REASON, FREEDOM, AND THE RULE OF LAW: THEIR SIGNIFICANCE IN WESTERN THOUGHT

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The idea of law and the ideal of the rule of law are central to the natural law tradition of thought about public (or "political") order.[1] St. Thomas Aquinas went so far as to declare that "it belongs to the very notion of a people {ad rationem populi} that the people's dealings with each other be regulated by just precepts of law."[2] In our own time, Pope John Paul II has forcefully reaffirmed the status of the rule of law as a requirement of fundamental political justice.[3] For all the romantic appeal of "palm tree justice" or "Solomonic judging," and despite the sometimes decidedly unromantic qualities of living by pre-ordained legal rules, the natural law tradition affirms that justice itself requires that people be governed in accordance with the principles of legality. Among the core concerns of legal philosophers in the second half of the twentieth century has been the meaning, content, and moral significance of the rule of law. The renewal of interest in this very ancient question (or set of questions) has to do, above all, I think, with the unprecedented rise and fall of totalitarian regimes. In the aftermath of the defeat of Nazism, legal philosophers of every religious persuasion tested their legal theories by asking, for example, whether the Nazi regime constituted a *legal* system in any meaningful sense. In the wake of communism's collapse in Europe, legal scholars and others are urgently trying to understand the role of legal procedures and institutions in creating and sustaining decent democratic regimes. It has been in this particular context that Pope John Paul II has had occasion to stress the moral importance of the rule of law. One of the signal achievements of legal philosophy in the twentieth century was Lon L. Fuller's explication of the content of the rule of law.[4] Reflecting on law as a "purposive"

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1 The idea of law and the ideal of the rule of law have always been central to the political thought of Christian philosophers and theologians. This idea and ideal were by no means Christian inventions, however. They were articulated and developed in pre-Christian classical and Jewish traditions of thought. The treatment of the subject in the writings of St. Thomas Aquinas is, unsurprisingly, deeply indebted to Plato and, especially, Aristotle, as well as to the Hebrew Bible.

2 ST. THOMAS OF AQUINAS, SUMMA THEOLOGIAE I-II, question 105, art. 2c (Fathers of the English Dominican Province trans., Christian Classics ed., 1981) (1273).

3 *See* JOHN PAUL II, ENCYCLICAL LETTER SOLICITURE REI SOCIALIS (1987).

4 *See generally* LON L. FULLER, THE MORALITY OF LAW (1964).

enterprise – the subjecting of human behavior to the governance of rules – Fuller identified eight constitutive elements of legality. These are as follows: (1) the prospectivity (i.e., non-retroactivity) of legal rules, (2) the absence of impediments to compliance with the rules by those subject to them, (3) the promulgation of the rules, (4) their clarity, (5) their coherence with one another, (6) their constancy over time, (7) their generality of application, and (8) the congruence between official action and declared rules.[5] Irrespective of whether a legal system (or a body of law) is good or bad, that is to say, substantively just or unjust, *to the extent* that it truly is a legal system (or a body of law) it will, to some significant degree, exemplify these elements.

It was a mark of Fuller's sophistication, I think, that he noticed that the rule of law is a *matter of degree*. Its constitutive elements are exemplified *to a greater or lesser extent* by actual legal systems or bodies of law. Legal systems exemplify the rule of law *to the extent that* the rules constituting them are prospective, susceptible of being complied with, promulgated, clear, and so forth.

