

Law's Two Moralities

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ABSTRACT

There are two Moralities of Law. The first is the Morality of the Rule of Law. The second is the Morality of Legality. The Morality of the Rule of Law is broad. It calls for (1) clear, general, publicly accessible rules laid down in advance; (2) prospectivity rather than retroactivity; (3) conformity between law on the books and law in the world; (4) hearing rights; (5) some degree of separation between (a) lawmaking and law enforcement and (b) interpretation of law; (6) no unduly rapid changes in the law; and (7) no contradictions or palpable inconsistencies in the law. The Morality of Legality is narrower. It calls for fidelity to existing law. It usually plays an important role within the executive branch, where violations of existing law are often (not always) experienced as taboo. The Morality of Legality can be seen as an inference from the Morality of the Rule of Law and, in particular, from (3) and (5). Neither of the two Moralities of Law takes a stand on free markets, freedom of speech, economic equality, or democracy. Still, both moralities are important. A nation that lacks the Morality of Legality is in deep trouble. A nation that lacks the Morality of the Rule of Law is going to become authoritarian.

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INTRODUCTION

My aim here is to distinguish between two Moralities of Law. The first is the Morality of the Rule of Law. The second is the Morality of Legality. One might think of the second as a subset or an entailment of the first, but it is important (I think) to distinguish the two.

The Moralities of Law are limited ideals. They do not require free markets or a small administrative apparatus. They do not require, or even call for, democracy, freedom of religion, or freedom of speech. They do not promote economic equality, health care, housing, or anything like those things. Some people

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think that they *forbid* economic equality,¹ but that is not right either. They can coexist with grotesque violations of human rights. Still, they are exceedingly important. A nation that lacks the Morality of Legality is in deep trouble. A nation that lacks the Morality of the Rule of Law is going to become authoritarian.

This Article begins with a discussion of the ingredients of the Rule of Law, drawing attention to its associated morality. It offers several overlapping accounts and urges a particular one. It urges that the Rule of Law must be distinguished from the Rule of Good Law. The Article then turns to the Morality of Legality, a far more limited idea, but nonetheless one of special importance, above all in government, where it imposes a kind of taboo. Government lawyers should and often do live in accordance with the Morality of Legality. From there, the Article explores the distinctive foundations of the Morality of Legality and its limitations. The Article then investigates the complex relationship between the Morality of the Rule of Law and the Morality of Legality. A brief conclusion emphasizes the immense importance of both of law's moralities.

I. THE RULE OF LAW VS. THE RULE OF GOOD LAW

What is the Rule of Law? How do we know that it has been violated? Does it have a distinctive morality? Some people identify the Rule of Law with an assortment of what they see as good things, such as democracy or free markets. Here is one account:

The function of the legislature in a free society under the Rule of Law is to create and maintain the conditions which will uphold the dignity of man as an individual. This dignity requires not only the recognition of his civil and political rights but also the establishment of the social, economic, educational and cultural conditions which are essential to the full development of his personality.²

Other people associate the Rule of Law with what they see as bad or not-good things, such as economic inequality.³ Thus Morton Horwitz writes:

I do not see how a Man of the Left can describe the rule of law as “an unqualified human good”! It undoubtedly restrains power, but it also prevents power's benevolent exercise. It creates formal equality—a not inconsiderable virtue—but it promotes substantive inequality by creating a consciousness that radically separates law from politics, means from ends,

¹ See, e.g., Morton J. Horwitz, *The Rule of Law: An Unqualified Human Good?*, 86 YALE L.J. 561, 566 (1977).

² JOSEPH RAZ, *THE AUTHORITY OF LAW: ESSAYS ON LAW AND MORALITY* 210–11 (1979) (quoting Clause 1 of the Report of Committee I of the International Congress of Jurists at New Delhi, 1959).

³ See Horwitz, *supra* note 1, at 566.

processes from outcomes. By promoting procedural justice it enables the shrewd, the calculating, and the wealthy to manipulate its forms to their own advantage. And it ratifies and legitimates an adversarial, competitive, and atomistic conception of human relations.⁴

One can define terms however one likes, but these conceptions of the Rule of Law are recipes for confusion. They conflate diverse things. Lon Fuller⁵ and Joseph Raz,⁶ among others, have given a more tailored and specific account, one that is not subject to this set of objections, and that is appealingly crisp and narrow. Raz writes, "If the rule of law is the rule of the good law then to explain its nature is to propound a complete social philosophy. But if so the term lacks any useful function."⁷ It follows that the Rule of Law is not the Rule of Good Law. Speaking of what he calls the Morality of Law, Fuller points to "eight distinct routes to disaster."⁸ These are:

