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A republican argument for the rule of law

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ABSTRACT
While the rule of law is surely a very important good, the familiar discussions found in the literature lead many to conclude that it is either a relatively trivial political ideal, or else a redundant one. What is needed is a new and persuasive defense of the rule of law that properly reflects its great significance for human well being. An important step towards building such an argument is to question a widely-shared but often unnoticed assumption that the rule of law should be understood as a virtue of legal systems. The path is then cleared for a republican argument built on two theses: first, the thought that an ideal society would be one in which no one is the master of anyone else, and second, the thought that our freedom from domination is not natural or pre-institutional.

KEYWORDS Rule of law; republicanism; freedom from domination; Lon Fuller; H.L.A. Hart; Joseph Raz

Introduction

This paper aims to defend the value of the rule of law from a republican point of view. Does the rule of law need defending? It might seem that it does not. Along with human rights, democracy, international cooperation, and so forth, the rule of law is widely acknowledged to be a good thing already. Nevertheless, the various arguments we have for its value are unsatisfactory. While it is surely a very important good, the familiar arguments found in the literature do not reflect this importance: some characterize the rule of law as a relatively trivial ideal, others as a redundant one. What is needed, and what this paper hopes to provide, is a new and persuasive defense of the rule of law that properly reflects its great significance for human well being.

The rule of law, this paper argues, is best understood as the fundamental solution to the distinctively republican challenge of securing freedom from domination: not only does the rule of law deliver a significant degree of republican freedom in its own right, it is also a precondition for our securing the rest.[1] Articulating this argument will lead us to change how we conceive of rule of law ideal and, in the process, reveal why the standard discussions in the literature have proved so unsatisfactory. We shall find that the rule of

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law is not, as commonly believed, a virtue of legal systems, but rather a virtue of social orderings.

The focus of this paper will be on conceptual issues concerning the rule of law and its value in relation to republican freedom; it will not address the institutional and other requirements necessary to implement the rule of law in practice. Republicans have distinctive views about these matters as well, which unfortunately must be here set aside.[2] The first section of the paper briefly reviews the unsatisfactory standard accounts of the rule of law, and then proposes a new approach starting from republican premises. The second develops a picture of the law as a mode of human association. The third sketches a phenomenological account of the distinctiveness of law, which then serves as the basis in section four for completing the normative argument for the value of the rule of law. Finally, the fifth section responds to a serious worry that the sort of freedom secured by the rule of law cannot be reconciled with the modern social-welfare state.

Three approaches to the rule of law

In most contemporary discussions, the rule of law is characterized as a list of specific virtues applicable to legal systems. While there is no consensus on what this list should or should not include, there is considerable overlap in the virtues proposed: among the most frequently mentioned, for example, are generality, prospectivity, publicity, clarity, consistency, and stability.[3] Some authors attempt to pare down this list to a few fundamentals, while others elaborate or expand the list considerably, but all more or less agree that to enjoy the rule of law is essentially to be subject to a legal system composed of clear and consistent general rules that are published in advance and not changed too often.

There is a serious difficulty with this framework, however, for it seems to diminish the value of the rule of law considerably. To be sure, it is widely recognized that it is easier to plan our lives when legal rules are predictable, consistent, and clear; more significantly, perhaps, the very enterprise of subjecting human conduct to the governance of rules may entail respecting those so governed as responsible moral agents.[4] But these are limited benefits. For example, there is no reason a regime of slave law could not perfectly well observe the rule of law virtues so understood: rules permitting the ownership of human beings can be made clear and consistent, can be published in advance, and so on. No doubt slaves benefit to some extent from the rules being clear, but surely the evil of human bondage overwhelms such paltry goods.

To avoid this problem, we might be tempted to reinterpret the rule of law virtues as substantive normative constraints. Generality, for instance, might be thought to require some degree of substantive legal equality.[5] The basic list of principles noted above might also be supplemented with other, even more explicitly normative requirements: we might claim that the rule of law

includes a requirement that the legislative process be open and democratic, or that the legal system recognize and respect individual rights.[6]

On a substantive interpretation of the rule of law, it is perfectly clear why we should regard it as valuable: such requirements would significantly constrain the purposes to which evil regimes might direct the law. Slavery, for example, would obviously be ruled out. Unfortunately, there is an important difficulty with this approach as well. Raz (1979) expresses the difficulty succinctly as follows:

> If the rule of law is the rule of good law then to explain its nature is to propound a complete social philosophy. But if so the term lacks any useful function. We have no need to be converted to the rule of law just in order to discover that to believe in it is to believe that good should triumph. (p. 211)

In other words, interpreted substantively, the rule of law simply represents a view about what sorts of laws it would be good to have. To argue that the rule of law is a good thing would then be to argue, redundantly, that good laws are a good thing. The concept of the rule of law might, on this view, serve as a more or less useful shorthand for that aspect of social justice which applies to the design of legal systems, but it would perform no independent work of its own.

Thus we arrive at an impasse. To clear the way for a fresh start, let us set aside these familiar discussions, and approach the problem from a different direction. This paper aims to defend the value of the rule of law from a specifically republican point of view. For present purposes, republicanism may be characterized as any public philosophy that regards the promotion of freedom from domination as its central ideal. Republican freedom can be defined as follows:

> **F**: *A* is free to ϕ provided there is no *B* having the uncontrolled ability to intentionally frustrate *A*'s ϕ–ing.[7]

Here we may suppose that *A* is a person, while *B* is another person or group. It is reasonable to suppose that enjoying some range of freedom from domination, so defined, is an important condition of human flourishing: when subject to domination people are among other things materially exploited, hindered from developing autonomous life plans, and deprived of self-respect.[8] To be sure, freedom from domination is not the only condition of human flourishing, and it follows that we may sometimes face difficult choices in which we will have to balance the need for freedom from domination against other important needs. Such issues are temporarily set aside, however.