Even Fuller's critics recognized his achievement in explicating the content of the rule of law.[6] What they objected to was Fuller's claims – or, in any event, what they took to be Fuller's claims – on its behalf.[7] Provocatively, Fuller asserted that, taken together, the elements of the rule of law, though in themselves procedural, nevertheless constitute what he called an "internal morality of law"[8] (hence, the title of Fuller's major work on the subject of the rule of law: *The Morality of Law*). Moreover, he explicitly presented his account of the rule of law as a challenge to the dominant "legal positivism" of his time. According to Fuller, once we recognize that law, precisely as such, *has* an internal morality, it becomes clear that the "conceptual separation of law and morality" which forms the core of the "positivist" understanding of law, legal obligation, and the practical functioning of legal institutions cannot be maintained.[9]

These claims drew sharp criticism from, among others, Herbert Hart, the Oxford legal philosopher whose magisterial 1961 book, *The Concept of Law*,[10] both substantially revised and dramatically revitalized the positivist tradition in analytical jurisprudence. In a now famous review essay in the *Harvard Law Review*, Hart accused Fuller of, in

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5 *Id.* at 39.

6 *See, e.g.*, H.L.A. Hart, Book Review, 78 HARV. L. REV. 1281, 1281-82 (1965) (reviewing LON L. FULLER, THE MORALITY OF LAW (1965)); Joseph Raz, *The Rule of Law and Its Virtue*, 93 LAW Q. REV. 195, 205-08 (1977).

7 Hart, *supra* note 6, at 12-81-82; Raz, *supra* note 6, at 206-08.

8 FULLER, *supra* note 4, at 200-24.

9 *Id.*

10 H.L.A. HART, THE CONCEPT OF LAW (1961).

effect, engaging in a semantic sleight of hand.[11] According to Hart, there is no reason to suppose that the constitutive elements of legality, which Fuller correctly and very usefully identified, should be accounted as a "morality" of any sort.[12] As Fuller himself seemed to concede, unjust (or otherwise morally bad) law can exemplify the procedural elements of legality just as fully as just law can.[13] But if that is true, then it is worse than merely tendentious to claim that these elements constitute an "internal *morality* of law."

Indeed, Fuller's critics have observed that even the most wicked rulers sometimes have purely self-interested reasons to put into place, and operate strictly in accordance with, legal procedures.[14] Yet even the strictest adherence to the forms of legality cannot insure that the laws they enact and enforce will be substantively just or even minimally decent. Replying to Hart and other critics, Fuller argued that the historical record shows that thoroughly evil regimes, such as the Nazi regime, consistently fail to observe even the formal principles of legality.[15] In practice, the Nazis, to stay with the example, freely departed from the rule of law whenever it suited their purposes to do so. So Fuller defied Hart to provide "significant examples of regimes that have combined a faithful adherence to the [rule of law] with a brutal indifference to justice and human welfare[.]"[16]

It is important to see that Fuller's claim here is not that regimes can never perpetrate injustices – even grave injustices – while respecting the elements of the rule of law. It is the weaker, yet by no means trivial, claim that those regimes which respect the rule of law do not, and cannot so long as they adhere to the rule of law, degenerate into truly monstrous tyrannies like the Nazis.

Still, Fuller's critics were unpersuaded. My own esteemed teacher, Joseph Raz, one of Hart's greatest students and now his literary executor, pursued a more radical line of argument to deflate Fuller's claim that the elements of the rule of law constitute an internal morality.[17] Raz suggested that the rule of law is a purely instrumental, rather than any sort of *moral*, good. He analogized the rule of law to a sharp knife – an *efficient* instrument and, in that nonmoral sense, "good," but equally serviceable in morally good and *bad* causes.[18] Indeed, according to Raz, insofar as the institution and maintenance of legal

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11 Hart, *supra* note 6, at 1281-82.

12 *Id.* at 1282-83.

13 *Id.* at 1283-88.

14 *See, e.g., id.* at 1287-88; Raz, *supra* note 6, at 196.

15 LON. L. FULLER, THE MORALITY OF LAW 40-41 (rev. ed. 1969).

16 *Id.* at 154.

17 Raz, *supra* note 6, at 205-08.

18 *Id.* at 208.

procedures improve governmental efficiency, they increase the potential for evildoing by wicked rulers.[19]

Fuller's arguments have, however, won some converts. Most notably, perhaps, is Neil MacCormick, who had once shared Raz's view that the requirements of the rule of law "can in principle be as well observed by those whose laws wreak great substantive injustice as by those whose laws are in substance as just as [they] can possibly be."[20] Eventually MacCormick revised his opinion to give some credit to Fuller's claim that the elements of the rule of law constitute a kind of internal morality.

