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COLLEEN MURPHYLON FULLER AND THE MORAL VALUE OF  
THE RULE OF LAW<sup>1</sup>

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## INTRODUCTION

It is often argued that the rule of law is only instrumentally morally valuable, valuable when and to the extent that a legal system is used to pursue morally valuable ends. In this paper, I defend Lon Fuller's view that the rule of law has conditional non-instrumental as well as instrumental moral value. I argue, along Fullerian lines, that the rule of law is conditionally non-instrumentally valuable in virtue of the way a legal system structures political relationships. The rule of law specifies a set of requirements which lawmakers must respect if they are to govern legally. As such, the rule of law restricts the illegal or extra-legal use of power. When a society rules by law, there are clear rules articulating the behavior appropriate for citizens and officials. Such rules ideally determine the particular contours political relationships will take. When the requirements of the rule of law are respected, the political relationships structured by the legal system constitutively express the moral values of *reciprocity* and *respect for autonomy*. The rule of law is instrumentally valuable, I argue, because in practice the rule of law limits the kind of injustice which governments pursue. There is in practice a deeper connection between ruling by law and the pursuit of moral ends than advocates of the standard view recognize.

The next part of this paper outlines Lon Fuller's conception of the rule of law and his explanation of its moral value. The third

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section illustrates how the Fullerian analysis draws attention to the impact that state-sanctioned atrocities can have upon the institutional functioning of the legal system, and so to their impact on the relationships between officials and citizens that are structured by that institution. The fourth section considers two objections to this account. According to the first, Razian objection, while the Fullerian analysis accurately describes the nature of the requirements of the rule of law, it offers a mistaken account of its moral value. Against my assertion that the rule of law has non-instrumental value, this objection argues that the rule of law is only instrumentally valuable. The second objection grants that the rule of law has non-instrumental moral value but claims that the Fullerian account of the requirements of the rule of law is incomplete.

#### FULLER ON THE RULE OF LAW

It is generally agreed that Lon Fuller's eight principles of legality capture the essence of the rule of law. Some argue that Fuller's criteria for the rule of law are incomplete, but few dispute the basic criteria Fuller identifies. Therefore, to develop a working understanding of the rule of law, Fuller's account is a natural starting point. In *The Morality of Law*, Fuller identifies eight requirements of the rule of law.<sup>2</sup> Laws must be **general (#1)**, specifying *rules* prohibiting or permitting behavior of certain kinds.<sup>3</sup> Laws must also be widely **promulgated (#2)**, or publicly accessible. Publicity of laws ensures citizens know what the law requires. Laws should be **prospective (#3)**, specifying how individuals ought to behave in the future rather than prohibiting behavior that occurred in the past. Laws must be **clear (#4)**. Citizens should be able to

<sup>2</sup> Fuller, Lon, *Morality of Law*, rev. ed. (New Haven: Yale University Press, 1969), p. 39. Fuller has an extended discussion of each criterion from pp. 46–90. My summary of Fuller is based on *The Morality of Law* as well as on Jeremy Waldron "Why Law- Efficacy, Freedom or Fidelity?", *Law and Philosophy* 13 (1994): 259–284, David Luban, "Natural Law as Professional Ethics: A Reading of Fuller", *Social Philosophy and Policy* (2001), and Gerald J. Postema, "Implicit Law", *Law and Philosophy* 13 (1994): 361–387.

<sup>3</sup> Fuller notes that this generality requirement is consistent with general injunctions on behavior being issued to specific individuals or groups. To meet the generality requirement, laws need not apply to the entire population.

identify what the laws prohibit, permit, or require. Laws must be **non-contradictory (#5)**. One law cannot prohibit what another law permits. Laws must **not ask the impossible (#6)**. Nor should laws change frequently; the demands laws make on citizens should remain relatively **constant (#7)**. Finally, there should be **congruence between what written statute declare and how officials enforce those statutes (#8)**. So, for example, congruence requires lawmakers to pass only laws that will be enforced, and requires officials to enforce no more than is required by the laws. Judges should not interpret statutes based on their personal preferences and police should only arrest individuals they believe to have acted illegally.

The eight criteria of generality, publicity, non-retroactivity, clarity, non-contradiction, constancy, and congruity specify necessary conditions for the activities of lawmakers to count as *lawmaking*. According to Fuller, law is “the enterprise of subjecting human conduct to the governance of rules”.<sup>4</sup> When lawmakers respect the eight principles of the rule of law, their laws can influence the practical reasoning of citizens. Citizens can take legal requirements and prohibitions into consideration when deliberating about how to act. They can predict how judges will interpret and apply rules, enabling them to form reliable expectations of the treatment different actions are likely to provoke. When the rule of law is realized, their expectations of congruence will not be disappointed. Taken together with the reasonable expectation that fellow citizens will also obey the law, these expectations justify the belief that the law gives citizens reasons to act or refrain from acting in certain ways.

So long as they avoid complete failure with respect to any one principle, lawmakers can meet the requirements of the rule of law to varying degrees and still succeed in making law. At some point, however, widespread violations of the principles of the rule of law diminish the legal character of a system of rules because the laws can no longer figure in the practical reasoning of citizens. Citizens cannot, for example, obey secret rules; if they do not know what the law requires when they deliberate about how to act, they cannot take that requirement into account.

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<sup>4</sup> Fuller (1969, p. 106).

When lawmakers fall far short of the ideal of the rule of law, Fuller argues, citizens start to feel resentment. They rely on knowing how the government expects them to behave in advance. Citizens feel resentment if the expectations are not clear, or are contradictory, or demand the impossible. Their actions will be judged according to a standard they had no fair opportunity to meet.<sup>5</sup> Citizens also feel resentment if they cannot form reliable expectations due to frequent divergence between written law and its enforcement. Failures of congruence undermine the confidence with which citizens can look to the written law to determine what officials expect of them. Resentment builds when officials expect citizens to fulfill certain duties, like obedience to law, despite the failure of government officials to fulfill their reciprocal duties.