Domination can take many forms, corresponding to the many different ways in which persons or groups might frustrate our choices: people may experience economic domination, psychological domination, cultural domination, and so on. An especially worrisome form of domination, however, arises specifically whenever people are exposed to coercive force. Here we

may take coercive force to mean roughly the use or imminent threat of violence or physical restraint. Republicans have good reasons for being centrally concerned with coercive force. For one thing, domination of this sort is no doubt particularly damaging to human well-being: thus, in securing our freedom from the domination that arises specifically out of the potential use or imminent threat of violence or physical restraint, we advance republican aims in an important respect directly.

But more than this, in the absence of clear expectations about when we are likely to be exposed to coercive force, hardly any of the other benefits of human association are possible. When people "live without other security, than what their own strength, and their own invention shall furnish,' Hobbes (1998) famously observed,

> … there is no place for industry; because the fruit thereof is uncertain: and consequently no culture of the earth; no navigation, nor use of the commodities that may be imported by sea; no commodious building; no instruments of moving, and removing such things as require much force; no knowledge of the face of the earth; no account of time; no arts; no letters; no society; and which is worst of all, continual fear, and danger of violent death …. (p. 85)

Imposing controls on the use of coercive force will thus also satisfy a necessary precondition for our addressing any other sort of domination as well. Combating economic domination, for instance, will certainly require erecting a range of regulatory and redistributive public policies and institutions, which we cannot hope to do unless some baseline of public order is already in place.

The special challenge for republicans, however, will be to impose controls on the use of coercive force in a way that is *itself* consistent with republican freedom. It will not do merely to replace one source of domination with another – uncontrolled private violence, say, with uncontrolled state violence.[9] That was Hobbes's solution, and he believed there was no other. This paper argues that the rule of law is best understood as precisely the desired alternative – a solution to the problem of controlling the use of coercive force while respecting republican principles. The rule of law on its own will not deliver complete freedom from domination. But it will deliver some, in reducing our exposure to coercive force, and it will open a public space within which policies and institutions designed to reduce other forms of domination become possible. At the same time, respecting the rule of law will ensure that our efforts on both fronts do not simply introduce new forms of domination in place of the old.[10]

In the process of carefully working through this argument, we will be led to a new and better way of understanding the rule of law ideal, one that reveals why the standard accounts in the literature are so unsatisfying.

Law as a mode of association

Let us begin by reflecting rather broadly on the felt experience of law. The law, we might say, is one mode of human association among others.[11] By mode of association here I mean roughly an arrangement of practices for managing the expectations and motivating the cooperation of diverse individuals.

It is obvious that there are enormous benefits to be gained from association with others – benefits from mutual assistance, from the division of labor, from exploiting diverse talents or abilities, and so forth. These benefits can be secured, however, only when people manage to coordinate their various efforts, and the mere promise of benefit is not itself always sufficient to ensure that they will. Successful coordination is not automatic. It requires, first, that each individual have reasonably clear expectations regarding what everyone is supposed to do; and second, that each individual be sufficiently motivated to perform his or her part in particular. Coordination can fail, therefore, through either a failure to clarify expectations, or a failure to sufficiently motivate cooperation, or both.

There are many reasons these failures might arise despite the promise of mutual benefit. Three in particular stand out. The first is lack of information. Individuals might not be aware that there are benefits to be had from coordination, or know how those benefits might be obtained. When it comes to economic planning, for instance, the relevant information might simply be too vast and dispersed to be collected and properly understood by all the relevant actors. Even in much simpler situations, however, merely not knowing one another's preferences can obstruct coordination. Imagine a group of henchmen who all detest a dictator, but each without knowing that the others do: even if it would be easy for them to depose the dictator working together, they might not succeed simply for want of confidence that the others will go along.

The second is disagreement. Even when individuals know each other's preferences, and that benefits can be obtained through mutual cooperation, they might disagree about how that cooperation should be organized. Sometimes this will be because they have different goals or aims. A group of environmentalists might only succeed in influencing Congress, for example, provided they coordinate their lobbying efforts: unfortunately, some want to prioritize wilderness preservation and others global climate change. Disagreements can also arise concerning how to divide the benefits of cooperation. Even supposing the dictator's henchmen manage to communicate their mutual preferences to one another, they might fail to organize a coup because they cannot agree who among them should become the new ruler.

The third is incentive failure. Sometimes, even when we know about the mutual benefits of coordination, and agree how that coordination should be organized, we fail through the lack of sufficient incentive. This problem

commonly arises when there are externalities to the actions of individuals. Imagine a group of workers who can secure better terms of employment if they present a united front to their employer. Unfortunately, so long as the other workers remain on strike, it is in the interest of each individual worker to go back to work, since the benefit of doing so accrues entirely to the lone defector, whereas the cost is shared by all. Likewise, even if we all know that reducing pollution is necessary, and even if we all agree how to distribute the cost of that reduction fairly, there still remains the problem of ensuring that each does his or her particular part.

To secure the benefits of association, then, these and perhaps other challenges must be overcome: mutual expectations must be clarified, and cooperation sufficiently motivated. Fortunately, there are many ways to do this. One very familiar approach, for example, is through hierarchical organization. Suppose one person is designated the association's leader, and the others are assigned to various ranks. Whenever there is disagreement as to what should be done, the higher ranked person decides. When two parties to a dispute have the same rank, their dispute is settled by a mutual superior, as so on. Call this the *mode of authority*. The mode of authority is the usual manner in which expectations are clarified and cooperation motivated within corporations, armed forces, and many governmental organizations.

