less cause to deliberate on its decisions and less need to justify them. The true goal of the pluralism of counterforces is not equilibrium; it is deliberation itself.")

85. Raz, *supra* note 6, at 8.

Raz also observes that the rule of law requires not only that promulgated and enforced laws comply with certain formal attributes of rules but that they also comply with certain procedural attributes as well. These, Raz states, include the requirement of fair and unbiased procedures, which necessarily entails "opportunities to consider relevant arguments and information" to those making and applying the laws.[86] Critically, the picture of law emerging here is clearly one that acknowledges, and accommodates, the practice of disagreement and dissent. An unbiased procedure is one that does not prejudge which viewpoints are and which are not preferable or even tolerable. As U.S. due process law has long acknowledged, what makes a proceeding "fair" is the opportunity for those who are affected by important legal decisions to be heard, to present facts and views regarding the issue, and to have the decision made, based on an unbiased assessment, by a neutral decisionmaker.[87] No proceeding would be deemed fair and unbiased if participants could not articulate their views or present evidence without fear of punishment or reprisal. Fair and unbiased procedures necessarily demand toleration of competing views and voices, both before and after decision.[88]

This toleration is essential to the fifth attribute identified above: that the rule of law must be made part of the public culture, education, and discourse of any state claiming fealty to it. For matters of great public concern are virtually never merely taken up once and neatly and finally resolved. Instead, the weightiest matters become the subject of the most far-reaching and long-lasting debates, ones that infect wide swaths of politics with their vigor and force people to take sides in conversations that may extend over years, decades, generations, or even centuries. Think slavery and emancipation and its concomitant, racial oppression, or the right to abortion, or economic policies of redistribution intended to address economic inequality. While these most bitter and divisive issues are often the ones that challenge rule of law institutions the most when successful and demonstrate its shortcomings in failure, they are strong reminders that social policymaking about constitutional and legal rights always takes place in a context of wide disagreement about fundamental concerns. A polity with any hope of resolving such divisive debates by law, rather than force, must cultivate a public culture that embraces the resolution of

86. *Id.*

87. *See* Hamdi v. Rumsfeld, 542 U.S. 507, 533 (2004) ("For more than a century the central meaning of procedural due process has been clear: 'Parties whose rights are to be affected are entitled to be heard; and in order that they may enjoy that right they must first be notified.' It is equally fundamental that the right to notice and an opportunity to be heard 'must be granted at a meaningful time and in a meaningful manner.'" (quoting Fuentes v. Shevin, 407 U.S. 67, 80 (1972))).

88. *See* MACCORMICK, *supra* note 43, at 26–27.

disagreement through the mechanisms that law provides—reasoned, principled debate about deeply competing views, based on full consideration of all relevant objective evidence. It is not coincidental that the states most deeply associated with rule of law values display the strongest commitments to open and tolerant cultural norms and free speech and a commitment to and respect for the scientific method. For these are the very attributes that undergird the substantive and procedural aspects of the rule of law.

## IV. DISSENT AS AN INTERNAL ATTRIBUTE OF LAW

The argument of the Essay thus far is that most, if not all, of the formal attributes hailed as necessary to any minimum conception of the rule of law implicitly presume a legal culture in which open disagreement is anticipated and dissent is both practiced and tolerated. No legal system that stifles disagreement; or threatens sanctions against those who challenge the rationality, generality, stability, or publicity of government actions or of judicial decisions; or discourages the presentation of reliable and relevant evidence; or punishes those who challenge the neutrality of decisionmakers, can possibly hope to sustain a system of government conforming to rule of law norms. This is not merely because permitting free and open deliberation of matters of public concern is good policy, but because the nature and essence of law itself demands it.

This is true for several reasons. Dissent forces reason into the open. It creates a context in which the reasons given by the prevailing party, or relied upon to justify the exercise of force, must stand side by side with those of the losing side and be compared in the public eye. Dissent exposes and preserves the contest over the meaning of justice for all to evaluate. It is the externalization of a dynamic that must occur for law to rule: the identification of reasons for decision, and the process of reasoning by which those reasons are judged, weighed, sifted, and ultimately selected as "true," or "correct," or at least superior to the others.