This resentment is reasonable. Underlying the resentment citizens feel about violations of the rule of law is, according to Fuller, a sense of fairness or reciprocity. For Fuller, the duties involved in social relationships rest on the reciprocal nature of those relationships. In a particular social relationship, each individual forms expectations about how others they are involved in a relationship with will act. These expectations form the basis for the duties that individuals have towards one another. Reciprocity plays a key role in Fuller's account of duty; according to him, the existence of duties depends partly on the behavior of others. In particular, it is fair to expect me to act in certain ways only if similar expectations hold with respect to those judging my behavior. In the legal context, citizens have a duty to follow legal rules provided those rules outline a standard that citizens are knowledgeable of, capable of following, and that is actually used to judge their conduct. Thus, when they respect the rule of law, officials restrain themselves in certain ways. They do not, for example, pursue the goals of government in the most efficient way if efficiency conflicts with the requirements of the rule of law. Citizens similarly restrain themselves, refraining from disobeying directives with which they disagree.<sup>6</sup>

In Fuller's view, then, the rule of law provides some normative grounds for thinking that citizens have a moral obligation to obey the law. However, this obligation is conditional. It is partly conditional

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<sup>5</sup> See Fuller's discussion of Rex pp. 33–38.

<sup>6</sup> I discuss how the rule of law expresses respect for autonomy in Section Four.

upon the actions of government officials. When government officials routinely violate the rule of law, passing retrospective legislation or basing their legal rulings on personal whim, then citizens no longer have a duty to obey the dictates of a government.<sup>7</sup> As Fuller states, “Certainly there can be no rational ground for asserting that a man can have a moral obligation to obey a legal rule that does not exist, or is kept secret from him, or that came into existence only after he had acted”.<sup>8</sup> Insofar as officials pass clear, prospective, non-contradictory laws and enforce those laws consistently and in accordance with the declared law, citizens have reason to obey the law, even when the government pursues a particular policy with which individual citizens disagree. Fuller’s account helps to explain why it is rational for citizens to participate in the system of cooperation which the legal system establishes. His account also helps us understand the way in which the rule of law limits the arbitrary exercise of power, by setting restrictions on the kind of rules officials can pass as well as on the actions officials legitimately can take.

#### APPLICATIONS TO ARGENTINA

We can use the theoretical framework of the rule of law to shed new light on *why* some behaviors, exhibited in repressive regimes and universally condemned, are in fact morally problematic.<sup>9</sup> Consider Argentina from 1976–1983. During the initial stages of military rule, government officials unofficially conducted an average of 30 kidnappings a day.<sup>10</sup> Over the seven years of military rule, 30,000 individuals disappeared. When describing what happened to the *desaparecidos*, or disappeared, Marguerite Feitlowitz writes,

<sup>7</sup> Fuller (1969, p. 40).

<sup>8</sup> Fuller (1969, p. 39).

<sup>9</sup> My claim is not that the rule of law can provide a useful analysis of every problematic behavior characteristic of repressive regimes or conflict-ridden societies. It focuses specifically on violations of the rule of law that affect the relationship between officials and citizens. There may be other violations by officials that are captured more accurately by a different moral framework.

<sup>10</sup> Feitlowitz, Marguerite, *A Lexicon of Terror: Argentina and the Legacies of Torture* (Oxford: OUP, 1998), p. 25. Feitlowitz cites an anonymous judicial source.

“suspected ‘subversives’ were kidnapped from the streets, tortured in secret concentration camps, and ‘disappeared’. Victims died during torture, were machine-gunned at the edge of enormous pits, or were thrown, drugged, from airplanes into the sea”.<sup>11</sup>

Some military leaders consistently denied responsibility for the disappearances or the existence of concentration camps. Consider President Jorge Rafael Videla, an army general and leader of the first junta. In 1977, in response to a question by a British journalist, he said, “I emphatically deny that there are concentration camps in Argentina, or military establishments in which people are held longer than is absolutely necessary in this . . . fight against subversion . . . I live with my family in a military zone and am certain that I don’t live in a concentration camp”. In 1978 he stated, “In Argentina, political prisoners don’t exist. No one is persecuted or constrained on account of his political ideas”.<sup>12</sup>

Government sponsored ‘disappearing’ of political dissidents in Argentina violated the congruence requirement of the rule of law. Committed on paper to democratic principles and ideals, Argentine written law nowhere sanctioned the kidnapping of civilians deemed ‘subversive’ by plainclothes police officers. Nor did it sanction the use of torture. The lengths to which legal officials went to deny responsibility for disappearances and to label abuse of individuals in detention as ‘regrettable excesses’ rather than torture underline this fact. Thus, the actual activity of law enforcement officials was radically at odds with the picture and description of official behavior sanctioned by the written laws and offered by officials themselves.

Official disappearing of citizens is widely condemned. What the Fullerian analysis provides is an additional insight into *why* such moral condemnation is justified. Disappearing individuals involved egregious violations of individual rights. When explaining the wrongness of disappearing in terms of its impact on the direct victim, or the disappeared, this is the most important thing to focus on. It is this perspective that is most commonly taken when explaining the wrongness of disappearing. However, the Fullerian analysis also draws our attention to the impact that the actions of officials can have upon the institutional functioning of the legal

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<sup>11</sup> Feitlowitz (1998, p. ix).

<sup>12</sup> Feitlowitz (1998, p. 28).

system, and so to the impact on the relationships between officials and citizens that are structured by that institution.

Official ‘disappearing’ of citizens violated the reciprocity at the heart of the relationship between government officials and citizens. Despite their own disregard for the rule of law, Argentine military leaders emphasized the need for obedience on the part of citizens to eradicate the subversive and corrupting elements of society.<sup>13</sup> However, Argentine government officials, through their actions, undermined part of the basis upon which any moral duty of obedience depends.