There are many other modes of association, however. Suppose we regard members of the association as equals. Whenever there is disagreement as to what should be done, everyone gathers together and debates the merits and demerits of the different options. Once discussion has run its course, consensus (if reached) or the will of the majority governs. Call this the *mode of deliberation*. Alternatively, suppose initial property holdings are settled in the association. Whenever there is some question as to what should be done, the interested parties engage in a process of bargaining and trading. Generally, the preference of the party willing to pay most determines the outcome, though perhaps with various side-payment to the others. Call this the *mode of bargaining*.

Each of these differing approaches to managing expectations and motivating cooperation has its own distinctive character. In other words, the way people do things and relate to one another in the context of a hierarchical organization is different from the way they do things and relate to one another in the marketplace, and either from the way they do things and relate to one another in the democratic forum. It follows that the felt experience of participating in each mode of association will be different.

Which mode is best? It should be obvious that there is no general answer to this question. Some are better for some sorts of problems and situations, others are better for other sorts of problems and situations. Often, they work best in combination, and thus it is not surprising that many examples of each can be found in various domains of all reasonably complex societies.

Now the law is yet another mode of association, different and distinct from each of the modes just mentioned. It too can be thought of as a particular arrangement of practices for managing the expectations and motivating the cooperation of diverse individuals. Sometimes it is said that the law is more fundamental than the other modes – indeed that it makes them possible. Public offices are created by law, for example, as are property rights, and there can be no authority without office, no bargaining without property. But this is obviously a mistake. It ignores the possibility that systems of authority and ownership might be based on social convention or custom rather than law.

What are fundamental are social rules – customs, conventions, norms, and so forth. It is from complex and to some extent overlapping configurations of social rules that the distinct modes of law, authority, deliberation, and bargaining are ultimately constructed. Exactly what sets the mode of law apart from the others we will explore in the following section. Whether we ultimately agree on a specific view about the distinctive character of law, however, the mere intuition that it must have some such character is enough to foreshadow the path our argument will ultimately follow. Let me explain.

It will not be difficult to imagine that there are going to be certain problems or situations in which it is better to manage expectations and motivate cooperation through the mode of law than any alternative. To clarify, this is not the familiar claim that the law's legitimacy derives, at least in part, from its capacity to solve coordination problems.[12] Of course the law can solve coordination problems, but so too can market exchange, democratic deliberation, and so on. The relevant claim here is instead a comparative one: given that the different modes of association have different characteristic features, it stands to reason that in some contexts it will be better to organize our activities through law, just as in others it will be better to organize our activities through markets, and so on.

In which contexts might law be best? Very plausibly, we might think, in addressing the particular challenge set out in the previous section – namely, how to manage the use of coercive force. The rule of law ideal, I shall argue, should be understood in the first instance as the normative claim that it is always best for the use of coercive force to be controlled by law.[13] Our next task is to explain why.

The felt experience of law

To understand why the use of coercive force is best managed by law, it would seem we need an account of the distinctive character of law as a mode of human association. This is too tall an order for a short discussion. However, we can make do with something less. To motivate the basic normative argument for the rule of law, we need only work out a few distinctive features of law, especially insofar as these are relevant to the use of coercive force.

We might be tempted to begin with the common thought that there is an important distinction to be made between standing rules and particular commands, and that whatever else is true of the law, it is surely first and foremost a system of rules.[14] Immediately we run into objections, however.

The issue is not, as usually believed, the problem of *distinguishing* rules from commands in the relevant sense. It is of course true that at a certain point there is no analytically sharp or precise distinction between rules and commands, but this need not undermine our argument. It is equally true of nearly all social phenomena that they exist on continua – that one tends to shade into the next. It does not follow that our felt experiences of all social phenomena are the same. Everyone knows what it feels like to be treated disrespectfully, say, even though there exist certain grey areas in which we cannot with analytic precision say whether a person has been treated with due respect or not. Since we experience different social phenomena differently, there will be normative reasons to organize our social world in some ways rather than others: thus we have reasons to ensure that people are treated with respect, so far as this is possible. Similarly, we can perfectly well make do with a rough contrast between rules and commands. Provided there are many cases in which it is obvious that something is a rule, and many others in which it is obvious that something is a command, the existence of harder cases at the margins need not impede progress.

In this spirit, let us say that a *rule* prescribes an open-ended course of conduct defined abstractly and indefinitely, whereas a *command* prescribes a concrete and specific action. Thus 'wait in line for service' is a rule, whereas 'stand here until told otherwise' is a command. As a useful shorthand, we might say that rules are practices while commands are performances.[15]

The real difficulty with characterizing the law as a system of rules lies elsewhere. Recall that our aim is to get a handle on the distinctiveness of law. The problem is that all modes of association, including the law, seem to rely on a healthy mix of rules and commands. Since this can most easily be seen by comparing the modes of law and authority, I begin there. Suppose that some town has an anti-littering ordinance which carries a 100 USD fine. The somewhat indifferent Andrea nevertheless litters in the town square, and is issued a ticket by officer Bob. When she subsequently appears in court, judge Carla orders Andrea to pay the fine, which she begrudgingly does. Everything in this little story is by the book, so to speak, from a rule of law point of view. Notice that many different rules are involved here, and not only the obvious one against littering: police officers lie under the rule, 'ticket anyone who litters', judges under the rule, 'order properly ticketed litterers to pay the appropriate fine', and so on. But commands are involved as well: in the end, Andrea was commanded by the judge to pay 100 USD to the public purse, and in the event that she refused, this command was assuredly backed by coercive force.