1. a failure to make rules at all, which means that all issues must be resolved on an ad hoc basis;
2. a failure to publicize rules, which means that those affected do not know what they are supposed to do;
3. an abuse of retroactive legislation, meaning that people are under threat of retroactive change;
4. a failure to make rules understandable;
5. enactment of contradictory rules;
6. enactment of rules that require people to do things that they lack power to do;
7. such frequent changes in the rules that people cannot orient their action in accordance with them;
8. a failure of congruence between the rules on the books and the rules as administered.⁹

Fuller calls these the morality that makes law possible, or more briskly the Morality of Law.¹⁰ He says:

A total failure in any of these eight directions does not simply result in a bad system of law; it results in something that is not properly called a legal system at all, except perhaps in the Pickwickian sense in which a void contract can still be said to be one kind of contract.¹¹

⁴ *Id.*

⁵ See LON L. FULLER, *THE MORALITY OF LAW* (1965).

⁶ See RAZ, *supra* note 2.

⁷ See *id.* at 211.

⁸ See FULLER, *supra* note 5, at 39.

⁹ See *id.*

¹⁰ See *id.*

¹¹ *Id.*

Raz is broadly in accord with Fuller.¹² He insists that the Rule of Law “is not to be confused with democracy, justice, equality (before the law or otherwise), human rights of any kind or respect for persons or for the dignity of man.”¹³ He adds:

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.¹⁴

Raz’s list of principles, constituting the Rule of Law, is not the same as Fuller’s. He adds, for example, the independence of the judiciary; easy access to courts; due process of law; and, strikingly, a requirement that “the discretion of the crime-preventing agencies should not be allowed to pervert the law.”¹⁵ Drawing on both Fuller and Raz, I have my own preferred account of the Rule of Law:

1. clear, general, publicly accessible rules laid down in advance;
2. prospectivity rather than retroactivity;
3. conformity between law on the books and law in the world;
4. hearing rights;
5. some degree of separation between (a) lawmaking and law enforcement and (b) interpretation of law;
6. no unduly rapid changes in the law; and
7. no contradictions or palpable inconsistencies in the law.¹⁶

What does the Rule of Law, understood in these general terms, achieve? Raz offers an answer, pointing to the “value” of the Rule of Law,¹⁷ or what we might call its distinctive morality. His account is subtle, but he urges that the Rule of Law contrasts with arbitrary power; that it helps people to fix long-term goals; that it protects personal freedom in important ways; and that it contributes to the protection of individual dignity, because “deliberate disregard for the rule of law violates human dignity.”¹⁸ He emphasizes that “the rule of law does not provide sufficient protection of freedom.”¹⁹ Not close. If we care about freedom, we need the Rule of Law and its associated morality, but we need plenty of other things too.

¹² See RAZ, *supra* note 2, at 211.

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.* at 218.

¹⁶ See Cass R. Sunstein, *The Rule of Law*, 4 AM. J.L. & EQUAL. 498 (2024).

¹⁷ RAZ, *supra* note 2.

¹⁸ *Id.* at 221.

¹⁹ *Id.* at 226.

Let us now turn to another kind of morality, one that helps define the role of the government lawyer.

II. THE MORALITY OF LEGALITY

The Morality of Legality is more specific and much narrower. It forbids violations of existing law, including acts that go beyond statutory authority. Those who are committed to it will not engage in unlawful action even if no court will be available to strike the action down, and even if there would be significant gains, including political gains, from undertaking the action. According to the Morality of Legality, it is a moral wrong, and essentially taboo, for those who work in the executive branch to act unlawfully, even if high-level officials want to act unlawfully, even if the circumstances clearly call for the action in question, and even if there is a strong public demand for the unlawful action.²⁰

In the United States, the Morality of Legality is a serious constraint on Senate-confirmed appointees, political though they may be; it should also serve as a serious constraint on the President personally. It is far more directive than it might seem. It is not at all innocuous. It is a red light; it is a conversation-stopper. It also empowers law and lawyers. The Morality of Legality is exceptionally important in the context of criminal and civil proceedings. If the executive branch proceeds against a private person (or a public one), it can impose something close to ruin, even if it does not win in court. An executive branch official, perhaps in the Department of Justice, might say something like this: "I will initiate proceedings only if I have a high degree of confidence that I will be able to find, and show, a violation of existing law." That would be consistent with the Morality of Legality. Alternatively, an executive branch official might say this: "In some cases, I will initiate proceedings even though I do not have a high degree of confidence that I will be able to find, and show, a violation of existing law." That would be inconsistent with the Morality of Legality. In the abstract, it is not at all clear why an executive branch official would defy the Morality of Legality in that way. Perhaps the official has a "hunch." Perhaps the official is acting in response to political pressures.

Or suppose that executive branch officials are deliberating about whether to issue a new regulation. The new regulation might repeal highway safety rules, or fuel economy rules, or rules governing student loans. Or the new regulation might restrict arsenic in drinking water, impose new eligibility requirements for immigration, or expand the scope of the Affordable Care Act.