Such violations of the rule of law also eroded the trust of citizens and alienated them from the judicial system and law-enforcement officials. When government officials violate the congruence requirement of the rule of law, it is unsurprising that distrust develops. It is no longer reasonable to trust politicians who lie or security officials who kidnap and torture citizens instead of protecting them from harm. Citizens who learn about such discrepancies between written law and official action have little reason to believe that other written or publicly espoused policies reflect the policies actually enforced by state agents. It is also unsurprising that citizens feel anger and resentment when government officials violate the rule of law. Agents responsible for disappearings treated with utter contempt those they kidnapped, tortured, and killed in secret. What we learn from Fuller is that this distrust is a product of the absence of reciprocity in the most fundamental political relationships between citizens and government officials.

The Fullerian rule of law framework thus provides a new perspective on why certain immoral behaviors are damaging, not only to the individuals concerned, but to the fabric of trust and reciprocity that underlies healthy political relationships. In the process, we acquire a greater appreciation for how citizens and officials in healthy political relationships act and *why* the health of those relationships depends upon these actions.

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<sup>13</sup> Feitlowitz (1998, pp. 22–23).

## TWO OBJECTIONS

In the previous section, I showed how interpreting certain behaviors exhibited in Argentina under the junta as violations of the rule of law reveals a dimension of wrongfulness not often addressed. Violations of the rule of law as such are morally problematic, I argued, because they undermine the reciprocity at the foundation of the moral duties of citizens and officials towards each other. This is a distinct moral wrong in addition to the wrong undeniably done in violating an individual's rights. Respect for the rule of law is, in my view, one significant aspect of morally healthy relationships between citizens and officials. Both objections challenge my claim to have gone some way towards meeting that goal by describing the nature and moral importance of the rule of law along Fullerian lines. According to the first objection, I misunderstand the moral importance of the rule of law. According to the second objection, I misunderstand the nature of the requirements of the rule of law.

A proponent of the *first* objection, while accepting Fuller's core principles of the rule of law, would reject the Fullerian analysis of its moral value. Instead, on this view, the value of the rule of law is purely instrumental. Whether the rule of law has moral value in specific circumstances is wholly dependent on the goals the legal system is pursuing. When the system's aims are morally good, then the rule of law is morally valuable in virtue of its role in promoting these aims. When the system's aims are immoral, however, the rule of law has no moral value. In contrast, a proponent of the *second* objection would argue that my description of the rule of law is incomplete and, consequently, my account of its moral value too thin. On this view, the rule of law places substantive as well as formal constraints on the laws which can be legitimately passed. According to this objection, including substantive constraints in an account of the rule of law is necessary to make the moral value of the reciprocity underlying respect for the rule of law clearer and more compelling.

I will use the theory of the rule of law offered by Joseph Raz to develop the first objection. For Raz the rule of law is not morally valuable in itself. The essential feature of law, in Raz's view, is that it claims to offer authoritative reasons for action. In other words, we have reason to obey laws simply *because* they are laws. For obedi-

ence to be possible, the law must be capable of guiding behavior. For obedience, and not mere conformity, to occur, law must be able to figure in the practical reasoning of subjects. Thus, the basic intuition around which Raz develops his account of the rule of law is that laws must be such that they can figure in the practical reasoning of subjects.<sup>14</sup> His principles of the rule of law fall into two categories. The first category of principles specifies what character rules must have in order to be law-like rules.<sup>15</sup> For example, laws should be clear, stable, public, and prospective.<sup>16</sup> The second category of principles is required to ensure that the machinery of law enforcement itself does not deprive law of its ability to guide behavior. So, for example, judicial decisions must accord with and be based upon the law. As Raz states,

[I]t is obvious that it is futile to guide one's action on the basis of the law if when the matter comes to adjudication the courts will not apply the law and will act for some other reasons . . . people will only be able to be guided by their guesses as to what the courts are likely to do – but these guesses will not be based on the law but on other considerations.<sup>17</sup>

In addition, Raz sets limits on the powers of other law-enforcing agents.<sup>18</sup> Police should not be allowed to ignore the activities of certain kinds of criminals nor should prosecutors select which individuals to prosecute on the basis of factors not mentioned in the law. Government officials in general should exercise their coercive power only through the channels specified by law.

For Raz, the rule of law is the “specific excellence of the law”. Raz draws an analogy between the property of sharpness in knives and the realization of the rule of law in a legal system. Sharpness is the property that enables a knife to perform its function well. When knives are very sharp, they cut well. Absent a certain minimum level of sharpness, an object which looks like a knife is

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<sup>14</sup> Raz, Joseph, *Authority of Law* (Oxford: Clarendon Press, 1979), p. 213.

<sup>15</sup> Raz notes that the list offered in “Rule of Law and Its Virtue” is not exhaustive. Depending on the particular circumstances of a society, different additional principles may be necessary in order to produce laws capable of guiding subjects.

<sup>16</sup> Raz (1979, pp. 214–215).

<sup>17</sup> Raz (1979, p. 217).

<sup>18</sup> Raz (1979, p. 218).

not, strictly speaking, a knife, because it cannot perform the function of a knife. Analogously, the rule of law is the feature which enables the law actually to guide the behavior of individuals. Absent a certain minimum level of the rule of law, a system of rules may superficially resemble a legal system, but will be unable to guide the behavior of individuals. Raz writes,

The law to be law must be capable of guiding behaviour, however inefficiently. Like other instruments, the law has a specific virtue which is morally neutral in being neutral as to the end to which the instrument is put. It is the virtue of efficiency; the virtue of the instrument as an instrument. For the law this virtue is the rule of law. Thus the rule of law is an inherent virtue of the law, but not a moral virtue as such.<sup>19</sup>

Thus, Raz agrees with Fuller that where law-makers completely violate one principle of the rule of law, what results is not law. He also agrees that, beyond this, realizing the rule of law is a matter of degree. However, Raz rejects the claim that the rule of law has non-instrumental moral value. To the extent that a particular society uses the tool of the law to achieve morally valuable social ends, then the implementation of a legal system acquires derivative moral value. It then becomes morally important to have the legal system perform its function well, thus establishing the moral value of respecting the rule of law. However, absent some such connection with a morally important purpose, the function facilitated by the rule of law, namely, guiding behavior, remains itself morally indifferent.