Now consider a different town without an anti-littering ordinance. This town is governed autocratically by Carla with the support of her henchman Bob. As it happens, Carla is not overly fond of Andrea. Seeing her litter in the public park one day, Carla instructs Bob to force Andrea to pay 100 USD to the public purse as a punishment. Now this is obviously an example of coercive command, but it turns out that rules are involved here as well. In particular, everyone in this town lies under the rule 'do what Carla says'. It is important that we see this *is* a rule in the relevant sense: in effect, this is the insight that underlies Hart's famous critique of classical positivism, though here pressed into broader service.[16] Given the natural equality of human beings, as Hobbes observed, it is simply not possible for any one person to successfully impose her will on many others through force alone. At the core of even the most despotic authoritarian organization there must be some sort of coordination rule among at least an inner circle of henchmen according to which they all follow the commands of their designated leader. Thus the town is not ruled by fear of Carla, strictly speaking, but rather by fear that unilateral deviations from the rule 'do what Carla says' will have bad consequences *given the expectation that everyone else* – and especially her henchmen – *will continue to observe that rule*.

Now one might protest that the authority-conferring rule is not written down and published, as was the anti-littering ordinance in the first town. But surely this does not matter. The experiential contrast between the two towns would not be reduced in any appreciable way if the rule 'do what Carla says' was in fact written down and published. That there is a contrast between the two towns cannot be denied; it just cannot be *simply* the fact that the first town is organized through rules, while the second is organized through commands.

Let us try another approach. What matters for our argument is the *felt experience* of law. Accordingly, consider things from Andrea's point of view. Specifically, since what we are ultimately concerned with is the incidence of coercive force, let us ask what Andrea must do, practically speaking, if she wants to avoid being exposed to the use or imminent threat of violence or physical restraint.

In the first town, the relevant rule for Andrea is 'don't litter'. Provided she follow this rule, she can reliably avoid experiencing coercive force. Now one might complain that the precise meaning of littering is subject to dispute, that it is in the nature of rules to have gaps, indeterminacies, and so forth; thus Andrea cannot be entirely certain whether Bob or Carla will regard some borderline conduct as littering in the relevant sense. We must grant this, of course, but the objection misses the point. Clearly there exists a wide swath of conduct that any town resident would without hesitation agree does not count as littering. Provided Andrea actually cares about avoiding coercive force, she need only confine herself to operating within this comfortable range. Notice here that when she does so, it does not matter who in particular

is the officer, nor who in particular is the judge: to that extent, the rule in question is, we might say, *impersonal*.

In the second town, the relevant rule for Andrea is 'do what Carla says'. Again supposing Andrea wants to avoid coercive force, this rule does not leave her without recourse. There are in the second town, just as much as in the first, paths of conduct she might follow that would ensure she is not likely to experience the use or imminent threat of violence or physical restraint. These paths of conduct are rather different in character, however. For instance, suppose that Andrea has a reasonably good sense of Carla's personality or internal psychology: in this case, Andrea might adopt the plan of complementing Carla and earning her good graces. So long as Carla thus remains favorably disposed towards Andrea, Andrea can be reasonably certain she will not experience coercive force. Alternatively, suppose that Andrea happens to know Bob is susceptible to bribery: in this case, Andrea might litter as much as she please, provided she is willing to bribe Bob to look the other way. So long as Bob continues to accept bribes, Andrea can be reasonably certain she will not experience coercive force. Notice, however, that in either case the strategies Andrea might adopt are not impersonal: on the contrary, they are highly dependent on the particular identities of the persons ingratiated or bribed. Substitute another ruler or henchmen, and Andrea may have to adjust her strategy accordingly.

In short, what distinguishes the towns is not that one is organized through rules while the other is organized through commands, nor even that strategies for avoiding coercive force are available in the first town but not the second. What distinguishes them is rather the *differing types* of strategies available in each town. Importantly, whatever else is true about the first town, it presents one opportunity not readily available in the second: namely, it is common knowledge in the first town that one can reliably avoid being exposed to violence or physical restraint by simply following an impersonal public rule.

Here we have been relying on the mode of authority for our contrast, but notice that the contrast works equally well for the modes of democratic deliberation and bargaining. In either of these latter modes, there will be strategies available for securing the reliable avoidance of coercive force, but in neither case will the strategies be impersonal. In democratic debate, for example, the outcome will depend on some combination of Andrea's rhetorical skills, together with the contingent preferences and beliefs of the others in the assembly. In bargaining, the outcome will depend on Andrea's available resources, together with the contingent preferences and resources of those with whom she is bargaining.

Let us provisionally characterize law as the impersonal coercive enforcement of public rules. It is of course a well-established dogma in contemporary legal philosophy that coercion is not an essential feature of law.[17] Whether this

dogma is sound or not we may here set aside, for our interest lies not in the concept of law or legal obligation, but rather in how ordinary people characteristically experience law as a possible way to manage the use of coercive force. We need not pretend that our working definition captures everything true and distinctive about the law: it is enough that it capture the distinctiveness of law as relevant for the particular normative argument that will follow.

Accordingly, let us say that coercive force is *controlled by law* when there exist impersonal public rules the following of which reliably ensures that we will not be exposed to violence or physical restraint. This gives us a straightforward test for determining the extent to which the rule of law obtains in any given situation or context. Taking any person *A*, we must simply ask ourselves whether there exist rules of law known to her such that, provided she undertake a reasonable effort to observe those rules, she will not ordinarily be exposed to coercive force. To the extent that our answer is yes, we may then say that she enjoys the rule of law, and not otherwise. More generally, societies enjoy the rule of law to the extent that all public and private uses of coercive force are controlled law.