Imagine the following possibilities, which map onto frequent realities:

- a) Lawyers within the executive branch report that the regulation is lawful and that no one is likely to challenge it.

²⁰ I discuss the Morality of Legality in detail in Cass R. Sunstein, *The Morality of Legality*, 54 HOFSTRA L. REV. 337 (2026), and I draw on some of that discussion here.

- b) Lawyers within the executive branch report that the regulation is lawful, and will be upheld, but that it will be challenged.
- c) Lawyers within the executive branch report that the regulation is lawful, and more than 50 percent likely to be upheld, but that it will be challenged, and that there is a significant chance that it will be struck down.
- d) Lawyers within the executive branch report that in their personal view, the regulation is lawful, but that it is more likely than not to be struck down; the chance of success in court is 40 percent.
- e) Lawyers within the executive branch report that in their personal view, the regulation is unlawful, and that it is more likely than not to be struck down, but it can be defended in good faith; the chance of success in court is 30 percent.
- f) Lawyers within the executive branch report that in their personal view, the regulation is unlawful, that it is more likely than not to be struck down, and it cannot be defended in good faith; the chance of success in court is 10 percent.
- g) Lawyers within the executive branch report that in their personal view, the regulation is unlawful, that it is more likely than not to be struck down, and it cannot be defended in good faith; the chance of success in court is 0 percent.

From the standpoint of the Morality of Legality, there is nothing at all wrong with going forward with the regulation in cases (a), (b), (c), and (d). Doing so in cases (f) and (g) is clearly a violation of the Morality of Legality. Case (e) is trickier, and reasonable people can differ. Some people might urge that legality, in the end, is decided by courts, not lawyers, and a respectable chance of validation (30 percent) is enough to justify a kind of green light. In my view, however, going forward is best understood as violating the Morality of Legality. Lawyers believe that the regulation is unlawful; that is their personal view. They think that it will be struck down as well, and they have a degree of confidence in that conclusion (70 percent). It would not be outrageous to go forward in those circumstances, but doing so would transgress the Morality of Legality.

III. THE MORALITY OF LEGALITY: FOUNDATIONS

Why and when should executive branch officials follow the Morality of Legality? What is its distinctive foundation? As a matter of law, there is a formal answer: Article II states that the President “shall take Care that the Laws be faithfully executed.”²¹ At a minimum, faithful execution entails a commitment to the Morality of Legality. There is also the Oath of Office:

An individual, except the President, elected or appointed to an office of honor or profit in the civil service or uniformed services, shall take the

²¹ U.S. CONST. art. II, § 3.

following oath: "I, AB, do solemnly swear (or affirm) that I will support and defend the Constitution of the United States against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; that I take this obligation freely, without any mental reservation or purpose of evasion; and that I will well and faithfully discharge the duties of the office on which I am about to enter. So help me God."²²

To be sure, the Oath of Office refers not to all laws, but to the Constitution in particular. Still, we should understand that the Oath is taken in light of the Take Care clause. For that reason, it is reasonable to understand it to require fidelity to law, which entails a commitment to the Morality of Legality.

Can the Morality of Legality be justified not only in terms of positive law, but in theoretical terms? Within the executive branch, it is generally (though not always) experienced, I suggest, in nonconsequentialist terms, as a kind of duty, associated with a moral taboo: just as one does not steal or slap someone in the face, so one does not violate the Morality of Legality. But there might well be a rule-consequentialist defense. An executive branch that does not follow the Morality of Legality will be unbound. Or at least it will be unbound unless and until it is stopped in court, in which case we might speak of constrained authoritarianism, with the nature and magnitude of the constraint depending on what the courts do.

Like the Morality of the Rule of Law, the Morality of Legality is a limited one. It does not guarantee freedom of religion, or freedom of speech, or due process of law. Or more precisely, it does not guarantee these things except contingently. It does guarantee fidelity to what positive law guarantees. But if positive law does not guarantee something, those who follow the Morality of Legality have no duty to that something.

IV. THE TWO MORALITIES

What is the relationship between the Morality of the Rule of Law and the Morality of Legality? One can have the latter without having the former. People might think: I owe a duty to the law, whatever it is. But if the law is retroactive, those who are committed to the Morality of Legality need not be committed to the Morality of the Rule of Law. If the law does not contain hearing rights, those who believe in the Morality of Legality will not insist on hearing rights. In these ways, the Morality of Legality is narrower and more modest than the Morality of the Rule of Law.