In the Razian view, then, respecting the rule of law achieves nothing of non-instrumental moral significance.<sup>20</sup> The Razian view

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<sup>19</sup> Raz (1979, p. 226). H.L.A. Hart advocated a similar understanding of the rule of law. According to Hart, there are many purposive activities the successful fulfillment of which may depend on adherence to certain internal principles. However, that there are such principles does not establish that the purpose pursued or the internal principles are moral. In his words, there is a “distinction between the notion of efficiency for a purpose and those final judgments about activities and purposes with which morality in its various forms is concerned”, *Essays in Jurisprudence and Philosophy* (Oxford: Clarendon Press, 1983), p. 350. Hart illustrates this point using the example of poisoning.

<sup>20</sup> Raz in a later work does make a positive case for the moral value of the rule of law in certain democracies. However, his justification of its moral value in these cases stems strictly from how the rule of law contributes to democratic governance. Thus, the view expressed there remains consistent with his earlier

implies that saying that officials and citizens respect the rule of law cannot in itself tell us anything morally significant about their relationship. Since Raz and Fuller agree on the basic criteria for the rule of law, Raz would agree that the examples from Argentina outlined in section three constitute violations of the rule of law. Where there is official denial of illegal practices for which the state is clearly responsible, a discrepancy between the established laws and their enforcement develops. However, on Raz's view, this fact does not add anything to the explanation of the moral wrongness of those actions. The reciprocity and duties undermined by the violations of the rule of law are, for Raz, morally insignificant.

In response, I want to give a more detailed account of the non-instrumental value of the rule of law and the additional moral wrong that I suggest is done in the cases discussed. Let me again emphasize that kidnapping, torturing, and killing citizens are morally wrong for a number of reasons. As we noted earlier, when considering the wrongness of disappearing from the perspective of the disappeared, the explanation of the wrong done should refer to the individual rights which have been violated. Disappearing fundamentally violates an individual's rights to life and liberty. Considered solely from the perspective of the individual disappeared, then, it seems the wrong done to an individual who legally disappeared is as significant as the wrong done to the individual who illegally disappeared. From this perspective, we add nothing significant to the explanation of the wrongness of disappearing when we note that it involved violating the rule of law.

However, the distinctive value of the rule of law emerges once we shift our perspective from the individual to the institutional level. The important moral values of reciprocity and respect for autonomy are expressed in the institutional framework of the rule of law. Consider reciprocity. By rejecting the Fullerian perspective on the rule of law, as the objection does, we overlook the moral basis of the duties involved in the relationships between citizens and officials. The Fullerian account explicitly recognizes that government officials can legitimately expect or demand obedience from citizens,

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view that viewed in isolation the rule of law is morally neutral. See Chapter 16, "The Politics of the Rule of Law", in *Ethics in the Public Domain* (Oxford: Oxford University Press, 1994), pp. 354–362.

and punish those who disobey, only under certain conditions that officials themselves must fulfill, and that the requirements of the rule of law always partially capture those conditions.

In addition, the rule of law constructs a framework of governing that is inherently respectful of people's autonomy. Implicit in the idea of the rule of law is the view that an individual "is or can become a responsible agent capable of understanding and following rules and answerable for his defaults".<sup>21</sup> The duties involved in respecting the rule of law are important in part because of the way that officials govern when they govern by law. When officials respect the rule of law, they treat citizens as responsible and self-directed agents. Citizens are judged based on standards of behavior that they had a real opportunity to follow. Thus, it is the decisions and actions of individuals, and not the whims of officials, which determine the legal treatment they receive. Departures from the principles of the rule of law, Fuller claims, affront an individual's dignity as a responsible agent.<sup>22</sup> When a society abandons the rule of law, it must replace the legal system with some other institution to regulate the behavior of citizens. However, it is not obvious what other kind of system of governance could treat citizens as responsible and self-directed agents in the way and to the extent that a legal system does.

This explanation of the non-instrumental value expressed by respect for the rule of law may seem insignificant. According to this Razian rejoinder, even if we grant that the rule of law has non-instrumental moral value, the goodness of the rule of law is extremely thin, because respecting the rule of law is consistent with all kinds of terrible behavior. Thus, even if we grant that there is a specific kind of reciprocity and respect for autonomy underlying the relationship between officials and citizens, this reciprocity and respect for autonomy do not always amount to anything significant, morally speaking.<sup>23</sup> Consider the case of legislators passing laws to exempt themselves from legal accountability for their actions. Such laws could be clearly written, promulgated, and consistently enforced by officials, and, therefore, be compatible with the require-

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<sup>21</sup> Fuller (1969, p. 162).

<sup>22</sup> *Ibid.*

<sup>23</sup> My thanks to Tom Hill for pressing this objection.

ments of the rule of law. Yet, in effect, only citizens are being held accountable for their failure to fulfill the expectations which leaders make on their behavior.