The republican argument for the rule of law

We may now weave together the various threads of discussion and complete the normative argument for the rule of law. Why is it best for all public and private uses of coercive force to be controlled by law? The main steps in the argument can be summarized as follows:

(1) Law is the impersonal coercive enforcement of public rules.
(2) When coercive force is employed in the impersonal support of a public rule, people can avoid being exposed to that coercive force by observing the rule, without depending on the good will of other human agents.
(3) People should be able to avoid being exposed to coercive force without depending on the good will of other human agents.
(4) Coercive force should never be employed *except* in the impersonal support of public rules (from [2] and [3]).
(5) Some uses of coercive force can be prevented only by having public rules that are themselves coercively enforced.
(6) There should be some law (from [1], [3], and [5]).
(7) There should be no uses of coercive force apart from law (from [1] and [4]).

Step two maintains that when coercive force is employed in the impersonal support of public rules, people can avoid being exposed to violence or physical restraint by following the rules, without having to secure the good

will of another human agent (for instance, through ingratiation or bribery). This thought was introduced in the previous section through a vignette. More generally, we might think of a public rule as any prescriptive guideline that as a matter of common knowledge in the relevant community more or less clearly partitions possible paths of action into those that count as observing the rule and those that do not. Provided it is common knowledge what the rule requires – in central cases at least – it should be possible for a person to avoid being exposed to coercive force merely by selecting from among the paths of action that fall on the correct side of the partition.[18] Provided the rule is impersonally enforced, it should not matter who the person happens to be, nor who the particular enforcers of the rule happen to be.

Step three – the claim that people should be able to avoid coercive force without depending on the good will of other human agents – follows from our republican commitment to the value of freedom from domination. There are many varieties of domination but, as we explained earlier, among the more consequential is that which flows from the ability of some to employ violence or physical restraint against others. Significantly, for republicans it matters not just how *probable* it is that an agent might employ coercive force, but also the *character* of that probability. If Bob is unlikely to employ coercive force against Andrea simply because he happens to be favorably disposed towards her, this will be unsatisfactory from a republican point of view: their relationship remains a hierarchical one insofar as Andrea's ability to avoid coercion depends on his continued good will. Put another way, the republican ideal is a society in which no one is the master of anyone else – a society of genuinely free and equal citizens.[19]

Notice that our argument here would not go through on the more familiar negative conception of freedom as the mere absence of hindrance or interference.[20] This is the view of Hobbes, according to whom the liberty of a person 'consisteth in this, that he finds no stop in doing what he has the will, desire, or inclination to do' (1651, p. 139). The use or imminent threat of violence or physical restraint undoubtedly counts as a hindrance in the relevant sense, but the conception of freedom as non-interference only gives us a reason to be concerned with the expected probability that people will actually encounter such hindrances. If our aim were simply to minimize that probability, the method of authority might serve just as well as the method of law: ruthless autocrats can be very effective at imposing social order through terror, thus ensuring their subjects experience relatively little violence or physical restraint quantitatively speaking – provided they keep their heads down, of course.

Putting the previous two thoughts together yields step four. If people should be able to avoid being exposed to coercive force without depending on the good will of other human agents, and if they can do so to the extent that coercive force is employed only in support impersonal public rules, then

it follows that the use of coercive force should be limited to the impersonal enforcement of public rules.

Step five introduces a further republican thought – namely, that our freedom from domination is not natural or pre-institutional (see Pettit, 1997, pp. 106–109). In the proverbial state of nature, there would be no freedom from domination, since we would have no assurance that others might not have the power to frustrate our choices whenever they so desire. More specifically, in the case of coercive force, we are all vulnerable to violence or physical restraint in the absence of institutional protection. It is difficult to see how in large modern societies we might prevent people from exercising coercive force over one another except by having impersonal public rules prohibiting such coercion (rules against murder, assault, rape, etc.), and then coercively enforcing those rules.[21] Thus, as Blackstone (1979) observed, 'laws, when prudently framed, are by no means subversive but rather introductive of liberty,' and indeed 'where there is no law, there is no freedom' (p. 122). This claim makes little sense on the conception of freedom as non-interference, according to which all laws as such are hindrances, even if by removing some freedoms others might be better protected.[22]

From step five, step six clearly follows: given that people should be able to avoid coercive force, and that they can do so only if there are some impersonal and coercively enforced public rules, there should be some such rules. By the definition stipulated in step one, this is equivalent to saying that there should be some law. Though obvious on reflection, this important aspect of the rule of law is often ignored in the contemporary literature, which focuses almost exclusively on detailing the principles of legality. Indeed Raz (1979) goes so far as to claim that the 'rule of law is designed to minimize the danger created by the law itself,' as if we could satisfy the ideal of the rule of law simply by having no law (p. 224).

Finally, step seven adds that there should be no public or private uses of coercive force *except* for the impersonal enforcement of public rules. In other words, we do not satisfy the rule of law ideal if the legal system authorizes public or private coercion, no matter how clear and consistent, generally framed, and published in advanced that authorization happens to be. Taken together, steps six and seven articulate the rule of law ideal. This is the ideal famously, though very imperfectly, expressed in Harrington's (1977) words as an 'empire of laws and not of men' (p. 161). Or, as Paine (1995) says, 'in free countries the law ought to be king; and there ought to be no other' (p. 34).

The argument, now complete, leads us to a new way of thinking about the rule of law ideal. The fundamental error underlying most accounts in the standard literature is a simple but subtle one. The rule of law is not properly understood as a virtue of legal systems, but rather as a virtue of social orderings: societies enjoy the rule of law to the extent that all public and private uses of coercive force are managed through the mode of law, and

neither left unmanaged nor managed through some other mode.[23] The significance of this change in orientation can be illustrated as follows.