> There is always something to be said for treating people with formal fairness, that is, in a rational and predictable way, setting public standards for citizens' conduct and officials responses thereto, standards with which one can judge compliance or non-compliance, rather than leaving everything to discretionary and potentially arbitrary decision. That indeed is what we mean by the "Rule of Law." Where it is observed, people are confronted by a state which treats them as *rational agents due some respect as such*. It applies fairly whatever standards of conduct and of judgment it applies. This has real value, and independent value, even where the substance of what is done falls short of any relevant ideal of substantive justice.[21]

MacCormick's revised understanding strikes me as sounder than the contrary understanding of Hart and Raz, who refuse to accord to the requirements of the rule of law any of the sort of more-than-merely-instrumental value that MacCormick labels "independent." Plainly it is the case that well-intentioned rulers who genuinely care for justice and the common good of the communities they govern will strive for procedural fairness – and will do so, in part, because they understand that people, as rational agents, are due the respect that is paid them when officials eschew arbitrary decision making and operate according to law. And we can understand this without the need for sociological inquiry into the way things are done by officials in more or less just regimes. Rather, it is the fruit of reflection on what such officials *ought* to do because they *owe* it to those under their governance. But if I am right about this, then respect for the requirements of the rule of law *is not a morally neutral matter* despite the fact that the elements of the rule of law are themselves procedural. Rather, rulers or officials have *moral reasons* and, inasmuch as these reasons are generally conclusive, a *moral obligation* to respect the requirements of the rule of law.

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[19] *Id.*

[20] Neil MacCormick, *Natural Law and the Separation of Law and Morals*, *in* NATURAL LAW THEORY 105, 122 (Robert P. George ed., 1992).

[21] Id. at 123 (emphasis added).

Of course, respect for the rule of law does not exhaust the moral obligations of rulers or officials towards those subject to their governance. Nor, as Fuller's critics, such as Hart and Raz, correctly observe, does respect for the rule of law guarantee that the substance of the laws will be just. If Raz went too far in one direction by treating the rule of law as a morally neutral "efficient instrument," boosters of the rule of law can easily go too far in the other direction by supposing that the achievement and maintenance of the rule of law immunizes a regime against grave injustice and even tyranny.

Here, historical and sociological inquiry is the antidote to overblown claims. Apartheid and even slavery have coexisted with the rule of law. And those legal positivists who claimed that even the Nazi regime worked much of its evil through formally lawful means were not without evidence to support their view. When it comes to the question of the alleged incompatibility of respect for the rule of law with grave substantive injustice, I would venture on behalf of the rule of law only the following modest thesis: An unjust regime's adherence to the procedural requirements of legality, so long as it lasts, has the virtue of limiting the rulers' freedom of maneuver in ways that will generally reduce, to some extent, at least, their capacity for evildoing. Potential victims of injustice at the hands of wicked rulers will generally benefit, if only to a limited extent, from their rulers' willingness, whatever its motivation, to respect the requirements of the rule of law.

Philosophers of law from Plato to John Finnis have warned that wherever the rule of law enjoys prestige, ill-intentioned rulers will find it expedient to – and will – adhere to constitutional procedures and other legal forms as a means of maintaining or enhancing their political power.[22] Plato himself had no illusions that adherence to such procedures and forms would *guarantee* substantively just rules. Nevertheless, he noticed that even apart from the self-interested motives of evil rulers, sometimes to act in accordance with principles of legality, decent rulers always and everywhere have reason to respect these principles, for procedural fairness is itself a requirement of substantive justice – one that is always desirable in human relations and, in particular, in the relationships between those exercising political power and those over whom such power is exercised.[23]

Where the rule of law is respected, there obtains between the rulers and the ruled a certain reciprocity. Now, this reciprocity will certainly be useful in securing certain desirable ends to which it is a means. I have in

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[22] PLATO, STATESMAN 53-72 (Julia Annas & Robin Waterfield eds., Cambridge Univ. Press 1995); JOHN FINNIS, NATURAL LAW AND NATURAL RIGHTS 274 (H.L.A. Hart ed., 1980).