Nor does reciprocity seem significant when we consider the ends a legal system might serve. In Raz's view, the rule of law does not restrict the ends that a legal system can serve. We can make sense of non-democratic societies, like Nazi Germany, realizing the rule of law. Bad regimes can respect the rule of law and good regimes can violate it. As Raz writes,

A non-democratic legal system, based on the denial of human rights, on extensive poverty, on racial segregation, sexual inequalities, and religious persecution may, in principle, conform to the requirements of the rule of law better than any of the legal systems of the more enlightened Western democracies. This does not mean that it will be better than those Western democracies. It will be an immeasurably worse legal system, but it will excel in one respect: in its conformity to the rule of law.<sup>24</sup>

Similarly, "Racial, religious, and all manner of discrimination are not only compatible but often institutionalized by general rules".<sup>25</sup> The moral value of 'reciprocity' seems of no consequence if it is compatible with the legal pursuit of grossly unjust ends. Nor do departures from the rule of law in these cases undermine or affront man's dignity as a responsible agent. Indeed, it may seem that *departures* from the rule of law are precisely what is required if officials are to respect the dignity of citizens, especially in cases where officials are asked to enforce substantively unjust laws. For instance, surely police officials would have accorded the dignity of black South Africans more respect by violating the congruence requirement of the rule of law than by abiding by it.

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<sup>24</sup> Raz (1979, p. 211). In this paper, democracy or a democratic legal system will refer to a legal system structured to respect the equal moral and political status of all citizens. References to the pursuit of unjust ends will refer to the pursuit of ends that deny the equal moral and political status of a portion the citizenry through, for example, the denial of basic human rights. This is consistent with the view of democracy Raz articulates. As the quotation suggests, the criteria for a legal system to be democratic involve more than simply how the legal system structures elections. The characteristics of a non-democratic legal system partly include violations of the rights of individuals.

<sup>25</sup> Raz (1979, p. 216).

It is a mistake to take the rejoinder as showing that the rule of law is merely and only instrumentally valuable. Rather, what the rejoinder shows is something weaker. It brings to the fore the *conditional* nature of the non-instrumental value of the rule of law. There are, as the rejoinder illustrates, certain contexts in which the reciprocity and respect for autonomy constitutively expressed by the rule of law fail to be realized at all. More importantly, it draws attention to the fact that the rule of law, and its constitutive values, can be realized to a greater or lesser degree in different contexts. However, the rejoinder gets its force from a disputable claim: that conceivability entails (real practical) possibility. Clearly conceivability entails conceptual or logical possibility – that is not in dispute. What I do dispute is that conceivability *guarantees* real, in our world, possibility. That is, when we conduct thought experiments in which we try to imagine in sufficient detail a dictator pursuing unjust ends by means of a legal system that is fully compliant with the Fullerian account of the rule of law, at a certain point our imagined case loses any plausibility. As Jeremy Waldron writes, “The outward appearance of the rule of law may be important for the external reputation of a regime. But those who reflect seriously on humanity’s experience with tyranny know that, in the real world, this problem of the scrupulously legalistic Nazi is at best a question about the efficacy of cosmetics”.<sup>26</sup> That is, it is only if we think of the rule of law as something “cosmetic” that it is compatible with pursuit of deeply immoral ends. Thus, it is unsurprising that historically there has always been a fundamental tension between the rule of law and repressive rule or the pursuit of unjust ends.

Why does the rule by law sit uneasily with non-democratic rule? If a government wants to “frighten [citizens] into impotence”<sup>27</sup> such that they are willing to do whatever the government demands, then respecting the rule of law is incompatible with that end. For example, terror is “the arbitrary use, by organs of the political authority of severe coercion against individuals or groups, the credible threat of such use or the arbitrary extermination of such individuals or groups’ ”.<sup>28</sup> The use of terror can facilitate the

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<sup>26</sup> Waldron (1994, p. 264).

<sup>27</sup> Fuller (1969, p. 40).

<sup>28</sup> Linz, Juan, *Totalitarian and Authoritarian Regimes* (Boulder: Lynne Rienner Publishers, 2000), p. 100.

creation of an uncertain environment, where citizens cannot predict how the government will respond to their actions. The rule of law, on the other hand, creates a predictable environment, in which citizens are confident about the requirements for their behavior and unlikely to be “frightened into impotence”.

Studies of totalitarian regimes frequently discuss the functional role of terror in such regimes. Political scientist Juan Linz, for example, argues that

[Terror is used in] establishing the monopoly of authority and organization, eliminating all autonomous subgroups, destroying physically and morally not only actual but potential opponents, creating an atomized society in which individuals feel unable to trust others, disrupting even the most elementary solidarities like the family and friendship, creating a widespread sense of personal insecurity leading to compliance and even overcompliance.<sup>29</sup>

One defining characteristic of totalitarian regimes is that the ruling group or leader identifies with and legitimizes policies based on “an exclusive, autonomous, and more or less intellectually elaborate ideology . . . The ideology goes beyond a particular program or definition of the boundaries of legitimate political action to provide, presumably, some ultimate meaning, sense of historical purpose, and interpretation of social reality”.<sup>30</sup> Totalitarian governments demand the total compliance of citizens with the requirements dictated by their ideological vision. Such compliance is easier to bring about in an environment where citizens fear what will happen if they show any dissent. Terrorizing a population, in other words, can facilitate compliance. Authoritarian regimes hoping to discourage the citizenry from genuine political participation can also more easily achieve this end in an environment dominated by fear and uncertainty which encourages compliance with government demands.

An additional factor is that the open pursuit of unjust aims or governance via repression makes a government potentially vulnerable to international sanctions.<sup>31</sup> This makes governments very

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<sup>29</sup> Linz (2000, p. 112).

<sup>30</sup> Linz (2000, p. 70).

<sup>31</sup> The nature and extent of the costs of losing support typically do not correlate directly with the degree to which a state violates the rule of law. National interest or international allegiances may mitigate or exaggerate the sanctions members of the international community place on states that violate the rule of law openly.

unwilling to make their systematic discrimination as public or explicit as they would have to if they wanted to make it consistent with the rule of law. When the methods of repression and the exact nature of the injustice being pursued are clearly, publicly articulated in laws, then it is more likely that a government will be pressured or feel pressure to change its method of governance or its policies. If the political leadership of a country makes explicit the fact that it is severely repressing its citizenry, it does so at the cost of having to completely isolate itself from the international community. If it is not isolated, then the political elites of other countries will be in communication with its own leaders. However, elites from other countries will not want to be associated with leaders openly responsible for and legally endorsing the repression of their citizenry. In addition, a government that explicitly states the nature of the injustice it is pursuing and legalizes intense repression risks undermining its legitimacy in the eyes of its citizens, for such legal sanctioning makes it very difficult for citizens to deny the brutality and injustice of 'their' government officials. So respecting the rule of law will be a very unattractive prospect for such a government.