Jeremy Waldron takes note of this aspect of the rule of law when he observes that determinations regarding what is and what is not the law are often matters "of [legal] contestation."[89] In such cases, he notes, law "becomes a matter of [legal] argument."[90] Waldron acknowledges that the adversarial nature of legal argument and hence, legal truth, is in tension with the formalist conception of the rule of law. If legal authority is

89. Jeremy Waldron, *The Rule of Law and the Importance of Procedure*, 50 NOMOS: AM. SOC'Y POL. LEGAL PHIL. 3, 19 (2011).

90. *Id.*

contingent upon legal argument, then at least to the extent such arguments are not predetermined, Waldron argues, it seemingly lacks essential rule of law characteristics such as certainty and predictability.

Now there are many things that might be said in response to Waldron's concern. Perhaps law's argumentative (and nondeterministic) nature only manifests in "hard cases," such that formalist rule of law characteristics may still be present most of the time. Or perhaps features of the law such as certainty and predictability are as much a function of procedure as of substance. That is, even where there is uncertainty (and there will always be some) about how old legal rules might apply to new cases, a legal system committed to resolving questions about the content of legal rules by resort to settled legal procedures may be sufficiently certain and predictable in the ways that matter to satisfy the requirements of the rule of law. Indeed, property libertarians like Hayek and early Raz seem to have embraced a quite naïve understanding of law that tracks a simplistic Langdellian formalism that no sophisticated lawyer could find plausible.

Law may aspire to the formalist virtues, but legal practice is built around a set of realist structures that, at their best, facilitate argument rather than passive surrender to authority. These institutions embrace pluralism rather than monism and deliberation rather than diktat. Law is never perfectly general, clear, stable, or predictable, just as judges are never perfectly neutral and laws never perfectly just. Rather, these are aspirational features of the imperfect law practiced every day, and a legal system complies with rule of law norms—if it does—by embracing them as norms that guide practice and then permitting as open, robust, and honest a debate about what they require in each case as the practicalities of life permit.

Waldron makes another point which is equally germane to the argument here:

> Applying a norm to a human individual is not like deciding what to do about a rabid animal or a dilapidated house. It involves paying attention to a point of view and respecting the personality of the entity one is dealing with. As such, it embodies a crucial dignitarian idea—respecting the dignity of those to whom the norms are applied as *beings capable of explaining themselves*.[91]

There are (at least) two sides to every legal dispute, and yet judges (or other legal actors) must usually rule for one side or the other. Differences sometimes, but not always, may be split. In structuring legal procedure around the recognition of this idea—that both sides to the dispute must,

91. *Id.* at 16.

simply to reflect the dignity of the individuals involved, be given a fair opportunity to explain themselves, to present facts, and to seek to persuade the court of their viewpoint—legal institutions are structural instantiations of the dialogic conception of law.[92] Appellate processes further underscore both the commitment to this dialogic conception and the recognition that the claims of the losing party in an action deserve equal consideration. The practice of dissent pays homage to the losing party in the debate; it recognizes and validates, where appropriate, contrary but reasonable perspectives, and it embodies the fundamental essence of law as a system of dispute resolution ultimately grounded in consent rather than force.[93]

The essential elements of due process—notice, a neutral decisionmaker, and an opportunity to be heard—are features of law that presuppose the existence of 1) an aggrieved party (for whom notice matters), 2) the possibility that the decisionmaker might be biased, and 3) the promise that the arguments advanced by the parties will not only be heard, but taken into account (for if they weren't, then the opportunity would be hollow). This basic understanding of the requirements of due process necessarily presumes that parties subject to law retain the right to, and are expected to express, their active disagreement with legal authority. The presumption of contestation between parties is inherent in adversarial systems of law, but even legal systems that lean more heavily on civil or inquisitorial traditions recognize basic notions of due process, including the formal neutrality of decisionmakers, the right to defense counsel, and the function of appeal in safeguarding the accuracy of trial court factfinding.[94]

92. Jules Lobel suggests that we should conceptualize courts as providing a forum for protest. They are themselves a form of institutionalized dissent. *See* Jules Lobel, *Courts as Forums for Protest*, 52 UCLA L. REV. 477, 479 (2004) ("[C]ourts not only function as adjudicators of private disputes, or institutions that implement social reforms, but as arenas where political and social movements agitate for, and communicate, their legal and political agenda.").

