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## THE RULE OF LAW: A CURRENTLY INCOHERENT IDEA THAT CAN BE REDEEMED THROUGH VIRTUE

*R. George Wright\**

### I. INTRODUCTION

The crucial idea of “the rule of law” comes in several varieties, or conceptions.<sup>1</sup> One family of traditional conceptions of the rule of law focuses primarily on procedures, processes, formalities, and decision-making structures.<sup>2</sup> Another family of rule of law conceptions places a greater emphasis on substantive or “positive” rights.<sup>3</sup> These two contending families may or may not be reconcilable.<sup>4</sup> More fundamentally, I argue herein that all of the mainstream understandings of the rule of law are internally inconsistent. Recognizing this surprising fact, however, can lead to favorable consequences. The mainstream ideas of the rule of law are indeed internally inconsistent, and thus misconceived, but they are not beyond any useful reconstruction. A genuinely coherent idea of the rule of law can be developed, and at least

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1. For the distinction between general concepts and more specific conceptions thereof, see RONALD DWORKIN, *LAW'S EMPIRE* 70-72 (1986); RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 135-36, 226-27 (1978); JOHN RAWLS, *A THEORY OF JUSTICE* 5-6 (1971).

2. See *infra* Parts II–III.

3. “Positive” in this sense refers not to rights being written into the law and observed or enforced, as in the idea of legal positivism, but to rights that require affirmative, costly provision. For discussion of the former sense of “positive,” see, for example, BRIAN BIX, *JURISPRUDENCE: THEORY AND CONTEXT* ch. 3 (6th ed. 2012). For discussion of the latter sense of “positive,” see, for example, David P. Currie, *Positive and Negative Constitutional Rights*, 53 U. CHI. L. REV. 864, 868, 872-80 (1986); William E. Forbath, *Constitutional Welfare Rights: A History, Critique and Reconstruction*, 69 FORDHAM L. REV. 1821, 1833-35 (2001); *infra* Parts II–III.

4. For background, see W.B. Gallie, *Essentially Contested Concepts*, 56 PROC. ARISTOTELIAN SOC'Y 167, 184-87 (1956); David Hillel-Ruben, *W.B. Gallie and Essentially Contested Concepts*, 39 PHIL. PAPERS, 257, 259-61 (2010); Peter M. Shane, *The Rule of Law and the Inevitability of Discretion*, 36 HARV. J.L. & PUB. POL'Y, 21, 21-22 (2013); Jeremy Waldron, *Is the Rule of Law An Essentially Contested Concept (in Florida)?*, 21 L. & PHIL. 137, 138-44 (2002).

approached, in practice. The key point is that the rule of law, in and of itself, requires more than the currently dominant theories recognize or admit. The crucial missing element, as I discuss below, is that of the basic virtues and vices.<sup>5</sup>

When we think of “law,” as in “the rule of law,” we ordinarily think in terms of various sorts of procedural or substantive rules, principles, structures, policies, doctrines, standards, processes, tests, rights, and so forth.<sup>6</sup> These various elements of the rule of law may or may not have a general moral dimension, as well.<sup>7</sup> A coherent understanding of the rule of law also, however, inescapably requires specific reference to several virtues. Briefly put, basic virtues are built into a coherent understanding of the rule of law.<sup>8</sup> But basic virtues are clearly not reducible to anything like the typically assumed elements of the rule of law—rules, principles, policies, rights, and so on.<sup>9</sup>

Virtues, thus, are of the essence to the rule of law.<sup>10</sup> This claim is not merely that a virtuously implemented rule of law tends to be a better rule of law, or that virtues merely enhance, improve, or stabilize a preexisting and independent general rule of law. The various basic virtues are instead intrinsic and essential to the very existence of the rule of law, and not merely to its creditable execution or implementation.<sup>11</sup> Moreover, virtues are inherent within the rule of law and not just in its admirable execution, despite the fact that the relevant virtues cannot be reduced to anything like rules, principles, policies, rights, or any other familiar elements of the rule of law.<sup>12</sup>

As surprising as this result might be, the good news is that if we understand the rule of law as virtue-impregnated in its very essence, we should then be able to enhance the quality of our rule of law institutions. In particular, our attention could then more readily be drawn to

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5. See *infra* Part IV.

6. For one attempt at a distinction among rules, principles, policies, and standards, see Ronald M. Dworkin, *The Model of Rules*, 35 U. CHI. L. REV. 14, 22-29 (1967).