Despite the fact that the rule of law is often incompatible with the pursuit of non-democratic ends, there are significant political costs in the international arenas for governments that openly violate the rule of law.<sup>32</sup> Neil MacCormick echoes a common sentiment when he writes, "A concern for the rule of law is one mark of a civilized society. The independence and dignity of each citizen is predicated on the existence of a 'governance of laws, not men'".<sup>33</sup> The legitimacy of a government is partially tied to respecting the rule of law. If a state openly violates the rule of law, it risks for this reason becoming a pariah in the international arena. In addition, respect for the rule of law increases the legitimacy of a government in the eyes of its citizens. Leaders who openly violate the rule of law also risk losing part of their standing among citizens. For

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<sup>32</sup> David Dyzenhaus discusses the relationship between international legitimacy and the rule of law as well as the political costs involved in violating the rule of law in his *Judging the Judges, Judging Ourselves* (Oxford: Hart Publishing, 1998).

<sup>33</sup> MacCormick, Neil, "Rhetoric and the Rule of Law", in David Dyzenhaus (ed.), *Recrafting the Rule of Law: The Limits of Legal Order* (Oxford: Hart Publications, 1999), p. 163.

these reasons, though it is inefficient for dictators or authoritarian rulers to limit their power by *actually* respecting the requirements of the rule of law, there is great reason to maintain the *façade* of legality.

Similar considerations often apply to democratic societies in conflict. Violent conflict frequently strains the rule of law in democracies. When analyzing the ‘Troubles’ in Northern Ireland, Brendan O’Leary and John McGarry discuss how “[d]epartures from traditional English legal procedures have become normal as a result of the conflict in Northern Ireland”.<sup>34</sup> Particular violations they cite include the fabrication of evidence by police in particularly politically volatile investigations after bombings. Such fabrications led to the wrongful convictions of the Guildford Four and Birmingham Six. Democratic leaders have historically advocated the detention of individuals who might be members of a suspected group, violating normal processes of due law or the presumption of innocence until proven guilty.<sup>35</sup> For certain periods in Northern Ireland detention without trial became customary. The rule of law makes it difficult to adopt policies like internment without trial although such things might be attractive options for ending conflict.

The process of subverting the rule of law is not always overt. While some officials may consciously manipulate the appearance of their rule so that it appears in the international arena to cohere with the requirements of the rule of law, many officials are in denial about or unaware of the corrosive effects of their actions on the legal system. Consider the role of judges in apartheid South Africa.

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<sup>34</sup> O’Leary, Brendan and John McGarry, *The Politics of Antagonism: Understanding Northern Ireland*, 2nd ed. (London: Althone Press, 1996), p. 48.

<sup>35</sup> The tension between sustaining the rule of law amidst conflict is becoming evident in the case of the United States. According to a report issued by the Justice Department’s inspector general, “the usual presumptions of the legal system were turned upside down in the aftermath of the attacks on Sept. 11, 2001. As a result, people detained on immigration charges were considered guilty until proven innocent and were often held for months after they had been ordered released. At times, the ordinary rules were replaced by no rules or perverse ones, the report said”. Justifications given for the unusual procedures typically appealed to the extreme nature of the situation and national emergency caused by 9–11. Liptak, Adam. “For Jailed Immigrants, a Presumption of Guilt” <http://www.nytimes.com/2003/06/03/politics/03ASSE.html>

Judicial oaths require judges to swear to uphold justice. As David Dyzenhaus writes “judges everywhere claim that their duty is not simply to administer the law, but to administer justice”.<sup>36</sup> However, Dyzenhaus argues, the majority of judges in apartheid South Africa endorsed a judicial ideology which had the effect of forcing them to make decisions which resulted in systematic injustice. Judges failed to see how deeply the common law presumptions underpinning the South African legal system were in conflict with the purpose of the apartheid program and the rules passed to enforce the apartheid system. Common law heritage includes a commitment to protect the fundamental rights and freedoms of individuals.<sup>37</sup> Consequently, judges were “at one and the same time being asked to articulate and give effect to equitable common law principles, and to uphold and enforce discriminatory laws: at one and the same time to be an instrument of justice and at another to be an instrument of oppression”.<sup>38</sup> Someone might argue that apartheid judges failed in their moral duties, but that would be different than the claim being offered here, which is that judges failed in their role *as judges*. Dyzenhaus argues that judges failed in their role as judges because they failed to expose explicitly the contradiction at the heart of the apartheid legal order. Instead of exposing the deep conflict between the rule of law and the apartheid program, insofar as it contradicted the principles at the very foundation of the apartheid legal system, judges endorsed a judicial ideology which required them to interpret laws as Parliament intended and obscured this fundamental contradiction. They were thus able to convince themselves that they were upholding the rule of law, and defend their actions under apartheid, when in actuality their judgments had precisely the opposite effect.

Many of the judges who did appear before the TRC legal hearing tried to rationalize their role in apartheid. They would appeal to the role they had in mitigating the unjust effects of apartheid legislation, when in actuality few judges used the resources at their disposal to reach verdicts of a maximally just sentence. Such denial of complicity in injustice is unsurprising, given our fundamental

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<sup>36</sup> Dyzenhaus (1998, p. 34).

<sup>37</sup> Dyzenhaus (1998, p. 15).