93. Dissent, in the form of counter-narrative also functions, as David Luban has observed, as an essential form of political resistance. Citing Benjamin and Cover, he explains that "resistance to superior force lies in recollection and storytelling, the practice of samizdat." DAVID LUBAN, LEGAL MODERNISM 40 (1994) (emphasis omitted).

94. *See, e.g.*, Chrisje Brants, *Wrongful Convictions and Inquisitorial Process: The Case of the Netherlands*, 80 U. CIN. L. REV. 1069, 1076 (2012) (describing general features of inquisitorial systems of justice as including the "investigating magistrate's, non-partisan role of representing and guarding all interests involved and in the prosecutor's control over the police," the "role of the defense in pointing to factual and legal deficiencies in the prosecution case and the limited, attendant rights necessary for this," and "the active involvement of the judges in the truth-finding process at trial and their duty to give reasoned decisions, and appeal on the facts—a full retrial before a higher court—as a form of internal judicial control.").

## V. DISSENT AS A POLITICAL REQUIREMENT FOR THE RULE OF LAW

From the above, it is clear that a legal system—at least one recognizable as such today—is predicated on the existence of disagreement about what the law does or should require. It assumes that disagreement about legal norms is both essential to the operation of the system and persistent. Debates do not end simply because some court, somewhere, has ruled. Appeals of lower court rulings may be brought to higher courts, and even the decisions of courts of last resort remain open to reconsideration in the future.[95] Even legal systems with robust conceptions of stare decisis cannot foreclose new and unforeseen circumstances that may require a legal rule to be modified, amended, or trashed.

But if legal systems necessarily imply toleration of legal dissent for such a system to conform to the rule of law, what about political systems? Can a political system that refuses to tolerate political dissent nevertheless maintain a legal system that complies with rule of law norms? What about political systems that, unlike democracies, confine the powers of lawmaking and governance to a narrower group, such as in a constitutional monarchy, a military junta, or a one-party state? If ordinary citizens are excluded from the processes of political decision-making, do formalist rule of law principles nonetheless require toleration of political dissent?

A moment's reflection makes clear that the answer must be that a government that respects the rule of law is a government that tolerates political dissent. This is true for two reasons. First, recall that a basic formalist presupposition of the rule of law is that "the government and its officials and agents are accountable under the law."[96] Such a principle was a basic precept for Dicey.[97] As Waldron explains, "The most important demand of the Rule of Law is that people in positions of authority should exercise their power within a constraining framework of well-established

95. Alexander Bickel, for instance, described judicial review as an "endlessly renewed educational conversation" between the Supreme Court and the public. ALEXANDER M. BICKEL, THE MORALITY OF CONSENT 111 (1975).

96. Stephen L. Rispoli, *Courting Access to Justice: The Rule of Law, the Rule of the Elite, and Non-Elite Non-Engagement with the Legal System*, 29 S. CAL. REV. L. & SOC. JUST. 333, 345 (2020).

97. *See* A.V. DICEY, INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION 114 (LibertyClassics 1982) (1915), https://oll-resources.s3.us-east-2.amazonaws.com/oll3/store/titles/1714/0125_Bk.pdf ("We mean in the second place, when we speak of the 'rule of law' as a characteristic of our country, not only that with us no man is above the law, but (what is a different thing) that here every man, whatever be his rank or condition, is subject to the ordinary law of the realm and amenable to the jurisdiction of the ordinary tribunals." (footnote omitted)).

public norms rather than in an arbitrary, ad hoc, or purely discretionary manner on the basis of their own preferences or ideology."[98]