7. The necessary role, if any, for moral considerations in a system of law is, in general, the subject of continuing controversy sparked by H.L.A. HART, *THE CONCEPT OF LAW* ch. IX (1961) and LON L. FULLER, *THE MORALITY OF LAW* 33-94 (rev. ed. 1969). The discussion of basic virtue, below, does not require that we think of all of the relevant virtues as distinctly moral virtues. See sources cited *infra* notes 157, 189.

8. See *infra* Part IV. For an especially subtle account of the relationship between rules or principles and virtues at a broader level, see Robert C. Roberts, *Virtues and Rules*, 51 PHIL. & PHENOMENOLOGICAL RES. 325, 331-33 (1991). For a broader downplaying of rules and principles in ethics, see generally JONATHAN DANCY, *ETHICS WITHOUT PRINCIPLES* (2004).

9. See *infra* Part III.

10. See *infra* Part III. See generally FULLER, *supra* note 7.

11. See *infra* Part V.

12. See Roberts, *supra* note 8, at 331; *infra* Part IV.

enhancing the role of the virtues inherent within, or in the operation of, the rule of law system,<sup>13</sup> and to specific ways in which the virtues implicated in the rule of law system can be developed and strengthened.<sup>14</sup> The distinction between what is intrinsic to the rule of law, and what is a part of merely the implementation, execution, or carrying out of the rule of law is explored a bit further in the concluding Part V below.<sup>15</sup>

To lay the groundwork for explaining and justifying these claims, though, let us first briefly summarize a few of the more prominent classical<sup>16</sup> and contemporary<sup>17</sup> mainstream understandings of the rule of law as an institution.<sup>18</sup>

## II. SOME HISTORICAL CONTRIBUTIONS TO THE IDEA OF THE RULE OF LAW

Probably no single historical writer has produced a complete and entirely satisfactory account of the institution of the rule of law. Collectively, though, the historical writers have jointly arrived at most, if not all, of what contemporary rule of law theorists would want to say. Consider the highly selective sampling of views immediately below.

As is frequently the case, Plato provides a helpful start to the inquiry. In his late dialogue *The Laws*, Plato writes that “the highest office in the service of the gods must be allocated to the man who is best at obeying the established laws.”<sup>19</sup> More pointedly, Plato then continues: “Such people are usually referred to as ‘rulers,’ and if I have called them ‘servants of the laws’ it’s . . . because I believe that the success or failure of a state hinges on this point more than on anything else.”<sup>20</sup> Interestingly, Plato had earlier emphasized the role of the classic virtues in this context throughout *The Republic*.<sup>21</sup>

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13. See *infra* Part IV.

14. See *infra* Part IV. This argument does not assume that the proper functioning of the rule of law is always the highest moral virtue of a legal system; it merely assumes that all else equal, the proper functioning of the rule of law is a good to be pursued.

15. See *infra* Part V.

16. See *infra* Part II.

17. See *infra* Part III.

18. See *infra* Part III.

19. PLATO, *THE LAWS* bk. IV, at 174 (Trevor J. Saunders trans., Penguin Books rev. ed. 1975) (c. 350 B.C.E.).

20. *Id.*

21. See generally PLATO, *THE REPUBLIC* (Allan Bloom trans., Basic Books 1991) (c. 370 B.C.E.).

The basic message of Plato in *The Laws* was followed by Aristotle in his own classic work, *Politics*.<sup>22</sup> Aristotle concisely argues that “[r]ightly constituted laws should be the final sovereign, and personal rule, whether . . . by a single person or body of persons, should be sovereign only in those matters on which the law is unable, owing to the difficulty of framing general rules for all contingencies, to make an exact pronouncement.”<sup>23</sup>

A largely normative, as opposed to purely descriptive,<sup>24</sup> account of law is later endorsed by Thomas Aquinas in his *Summa Theologica*.<sup>25</sup> Aquinas at least cites the argument that human law ought to be “virtuous, just, possible to nature, according to the custom of the country, suitable to place and time, necessary, useful, clearly expressed, [and] framed for no private benefit, but for the common good.”<sup>26</sup> Clarity of the law is specifically cited, “lest by [the law’s] obscurity it lead to misunderstanding.”<sup>27</sup> This is one of the continuing “formal” considerations that are, as we shall see below, commonly thought of by modern writers as components of the rule of law.<sup>28</sup>

Almost simultaneously, the Magna Carta of 1215 recognized, as a matter of positive law, some important elements of the modern rule of law.<sup>29</sup> Perhaps most centrally, clause thirty-nine addresses, in a limited way, what we would call due process: “No free man shall be seized or imprisoned, or stripped of his rights or possessions, . . . except by the lawful judgment of his equals or by the law of the land.”<sup>30</sup> Six hundred

22. See generally PLATO, *supra* note 19.

23. ARISTOTLE, *POLITICS* bk. II, at 127 (R.F. Stalley ed., Ernest Barker trans., Oxford Univ. Press rev. ed., 2009) (c. 350 B.C.E.). See generally W. von Leyden, *Aristotle and the Concept of Law*, 42 *PHILOSOPHY* 1 (1967).