<sup>38</sup> Dyzenhaus (1998, p. 15).

psychological need to believe that we are moral.<sup>39</sup> Individuals typically recognize their moral shortcomings and imperfections; the crucial thing is to be able to distinguish particular imperfections from the characteristics of evil or amoral persons. However, individuals do not form their identities in isolation. The perceptions of others affect our self-conception. Therefore, it is also important that *others* recognize our moral identity and do not think of us as evil or morally vicious persons. Moreover, individuals have a psychological need for narrative unity. Typically, individuals construct a story or narrative in which they had or have reason to perform certain actions. Such narrative construction both allows us to justify our actions (that seem evil to others) and helps us individually to make sense of our actions.<sup>40</sup>

The above considerations apply metaphorically to nations. No nation thinks of itself as evil or immoral. National identities typically emphasize the virtues and values characteristically exhibited through its history. National identities, however, are influenced by the perceptions and judgments of other nations. Thus, it is important that other nations do not think of one's nation as evil or immoral. Typically, the history of a nation is in part a narrative justifying the actions of that nation. Such narrative construction helps members of a nation make sense of their nation's history and justify their nation's actions which others may perceive as evil or immoral.

Actually fulfilling the requirements of the rule of law makes it very difficult for government officials to deny responsibility for immoral actions or unjust policies. When government officials respect the requirements of the rule of law, citizens know what actions and policies the government is responsible for committing and enforcing. The requirements of the rule of law set up conditions that ensure open and clear governance. When they respect the rule of law, then, government officials are forced to publicly endorse and implement unjust actions and immoral policies. Yet, given the need for individuals to maintain their moral identity, it is

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<sup>39</sup> For an interesting discussion on denial in a political context see Stanley Cohen's *States of Denial: Knowing about Atrocities and Suffering* (Oxford: Polity Press, 2001).

<sup>40</sup> There is a philosophical tradition of thought that emphasizes the social component of identity formation. Jean-Jacques Rousseau, David Hume, and G.W.F. Hegel, for example, discuss the fundamental human need for recognition.

less likely that government officials will pass grossly unjust laws and sanction immoral policies openly. Doing so undermines the perception of goodness, or at least lack of evil, which it is important for individuals to maintain. For, as Fuller states,

Even if a man is answerable only to his own conscience, he will answer more responsibly if he is compelled to articulate the principles on which he acts . . . It has been said that most of the world's injustices are inflicted, not with the fists, but with the elbows. When we use our fists we use them for a definite purpose, and we are answerable to others and to ourselves for that purpose. Our elbows, we may comfortably suppose, trace a random pattern for which we are not responsible, even though our neighbor may be painfully aware that he is being systematically pushed from his seat. A strong commitment to the principles of legality compels a ruler to answer to himself, not only for his fists, but for his elbows as well.<sup>41</sup>

Eugene de Kock, dubbed 'Prime Evil' among South Africans, was a commanding officer of state-sanctioned death squads responsible for killing and torturing African National Congress (ANC) activists during apartheid. He is currently serving a 212-year prison sentence for crimes against humanity. When interviewed by psychologist Pumla Godobo-Madikizela, he stated that "the dirtiest war you can ever get is the one fought in the shadows . . . There are no rules except to win. There are no lines drawn to mark where you cannot cross. So you can go very low – I mean very low – and it still doesn't hit you".<sup>42</sup> Denial of responsibility for atrocities or wrongdoing, or recognition that you are doing wrong, is much easier to maintain when your actions are secret.

I have been arguing against the claim that it is possible in our world for a government to fully comply with the requirements of the rule of law while pursuing grossly unjust ends.<sup>43</sup> In the process I have shown another, instrumental reason for valuing the rule of law. Not only does respecting the rule of law involve recognizing the reciprocal nature of the duties officials and citizens have towards one another and respecting the autonomy of citizens, in practice the

<sup>41</sup> Fuller (1969, p. 159).

<sup>42</sup> Godobo-Madikizela, *A Human Being Died That Night* (Boston: Houghton Mifflin Co., 2003), p. 20.

<sup>43</sup> The argument reflects and supports Fuller's own trust in procedures. As Fuller writes, "If we do things the right way, we are likely to do the right thing". in "What Law Schools Can Contribute to the Making of Lawyers?" *Journal of Legal Education* 189 (1948–1949): 189–203. See p. 203.

rule of law limits the kind of injustice which governments pursue. However, this above line of thought may leave some still dissatisfied. Just look, someone might say, at how many regimes *did* openly pursue immoral ends while respecting the rule of law. What about South Africa? Or Argentina?

When you examine these cases carefully, however, you realize that only the *façade* of legality was maintained by these regimes. For example, the Argentine report *Nunca Mas* states about the Argentine judiciary during the dictatorship that “[a]lthough intended by the Supreme Law of the Nation to protect citizens from excesses of authority, it now condoned the usurpation of power and allowed a host of judicial aberrations to take on the appearance of legality”.<sup>44</sup> In South Africa, not only was there systematic *de facto* extra-legal use of torture and death squads targeting ANC activists, both officially denied, there was at its very foundation a contradiction in the apartheid legal system. There was on the one hand a program designed to restrict the liberty and rights of the majority of a population legally enacted by a common law legal system, at the foundation of which is a commitment to protecting the liberty and rights of all citizens. As Dyzenhaus argues, respect for the rule of law would have required judges to openly recognize and in their rulings articulate the fact that a commitment to apartheid required a rejection of a foundational principle of the common law legal system.<sup>45</sup> South African judges, by obscuring and ignoring this fundamental contradiction, failed to uphold the rule of law. History is replete

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<sup>44</sup> *Nunca Mas: The Report of the Argentine National Commission on the Disappeared*, Part III: Judiciary. Spanish and English editions of the report are available on the web at [www.nuncamas.org/index.htm](http://www.nuncamas.org/index.htm).