Is the Morality of Legality entailed by the Morality of the Rule of Law? It appears to be. Or at least we could squeeze the Morality of Legality just a bit, so that it fits within the Morality of the Rule of Law. Suppose that executive branch officials proceed with regulations that violate governing statutes or the Constitution. It would be reasonable to say that there is inconsistency between the

²² 5 U.S.C. § 1331.

rules on the books and the rules in the world. If the executive branch is acting in a way that defies governing law, governing law is a charade. The point is much clearer, I think, if the executive branch is engaging in criminal or civil actions in violation of or without reference to governing law. If so, we have something close to an absence of law at all: The executive is ungoverned by it.

V. AN ALTERNATIVE VIEW OF THE RULE OF LAW

Let us now turn to the distinctive account of Friedrich Hayek, who was an eloquent and vigorous theorist of the Rule of Law.²³ Hayek associated it with freedom:

The conception of freedom under the law that is the chief concern of this book rests on the contention that when we obey laws, in the sense of general abstract rules laid down irrespective of their application to us, we are not subject to another man's will and are therefore free. It is because the lawgiver does not know the particular cases to which his rules will apply, and it is because the judge who applies them has no choice in drawing the conclusions that follow from the existing body of rules and the particular facts of the case, that it can be said that laws and not men rule.... As a true law should not name any particulars, so it should especially not single out any specific persons or group of persons.²⁴

That sounds good, but what does the last sentence mean? Suppose that a legislature enacts an antitrust law, but exempts labor unions. Or suppose that a legislature forbids blind people from driving. Or suppose that a law forbids discrimination against pregnant people. Has it singled out any specific "group of persons"? Has it violated the Rule of Law? My answer: Yes to the first, No to the second. That seems to be a decisive objection to Hayek's formulation.

But Hayek did not miss the problem. He wrote:

The requirement that the rules of true law be general does not mean that sometimes special rules may not apply to different classes of people if they refer to properties that only some people possess. There may be rules that can apply only to women or to the blind or to persons above a certain age. (In most instances it would not even be necessary to name the class of people to whom the rule applies: only a woman, for example, can be raped or got with child.) Such distinctions will not be arbitrary, will not subject one group to the will of others, if they are equally recognized as justified by those inside and those outside the group. This does not mean that there must

²³ He wrote about it in many places. See F.A. HAYEK, *THE ROAD TO SERFDOM* (1943); F.A. HAYEK, *THE CONSTITUTION OF LIBERTY* (1960).

²⁴ See F.A. HAYEK, *THE CONSTITUTION OF LIBERTY* 221–22 (1960).

be unanimity as to the desirability of the distinction, but merely that individual views will not depend on whether the individual is in the group or not.²⁵

That is an exceedingly interesting passage. Hayek seems to be adding an epicycle here, to the effect that a group may indeed be singled out if those within the group *and* those outside it agree that it is appropriate to do so. But what does that have to do with the Rule of Law? And is it right? Suppose that most Americans with disabilities favored the Americans with Disabilities Act, and that most Americans without disabilities did not favor that Act. Would the Act violate the Rule of Law? No, not at all. Would the Act stand condemned in principle? No, not at all.

Hayek also referred to the “kinds of governmental measures which the rule of law excludes in principle because they cannot be achieved by merely enforcing general rules but, of necessity, involve arbitrary discrimination between persons.”²⁶ But what is “arbitrary discrimination between persons”? The problem is that by itself, the Rule of Law, and its morality, cannot tell us what is arbitrary and what is not. If people are generally forbidden to go over the speed limit, but if police officers and those who drive ambulances are allowed to do so, we do not have arbitrary discrimination. If everyone is required to obey the speed limit law except those whose last name begins with “U,” we have arbitrary discrimination. Any judgment about arbitrariness requires a substantive judgment of some kind. The Rule of Law, and its distinctive morality, cannot supply that substantive judgment. This is a stark reminder of the narrowness of the Morality of the Rule of Law.

CONCLUSION

The Morality of Legality is often (not always) in force within the executive branch. When it is, the law imposes a veto on initiatives that important officials, including the President personally, strongly favor. The Morality of Legality is, of course, the basis of a norm in the private sector as well. Many people think: I will not violate the law, because it is wrong to violate the law.

The Morality of the Rule of Law imposes a far broader set of constraints. It is associated with one understanding of “freedom from fear.” It certainly does not ensure security, but it removes a number of serious threats that ordinary citizens would otherwise face. It turns people from supplicants into rights holders. It does not guarantee freedom of speech, democracy, freedom of religion, free markets, or private property. But if and when it is gone, you are going to miss it.²⁷

²⁵ *Id.* at 222–23.

²⁶ *Id.* at 336.

²⁷ Cf. Lise LS, *Pitch Perfect – Cups (When I’m Gone) Lyrics*, YOUTUBE (Feb. 14, 2016), <https://www.youtube.com/watch?v=-XOR3k-wa4k> [<https://perma.cc/GP7J-7LR6>].