Consider a society in which there is a law that prohibits spouses from suing each other, and another that prohibits spouses from testifying against each other in criminal cases. If we think the rule of law is a virtue of *legal systems*, then we would have to concede that the family law regime in this society answers to that ideal, for its rules are perfectly clear, general, consistent, prospective, and so forth. But if we think the rule of law is a virtue of *social orderings*, a different picture emerges, for it is very far from the case that every public and private use of coercive force in that society is actually controlled by law. On the contrary, spouses can to a considerable extent employ or threaten to employ violence or physical restraint against one another at their personal discretion, without effective legal consequence. To clarify, the issue here is not that the law is *silent* with respect to inter-spousal coercion. The rule of law would not be satisfied, on the view we have proposed, by the addition of a third law explicitly authorizing such coercion. To actually *control* the use of coercive force, the law must do more than merely grant a stamp of legal approval, so to speak, to that use. Specifically, as we have stipulated, it must articulate a set of impersonal public rules such that, provided people undertake a reasonable effort to follow those rules, they will not ordinarily be subjected to violence or physical restraint at the hands of others.

Notice that on the correct view, the rule of law virtues so central to the standard accounts are revealed to be conceptually derivative. Suppose that within some regime of slave law, a new set of legal restrictions are introduced significantly reducing the discretionary authority of slave owners. Further suppose that these new regulations are only partially effective because they score rather poorly on clarity, consistency, publicity, and so forth. On the standard view, we should say that the rule of law has declined somewhat, insofar as the average degree of clarity, consistency, publicity, and so forth in the legal system as a whole has decreased. On the correct view, we should say that the rule of law has improved somewhat, insofar as more potential uses of coercive force are now controlled, albeit imperfectly, by law.

It should be obvious with a bit of reflection that the rule of law, so conceived, is going to be very far from a trivial ideal. The law of slavery is to a large extent a law for slave owners, protecting their discretionary authority to coerce slaves as they please. However clear and consistent its rules, however generally framed and published in advanced, those rules inevitably leave a large domain of coercive force effectively uncontrolled by law. While it is true historically that slave law regimes tended towards moderation over time, introducing more and more constraints on the treatment of slaves, slavery can never be fully reconciled with the rule of law so long as it includes the fundamental discretionary right to buy, sell, and transport human beings as property.

At the same time, this account of the rule of law is not redundant, as are the usual substantive accounts: it is not reducible to the mere assertion that good laws are a good thing. Rather, it rests on a strictly descriptive account of the felt experience of law as a mode of social ordering, together with a normative argument to the effect that this is the best mode when it comes to managing the use of coercive force. It does not wait on a full account of social justice.

The rule of law and republican policy

Earlier we stressed that the rule of law on its own does not deliver complete freedom from domination. But in reducing our exposure to coercive force it delivers some, and by introducing a measure of social order it makes possible our securing the rest. Securing the rest, however, will require a wide range of public policies and institutions. To combat economic domination, for instance, we may need regulatory policies to protect collective bargaining rights, antitrust agencies to break up concentrations of market power, and redistributive programs to ensure that everyone's basic needs are met.[24] This raises further questions for republicans. Is it realistic to suppose that we can combat domination in its many forms without granting public officials extensive discretionary powers? And if not, can that discretion be reconciled with the rule of law?

Friedrich Hayek famously claimed that the modern social-welfare state is fundamentally at odds with the rule of law.[25] Roughly speaking, the argument is that modern societies are incredibly complex and dynamic, far beyond the capacity of even the most diligent experts to fully understand in detail. It is thus impossible to predict the effects social legislation will have in particular cases. Policies that seem to serve reasonably well at first will almost certainly turn out to have perverse, self-defeating, or unjust consequences in unanticipated future circumstances. To secure or maintain the desired outcomes, therefore, it will be necessary to delegate wide discretionary authority to public officials so they can address complex problems as they arise. But this is precisely what the rule of law condemns: the individuals subject to such discretion will not experience coercive force only when they fail to observe impersonal public rules of law, but rather according to the whim or pleasure of the relevant public officials. Thus we cannot advance social welfare without abandoning the rule of law.

Hayek of course welcomed this conclusion, as grounds for rejecting the modern social-welfare state. Ironically, his argument has been lent further credibility by some progressives who, granting the alleged incompatibility, suggest that we reject the rule of law instead.[26] If either view is right, that would certainly be disheartening. For many, it would call into question the republican ideal of an empire of laws and not of men. Fortunately, as this final

part of the paper argues, the rule of law is compatible with granting public officials the sort of discretion they will need to achieve the full range of republican aims.

Importantly, there are different possible sources of discretion.[27] One sort of discretion arises from the nature of rules themselves. As noted earlier, all public rules involve partitioning the set of possible circumstances and the set of possible responses into categories, and then drawing a map between the two. The anti-littering ordinance, for example, gathers all those situations in which a person has littered together and assigns a fine of 100 USD as the appropriate response. Now these partitions can be given various degrees of specificity along a more or less continuous range. At one end of the range we might have relatively specific *bright-line rules*, such as 'drive at 55 miles per hour or less' or 'don't drink until you are 21', while at the other end we might have relatively less specific *standards*, such as 'drive a reasonable and prudent speed' or 'don't drink until you are sufficiently mature'. Given the immense diversity of possible circumstances, however, few public rules could ever be so detailed and specific as to render their implementation strictly mechanical. It follows that at least some discretionary judgment will usually be necessary to apply any given rule to a particular situation. Let us call this first sort of discretion *rule-implementing discretion*. The degree of such discretion will be less in the case of bright-line rules, more in the case of standards.