<sup>45</sup> Part of what drives Fuller’s focus on reciprocity is a concern to have the dignity of individuals qua responsible agents respected. Given this underlying concern, it may seem that filling out an account of what reciprocity involves might include a commitment to protecting human rights. In the case of South Africa we have a clear example of a legal system that, given its common law presumptions, in practice requires that all citizens be treated as equals and with respect. There may be resources that perhaps, with additional argument, would make the Fullerian account of the rule of law and its underlying principle look similar to Dworkin’s account of the rule of law. However, additional argument is needed to show that what is true in the South African case is true generally and, more importantly, that Fuller is committed to this more substantive understanding of the rule of law on his own terms.

with examples of repressive regimes and societies in conflict where violations of the rule of law were commonplace. History provides few examples of repressive regimes or civil conflicts where the rule of law flourished alongside the pursuit of systematic injustice. In virtually all, the rule of law was weakened.

It is important to emphasize that I have been arguing against the compatibility of the pursuit of *systematic* injustice and the rule of law. It is of course possible that particular immoral or unjust laws be passed in accordance with the requirements of the rule of law. Respect for the rule of law does not guard against every injustice. In addition, there may be cases where racism or prejudice against a particular group in society makes it likely that actions viewed as impermissible against the dominant group seem justifiable against a minority group. Or there may be certain circumstances, like threats to national security, where actions previously viewed as beyond the pale suddenly become viable options. Even in these cases, however, the rule of law can play a role in limiting injustice. It is important to recognize that members of a society are forced to be fully aware of what they are sanctioning if they sanction torture or the discriminatory allocation of resources. It is likely that even in these cases the rule of law will mitigate or restrict the use of torture. In addition, such a society opens itself up to sanctions from the international community to the extent its violations of international norms are enshrined in laws.

In summary, the first objection I considered in this section is that respect for the rule of law has no non-instrumental moral significance. I discussed the conditional non-instrumental values of reciprocity and respect for autonomy expressed by respect for the rule of law. I then argued that in practice there is a deep tension between ruling by law and systematically pursuing unjust ends. Appealing to the hypothetical scenarios Raz sketches therefore does not mitigate the value reciprocity has in practice, for such scenarios do not represent practical possibilities. The reciprocity between citizens and officials, the recognition that the duties and obligations that each can demand depends in part on their own actions, is morally significant for non-instrumental reasons as well as for the instrumental role it can play in limiting injustice. Given the nature

of its value, respect for the rule of law is an important component of healthy political relationships.

According to second objection, respect for the rule of law is fundamentally important and valuable, but my account fails to explain sufficiently for its worth. On a more substantive conception, the rule of law imposes specific restrictions on the content of the law. The rule of law requires that certain fundamental individual rights be constitutionally guaranteed and protected in practice. Advocates of the second objection are motivated to expand the requirements of the rule of law in order to strengthen and clarify the connection between respect for the rule of law and the pursuit of substantive justice. In the view of advocates of this conception of the rule of law, my omission of the protection of individual rights or respect for fundamental moral principles represents a conspicuous error in my account of the rule of law. By adding such substantive limits on the behavior of government officials, the objection goes, the moral significance of the reciprocity at the heart of the relationship between citizens and officials structured by the rule of law seems much clearer. Now part of the rules requires officials to respect the individual rights of citizens.

I do not think these additional aspects of the relationship between citizens and officials are appropriately captured by the rule of law. Different ideals of political morality capture distinct aspects of political relationships. The rule of law is only one of the ideals of political morality. As Raz rightly states, “The rule of law is a political ideal . . . It is . . . just one of the virtues which a legal system may possess and by which it is to be judged”.<sup>46</sup> It is important not to exaggerate the value or scope of respect for the rule of law and not to conflate different ideals of political morality.<sup>47</sup> The

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<sup>46</sup> Raz (1979, p. 211).

<sup>47</sup> One consequence of the fact that the rule of law is one ideal of political morality is that there may be situations in which, all things considered, it is best to violate the rule of law or fail to obey those who generally uphold it. There may be times when the pursuit of another ideal of political morality – for example, justice in the distribution of resources – requires compromising the principles of the rule of law, and we may be morally obligated, all things considered, to violate the rule of law. What my argument highlights is that, even in these situations, we should still recognize that something morally valuable is thereby lost, even though on balance its loss is justified.

requirements of the rule of law relate specifically to the function of law, which is to guide behavior. Respecting rights specified in foundational documents may become part of the requirements of the rule of law, insofar as violations of those rights conflict with the requirement of congruence between written statutes and their enforcement. However, they do not, apart from their relationship with the congruence requirement, specify requirements of the rule of law. Respecting rights is not a precondition for guiding behavior.<sup>48</sup> Thus, it is not appropriately part of the ideal of the rule of law.

The requirements of the rule of law specify a minimum threshold for desirable behavior. However, it would be a mistake to underestimate the non-instrumental value of these requirements or of the basic reciprocity such requirements express. In many societies in transition to democracy, for example, the very notion that officials are bound by the publicly articulated, clear and consistent rules represents a radical shift from the understanding and behavior of officials prior to the transition. The idea that the obligation that citizens have to obey officials is conditional on the actions of officials is often absent as well. That there is reciprocity and considerations of fairness at the heart of this political relationship, like all relationships, is, in these circumstances, a foundational idea which needs to be articulated and emphasized and is articulated and emphasized by the ideal of the rule of law I endorse. It would be a mistake to downplay the importance of recognizing and developing the basic reciprocity at the heart of the rule of law because its presence can be taken for granted in certain societies.

Department of Philosophy  
University of North Carolina at Chapel Hill  
CB#3125, Caldwell Hall  
Chapel Hill, NC 27599-3125  
USA  
E-mail: cmmurphy@email.unc.edu

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<sup>48</sup> Advocates of this conception of the rule of law would need to argue for the claim that respecting rights is a precondition for guiding behavior.