[23] PLATO, *supra* note 22, at 55-60.

mind, for example, various elements of social order, including efficiency in the regulation or delivery of public services, or both, and political stability, particularly in times of stress. But Plato's point, and I see no reason to doubt it, is the moral-philosophical one that, given the dignity of human beings, this sort of reciprocity is more than *merely* a means to other ends. As such, it ought to be protected and advanced wherever possible, and it may not lightly be sacrificed even for the sake of other important goods.

Now, there is a lot packed into my little phrase – more Kantian in flavor, I suppose, than Platonic – "given the dignity of human beings." Although most people have moral objections to cruelty toward animals, we do not consider that pets or farm animals are to be governed in accordance with the requirements of the rule of law. Within the bounds of decency, we hope, the farmer resorts, rather, to Pavlovian methods or, indeed, to whatever it takes to get the chickens to lay and the cows into pasture. Indeed, it would be pointless to attempt to rule nonhuman animals by law since laws cannot function for chickens and cows as *reasons* for their actions. The farmer, rather, causes (or at least attempts to cause) the animal behavior he desires. Humans, by contrast, can be governed by law because legal rules can function in people's practical deliberation as what Herbert Hart described – in an important break with his positivist predecessors, Bentham and Austin, who conceived of legal rules as *causes* of human behavior, rather than as *reasons* – as "content-independent" and "peremptory" reasons for action.[24]

Virtually all philosophical accounts of human dignity stress the moral significance of human rationality. People are indeed, as Neil MacCormick says, "due some respect" as "rational agents."[25] But if this is true, as I believe it is, then perhaps it is worth pausing to consider why and how governance in accordance with the requirements of the rule of law treats people with some of the respect that they are due as *rational* agents. What is it about human rationality that entails a dignity that is violated when rulers treat those subject to their rule the way farmers treat livestock?

Today, when one speaks of human rationality (in virtually any context) one will be understood to be referring to what Aristotle labeled "theoretical" rationality. (Theoretical rationality, as opposed to what Aristotle labeled "practical" rationality, inquires into *what is, was, or could be the case* about the natural, social, or supernatural world; practical rationality identifies possibilities for choice and action and

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[24] *See* H.L.A. HART, ESSAYS ON BENTHAM 243-68 (1982); *see also* DANIEL N. ROBINSON, PHILOSOPHY OF PSYCHOLOGY 50-57 (1985) (providing a particularly illuminating account of the differences between reasons and causes).

[25] MacCormick, *supra* note20, at 123.

inquires into *what ought to be done.*) *Merely* theoretically rational beings, however, could not be ruled by law and would, in any event, no more deserve to be ruled by law than computers deserve such rule. It is hard to see how even theoretically rational agents who, unlike computers, experienced feelings of desire and brought intellectual operations to bear in efficiently satisfying their desires, could be due the respect implied by the rule of law or other requirements of morality. (This is why instrumentalist theories of practical reason such as Hobbes's[26] or Hume's[27] – not to mention the various contemporary reductionist accounts of human behavior which understand human beings as computers who are motivated by desires – have difficulty providing an even remotely plausible account of human dignity, and only rarely offer to do so.) Such agents would not be capable of exercising *practical* reason and making *moral* choices. Their behavior could only be caused ultimately either by external coercion or internal compulsion.[28] Lacking the capacity ultimately to understand and act on the basis of more-than-merely-instrumental *reasons*, they would literally be beyond freedom and dignity. My proposition is that the rationality that entitles people to the sort of respect exemplified in the principles of the rule of law is not primarily the rationality that enables people to solve mathematical problems, or understand the human neural system, or develop cures for diseases, or inquire into the origins of the universe or even the existence and attributes of God. It is, rather, the rationality that enables us to judge that mathematical problems are to be solved, that the neural system is to be understood, that diseases are to be cured, and that God is to be known and loved. It is, moreover, the capacity to distinguish fully reasonable possibilities for choice and action from possibilities that, while rationally grounded, fall short of all that reason demands.[29]