Notice, however, that the degree of rule-implementing discretion tracks the content of the rule in question, not its reliability. For a public rule to be reliable, there must exist some mechanism for holding the relevant parties to account for observing it, and thus a very different sort of discretion can emerge when such mechanisms are absent or ineffectual. Let us call this second sort of discretion *accountability discretion*. While it is true that excessive rule-implementing discretion can give rise to accountability discretion, they are nevertheless distinct.[28] This can be seen if we imagine a community in which, although there is a bright-line rule 'drive at 55 miles per hour or less', speeding tickets issued by the police cannot be challenged in court: here the police have very little rule-implementing discretion in principle, but extensive accountability discretion in practice. Dicey (1982), in his review of nineteenth-century French administrative law, was very concerned about the accountability discretion created when agents of the state are granted broad legal immunities in the conduct of their official duties (chapter. 21). To some extent prosecutors in the United States enjoy a similar immunity, and thus accountability discretion in the exercise of their charging authority.[29] Even when formal accountability mechanisms are in place, they may prove ineffectual if the content of a rule is so poorly formulated that there is no general agreement among reasonable people as to what counts as observing the rule. This might happen because the terms of the rule are excessively vague, inconsistent, or politically controversial. Current asylum adjudication in the United States might be an unfortunate example.[30]

Finally, distinct from either rule-implementing or accountability discretion, a third sort of *strong discretion* emerges when controlling rules are simply absent alltogether.[31] Such discretion might be explicit, as for example, when autocratic rulers are granted emergency powers to condemn or pardon prisoners of state. It might also arise implicitly from the failure to create rules, as for example, when masters hold discretionary authority over their slaves in the absence of laws explicitly regulating their treatment. At least in modern democratic societies, pure cases of strong discretion when it comes to the use of coercive force are probably rare.

Now which sorts of discretionary authority, if any, can be reconciled with the rule of law? The rule of law requires that the use of coercive force be properly controlled by impersonal public rules. Now it is easy to see that neither strong discretion nor accountability discretion meet these conditions: in neither case will it be possible to form reliable expectations concerning the incidence of coercive force. Recall our imagined community where police-issued speeding tickets cannot be contested: despite the existence of a bright-line rule on paper, drivers in such a community will in practice be vulnerable to coercive force simply at the whim and pleasure of the police.

Fortunately, we have no reason to believe that the achievement of republican aims will ever require granting public officials strong discretion or accountability discretion. But what about rule-implementing discretion? Suppose that in order to combat economic domination, we need to create an antitrust agency to break up concentrations of market power. Given the dynamic complexity of the social and economic world, it may not be possible to provide in advance a detailed specification of how or when this should be done – or at any rate, not if the agency is going to succeed in its aims over time. It follows that the legislation governing such an agency will probably be better crafted as flexible standards than as bright-line rules, and to that extent the agency may exercise considerable rule-implementing discretion.

Can the sort of rule-implementing discretion, sometimes needed to achieve republican aims, be reconciled with the rule of law? Under suitable conditions, I believe it can. First, suppose that the *aim* and *scope* of the relevant discretionary authority is precisely defined. In the case of an antitrust agency, for instance, the governing laws might direct the agency to promote open markets while limiting it's ambit to firms of a certain size. Second, suppose there are explicitly rule-governed *procedures* for exercising the relevant discretion. Perhaps the antitrust agency must first perform a study of the relevant industry, then hold a public hearing, allow for a period of notice and comment, and so forth. Finally, suppose effective mechanisms of *accountability* hold the relevant public officials to each of these various rules and procedures. Firms can challenge the agency's findings in court, elected officials can subject the agency to oversight, and so on.

Of course it is beyond the scope of the present discussion to detail how, practically speaking, these conditions are best met in any particular instance. In principle, however, when they are suitably met it will be possible for people to form sound expectations about how and when discretionary authority will be exercised, and thus sound expectations concerning the likely incidence of coercive force. From our point of view, that is what matters. People might not agree that there should be an antitrust agency, or they might complain that it has set the bar for open markets too high, or they might dispute its findings in this or that particular case. But nevertheless, it will be common knowledge what the agency's purposes are and how it will go about its business, and it will be easy enough to steer clear of its reach should one desire to do so.

Thus there is no necessary incompatibility between the rule of law and the pursuit of the full range of republican policy aims. In many cases, we will simply not need to grant public officials significant discretionary powers. Securing everyone's basic needs, for example, might most effectively be done through an unconditional basic income grant, which would involve hardly any discretion on the part of public officials at all.[32] In other cases where public officials might combat domination more effectively with a greater degree of rule-implementing discretion, republicans can happily concede such discretion, provided the above conditions for its exercise are suitably respected.

This is not to say, of course, that modern social-welfare states do in fact limit themselves to rule-implementing discretion, or even when they do that they always respect the above conditions for its exercise. Quite the contrary. However it is to say – at least from a republican point of view – that they ought to.

Conclusion

This paper has argued that the rule of law has significant value for human well being insofar as it is essential for securing our freedom from domination. It is perfectly consistent with this argument to believe that the rule of law confers other benefits as well: certainly it can provide a stable framework of expectations for people to plan their lives, and it might even enhance human dignity by respecting people as responsible moral agents. But the law is not unique in its ability to deliver these other goods. Properly functioning markets, for example, can generate clear expectations, and democratic deliberation respects people as responsible moral agents, perhaps better than law. The argument from republican freedom shows why law is special – why it is not merely a good, but a necessary good. When it comes to governing the use of coercive force in a manner consistent with our freedom, we have no apparent substitute for law.