Second, a foundational principle of the rule of law is that it guarantees to each person subject to the law's processes the minimization of arbitrary decision-making by government officials. Protections against arbitrary decision are reflected in the formalist embrace of the principles of generality, clarity, and publicity. As Dicey explained, the primary mechanism to realize such protections is through open and ready access to independent, neutral adjudicators. In England, this access was secured through the system of common law courts and the right to access them through procedural mechanisms such as the writ of habeas corpus.[99]

More broadly, these principles require citizen access to courts or other neutral decisionmakers and the accompanying ability to raise any and all relevant arguments regarding the propriety and legitimacy of the exercise of legal authority in matters that concern the citizen.[100] The state, in turn, must necessarily permit such issues to be raised by those subject to coercive legal power without fear that doing so will trigger legal or extralegal sanctions. The legal process itself must necessarily permit the full expression of views, including dissenting views, to ensure the absence of bias by the legal process itself.

In turn, only through the practice and toleration of dissent can a government show that it operates by reason and not by force or will, whoever the lawmakers might be. After all, the power to legislate implies the power to enforce, which in turns triggers—and in a rule of law system, must trigger—the working of the state's legal machinery. All of the formal requirements demanded by the rule of law, including norms of generality, non-arbitrariness, etc., then come into play and, as discussed above, can only be guaranteed given adherence to legal procedures that permit challenge based on alleged defects with respect to such rule of law parameters. Indeed, these formal attributes of law cannot be separated from challenges to other formal attributes of the law—including whether the laws themselves complied with the authoritative forms necessary to signify them as authoritative rules.[101] To use the language of H.L.A. Hart,

98. Jeremy Waldron, *The Rule of Law*, STAN. ENCYC. PHIL., (Summer 2020), https://plato.stanford.edu/entries/rule-of-law/.

99. DICEY, *supra* note 95, at 128–42.

100. *See* Rispoli, *supra* note 94, at 350. ("Thus, the consensus in the United States and abroad appears to be that the traditional notion of access to justice requires access to the courts (or other governmental systems) for peaceful conflict resolution of civil disputes with substantively and procedurally fair adjudication.").

101. *See, e.g.*, ARISTOTLE, THE POLITICS OF ARISTOTLE 145–46; 1287 a § 3 (Sir Ernest Barker ed., Oxford Univ. Press 1946) ("[F]or the arrangement (which regulates rotation of office) *is* law.").

a law is not authoritative unless it complies with the governing rule of recognition.[102] Ultimately, it is plain that the scope of debate demanded by the rule of law must necessarily include the legitimacy of the laws enacted by the state and, thus by implication, the legitimacy of the rulers who enacted and enforced them.

Moreover, the procedural minima required by legal due process—the duty to provide notice, the opportunity to be heard, the opportunity to present evidence, and the opportunity to receive a fair hearing by a neutral and unbiased decisionmaker—necessarily establish certain baseline features of government. Most importantly, they imply that power cannot be so concentrated in government that the chance at a fair hearing in cases involving the exercise of government power is extinguished. Law requires an independent judiciary precisely because any other arrangement precludes judges from performing their most basic obligations in the most critical cases.

So even the most formalistic conception of what the rule of law entails necessarily implies a legal system that permits challenges to the legitimacy of the laws and the legitimacy of the lawmakers too. It implies a judiciary that is sufficiently independent that it can adjudicate such claims in an unbiased and neutral way. It implies that prosecutors will decide who to charge and who to punish without consideration of improper, non-legal criteria. And it implies that litigants will be free to raise these challenges without fear that they will be subject to reprisal for exercising their right to bring such challenges against the state. A full conception of legality, practiced with integrity within a polity, inevitably raises issues that go to the heart of political legitimacy, which is why regimes attempting to pursue the so-called "Rule of Law Model Without Democracy," such as Taiwan and South Korea once did, and China still does, inevitably fail to safeguard rule of law principles. Such regimes rightly fear that a full embrace of rule of law principles will constitute a potential "Trojan horse" that threatens the underpinnings of the regime's political legitimacy itself.[103]

The right to voice disagreement with the substance and procedure is obviously an essential feature of public deliberation, which as discussed above is inherent in the concept of the rule of law. Acts of civil

Aristotle here is pointing out that the procedures which structure government decision-making, and government itself, is law's essence.