In short, the dignity that calls forth the respect due to rational agents in the form of, among other things, governance in accordance with the rule of law flows from our nature as *practically* intelligent beings, that is, beings whose nature is to understand and act on more-than-merely-instrumental reasons. The capacity to understand and act on such reasons stands in a relationship of mutual entailment with the

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[26] *See* THOMAS HOBBES, LEVIATHAN 134-47 (C.B. MacPherson ed., Penguin Books 1985) (1651).

[27] *See* DAVID HUME, A TREATISE OF HUMAN NATURE 225-27 (David Fate Norton & May J. Norton eds., Oxford Univ. Press 2000) (1740).

[28] *See* GERMAIN GRISEZ ET AL., FREE CHOICE: A SELF-REFERENTIAL ARGUMENT (1976).

[29] *See* Robert P. George, *Natural Law Ethics, in* A COMPANION TO PHILOSOPHY OF RELIGION 460-64 (Philip L. Quinn & Charles Taliaferro eds., 1997) (providing an explanation of this point); *see also* ROBERT P. GEORGE, MAKING MEN MORAL: CIVIL LIBERTIES AND PUBLIC MORALITY 8-18 (1993).

human capacity for free choice, that is, our capacity to *deliberate and choose* between or among open possibilities (i.e., options) that are provided by "basic human goods," i.e., more-than-merely-instrumental reasons.

Free choice *exists* just in case people have, are aware of, and can act upon such reasons; people have, are aware of, and can act upon such reasons just insofar as they have free choice. But if it is true that people possess reason and freedom, then they enjoy what can only be described as *spiritual* powers[30] and, it might even be said, a certain sharing in divine power – viz., the power to bring into being that which one reasonably judges to be worth bringing into being (something "of value") but which one is in no sense compelled or "caused" to bring into being.

What is God-like, albeit in a very limited way, is the human power to be an "uncaused causing." This, I believe, is the central meaning and significance of the (otherwise extraordinarily puzzling) biblical teaching that man (unlike other creatures) is made in the very "image and likeness of God."[31] This teaching expresses in theological terms and proposes as a matter of revealed truth the philosophical proposition I have been advancing about the dignity flowing from the nature of human beings as *practically* intelligent creatures. Its upshot is not that human beings may not legitimately be ruled, but that they must be ruled in ways that accord them the respect they are due "as rational agents." Among other things, it requires that the rule to which human beings are subjected is the *rule of law.*

Reflection on the relationship of human reason and freedom – and the theological significance of this relationship in a religious tradition crucially shaped by the biblical account of man as a possessor of spiritual powers and, indeed, as an *imago dei* – helps, I believe, to make sense of the centrality of law and the rule of law in Western thought about political morality. In particular, it helps to explain the stress laid upon the ideal of the rule of law as a fundamental principle of political justice in the tradition stretching from early and medieval Christian thinkers to John Paul II.

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[30] On the status of free choices as "spiritual" entities, see I GERMAIN GRISEZ, THE WAY OF THE LORD JESUS: CHRISTIAN MORAL PRINCIPLES 50-52 (1983).

[31] [M]an is said to be made in God's image, insofar as the image implies *an intelligent being endowed with free-will and self-movement*: now that we have treated of the exemplar, i.e., God, and those things which come forth from the power of God in accordance with his will; it remains for us to treat of His image, i.e., man, inasmuch as he too is the principle of his actions, as having free will and control of his actions.

AQUINAS, *supra* note 2, at 19.