For all that, it is important not to fall into the trap of regarding the rule of law ideal as a complete public philosophy. Though a very important and perhaps sometimes underrated political value, it is by no means the only

thing we should care about. Inevitably it follows that the value of the rule of law will sometimes conflict with other values – values of democracy, or equality, or historical justice, and so forth. Since the rule of law will not in all cases take priority over these other values, we must accept that it has limits.[33] It is not my ambition in this paper to trace those limits, however: it has simply been my aim to explore where the real value of the rule of law lies, and to express that value with as much force and clarity as possible. Doing so is the necessary first step to assigning the rule of law its appropriate place in any complete public philosophy.

Notes

1. Kramer (2010) and Sharon (2016), among others, have doubted the proposed connection between republican freedom and the rule of law. This paper aims to supply the argument they find wanting in the republican literature.
2. Most importantly, republicans hold that it will not be possible to implement the genuine rule of law in any society that does not adequately subject public officials to popular control: see Pettit (1997 and 2012).
3. Standard lists of the rule of law virtues can be found in Fuller (1969, pp. 46–91), Raz (1979, pp. 214–218), or Finnis (1980, pp. 270–271). For a detailed recent discussion, see Marmor (2004).
4. For a discussion of the former, see Waldron (1989); according to the compelling interpretation in Rundle (2012), the latter represents Fuller's view.
5. This might follow, for example, if we understood generality to require that legal distinctions be acceptable to a majority of persons in each distinguished class, as proposed by Hayek (1960, pp. 153–154).
6. See for example, Bingham (2010) and Dworkin (1985), respectively.
7. On the republican conception of freedom see especially Pettit (1997), Pettit (2012), and Skinner (1998), and the papers collected in Laborde and Maynor (2008).
8. For further discussion, see Pettit (1997, pp. 85–89), Maynor (2003, pp. 52–59), or Lovett (2010, pp. 130–34).
9. Pettit (1997, pp. 105–106, 171–172) characterizes this as the challenge of reducing *dominium*, or private domination, without increasing *imperium*, or political domination.
10. As noted in the introduction, we here set aside the institutional challenge of ensuring that public officials actually respect the rule of law.
11. Though the terminology here is borrowed from Oakeshott (1983, p. 119 and *passim*), the definition that follows is by design conceptually thinner.
12. Such claims date back at least to Aquinas, if not before; modern versions can be found in Finnis (1980, pp. 351–352) and Raz (1999, pp. 64, 159).
13. Whether or how far we might want to extend this ideal to certain non-coercive activities is beyond the scope of this paper. One might argue, for example, that all state action – coercive or otherwise – should be controlled by law.
14. This is the central basis for the argument in Hayek (1960), for example.
15. This helpful phrasing is derived from Oakeshott (1983, pp. 129–130). Note that 'command' as here defined should not be confused with the broader sense of 'command' relevant for debates concerning the command theory of law. The

distinction drawn in the text roughly corresponds to the distinction between the two species of command as defined by Austin (1998, pp. 18–24).

16. See Hart (1994, esp. chapter. 4): roughly, he argues that the will of a sovereign does not make law, but rather the following of a rule of recognition by legal officials.
17. This dogma is largely due to Hart's (1994) influential attack on Austin, now widely accepted. Some have challenged it, however: see for example, Schauer (2010).
18. Note that this condition might not hold for persons outside the relevant interpretive community who are thus unable to grasp the central public meaning of the rules. Here we might consider not only young children and the mentally disabled, but perhaps also in some cases the members of different cultures.
19. The argument in this paragraph is not contradicted by the approbation we normally assign to the unforced exercise of good will. Thus it is perfectly consistent to regard the behavior of Danish citizens who hid Jews from the Nazis as noble, and also to believe that there should have been public rules the latter might have followed to avoid being sent to concentration camps in the first place. Jews should not have had to depend on the goodwill of Danish citizens, but they did, and the latter are to be praised for having extended it.
20. For further discussion, see Pettit (2009).
21. Here we remain agnostic as to how far it might be possible in small, tightly-knit communities to effectively control the use of coercive force through social convention and custom alone, and thus in a sense to enjoy the rule of law without law.
22. Cf. Bentham's assertion (1987, p. 57) that 'all laws creative of liberty, are, as far as they go, abrogative of liberty.'
23. Something like this approach might be found in Fuller's earlier writings, before the debate with Hart: see Rundle (2012). Glimpses can perhaps also be seen in the contrast he draws between law and managerial discretion in his 'Reply to Critics' (1969, esp. pp. 207–210).
24. For discussion, see Pettit (1997, pp. 158–165) and (Pettit, 2012, pp. 110–117).
25. See esp., Hayek (1960). Many of his arguments were foreshadowed in Dicey (1982), and have recently been recyled in Epstein (2011).
26. For an excellent review, see Scheuerman (1994).
27. Here we will discuss the discretion to determine specific outcomes – e.g. whether or not someone will be coercived – not the discretion to create or change the rules themselves. Though important and complex, it is beyond the scope of this paper to properly analyze the nature of legislative authority.
28. Some argue, for instance, that the loose interpretation the U.S. Supreme Court has given to the 'public use' standard for eminent domain amounts in effect to a grant of accountability discretion: see Epstein (2011, pp. 109–113).
29. For a recent critique of prosecutorial discretion, see Pfaff (2017, chapter. 5).
30. Legomsky (2007) argues that the shocking inconsistency in current U.S. asylum adjudications stems in part from deep ideological differences.
31. Dworkin (1977, p. 32). Whereas Dworkin contrasts strong discretion with the other two sorts of what he terms 'weak discretion,' it will turn out on our analysis that the more significant cut is between rule-implementing discretion and the other two.
32. For discussion, see Lovett (2010, pp. 190–203).

33. Some of which are discussed in Marmor (2004, pp. 9–38).

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