102. H.L.A. HART, THE CONCEPT OF LAW 265–67 (2012).

103. Weitseng Chen, *Twins of Opposites: Why China Will Not Follow Taiwan's Model of Rule of Law Transition Toward Democracy*, 66 AM. J. COMP. L. 481, 487 (2018) ("[L]egal reforms nonetheless spill over into the political arena to a point where the party-states have to carefully manage and contain them, or Trojan horse effects will bring about the end of the authoritarian regime.").

disobedience, performed by dissenting citizens, likewise fall well within the scope of public deliberation. Where such acts are not accompanied by violence, they represent not a threat to the rule of law but an affirmation of it. As Martin Luther King, Jr. so eloquently argued in his "Letter from Birmingham City Jail," an individual who refuses to obey an unjust law as a form of protest and "willingly accepts the penalty by staying in jail to arouse the conscience of the community" is "in reality expressing the very highest respect for law."[104] In return, governments aiming to conform their practices to rule of law principles are obliged to treat such protesters with dignity and respect.

We can thus see how, beginning with a few formal bedrock principles—which are essential to the normal operation of any legal system that purports to respect the rule of law—we are inevitably propelled toward a far more substantivist account of the rule of law. It almost goes without saying that legal institutions cannot operate properly under conditions in which citizens raising legal challenges to government action, or legal actors themselves, might be imprisoned, tortured, or killed for so doing. Respect for basic human rights is thus a fundamental prerequisite of any regime that hopes to claim the mantle of the rule of law.

How much further does this logic go? Does the rule of law necessarily imply democratic governance? Respect for private property? Guarantees against racial, ethnic, religious, or gender-based discrimination? The provision of basic social services such as food, shelter, education, employment, health care, and other essential features of an adequate social safety net to all citizens? The answers to these questions are far from clear, and the arguments for including one or more of such rights in any list of essential characteristics of a government operating pursuant to the rule of law is strong. One thing we can say, however, is that it is certainly not obvious that any of the above can be perfunctorily dismissed. Each such claim, and more besides, may well be predicated upon, and defended as implicit in, the rule of law construct. After all, is it really possible for all citizens to get the benefit of a neutral decision-maker in a state that tolerates discrimination against one of the parties to a dispute? Can it safely be assumed that the laws themselves are "general," "clear," and non-arbitrary when they apply differently against different social groups or classes? I believe the answers to such questions are fairly clear, but the reader can reach their own conclusions.

104. *See* Stephen L. Carter, *The Dissent of the Govern*ors, 63 TUL. L. REV. 1325, 1338 (1988–89) (quoting Martin Luther King, Jr., *Letter from Birmingham City Jail*, *in* A TESTAMENT OF HOPE: THE ESSENTIAL WRITINGS OF MARTIN LUTHER KING, JR. 289, 294 (J. Washington ed., 1986)).

## CONCLUSION

What has been said above makes plain, I think, that any conception of the rule of law must include the practice and toleration of dissent as an essential attribute of what it means to respect or adhere to it. The formalist conception, which presumes that a legal or political system may comply with rule of law principles while suppressing legal dissent and failing to respect at least that core of basic human rights necessary to permit those who disagree with law or public policy to do so, publicly and without fear of retribution, fails to take into account the minimum requirements that law itself demands. The rule of law concept must incorporate not only the basic legality principles but also the substantive values that make adherence to the legality principles possible. Indeed, the centrality of dissent to the very meaning of law, and the ready visibility of instances in which governments fail to respect it, make indices measuring the vitality of free speech, the toleration of public political protest, and the non-persecution of activists supporting popular critical movements such as Black Lives Matter in the United States, and dissident voices to oppressive regimes across the world, the single most salient indicabtor of the rule of law today.