24. Thomas Aquinas famously seeks to unite just or natural law principles with (valid) positive human law by arguing that in some sense, an unjust positive law should not count as genuine positive law. See THOMAS AQUINAS, *SUMMA THEOLOGICA* qu. 95, art. 2 (Fathers of the English Dominican Province trans., Christian Classics rev. ed., 1981) (c. 1274) (referencing Saint Augustine’s philosophy). Commonsensically, though, a positive human law that is inconsistent with an established custom could still be enforced, and in that sense count as law, as could law that fails to display some relevant virtue. See, e.g., MARSILIUS OF PADUA, *DEFENSOR PACIS* ch. X, at 36 (Alan Gewirth trans., Columbia Univ. Press 2001) (1324).

25. See AQUINAS, *supra* note 24, at qu. 95, art. 2 (referencing Saint Augustine’s philosophy).

26. *Id.* at qu. 95, art. 3 (citing Saint Isidore of Seville and referring to human law as conducive to human virtue). For Aquinas’s understanding of the idea of law in a much broader sense, see *id.* at qu. 90. For Aquinas’s discussion on the virtues as habits or traits of character, see *id.* at qu. 55-66.

27. *Id.* at qu. 95, art. 3. For broad further discussion, see generally JOHN FINNIS, *AQUINAS: MORAL, POLITICAL, AND LEGAL THEORY* (1998).

28. See *infra* Part III.

29. See generally *The Text of Magna Carta*, FORDHAM U., [www.fordham.edu/halsall/source/magnacarta.asp](http://www.fordham.edu/halsall/source/magnacarta.asp) (last visited Sept. 2, 2015).

30. *Id.* at cl. 39; see also *id.* at cl. 40 (“To no one will we sell, to no one deny or delay right or justice.”).

years later, Justice Joseph Story cited this passage as authority for procedural due process and trial by jury.<sup>31</sup>

At a more general level, the Magna Carta then specifies that “[w]e will appoint as justices, constables, sheriffs, or other officials, only men that know the law of the realm and are minded to keep it well.”<sup>32</sup> Pressing the argument further, Marsilius of Padua concluded a century later that “no judgment, so far as possible, should be entrusted to the discretion of the judge, but rather it should be determined by law and pronounced in accordance with it.”<sup>33</sup>

Further differentiation of the broad idea of the rule of law—as supposedly distinct from the “rule of men”<sup>34</sup>—is then worked out by the seventeenth century political theorist James Harrington.<sup>35</sup> Harrington argues in the following terms:

That law which leaves the least arbitrary power to the judge or judicatory is the most perfect law. Laws that are the fewest, plainest, and briefest leave the least arbitrary power to the judge or judicatory and, being a light to the people, make the most incorrupt government. Laws that are perplex, intricate, tedious, and voluminous leave the greatest arbitrary power to the judge or judicatory and, raining snares on the people, make the most corrupt government.<sup>36</sup>

In a later and somewhat more “substantive” approach to the rule of law, William Blackstone sought to combine a concern for liberty, the conformity of orders and decrees to the rules of equity, and the equal protection of the laws, “by which the meanest individual is protected from the insults and oppression of the greatest.”<sup>37</sup> Some emphasis on the

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31. See JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 932, at 663 (Carolina Academic Press rev. ed., 1987) (1833).

32. *The Text of Magna Carta*, *supra* note 29, at cl. 45.

33. MARSILIUS OF PADUA, *supra* note 24 at ch. XI, 38; see also *id.* at 40–42 (citing Aristotle).

34. JAMES HARRINGTON, THE COMMONWEALTH OF OCEANA AND A SYSTEM OF POLITICS 9 (J.G.A. Pocock ed., Cambridge Univ. Press 1992) (1656) (referring to “the empire of men and not of laws”); see JOHN LOCKE, TWO TREATISES OF GOVERNMENT § 137, at 259 (Cambridge Univ. Press 1963) (1690).

35. HARRINGTON, *supra* note 34, at 9.

36. JAMES HARRINGTON, THE POLITICAL WRITINGS OF JAMES HARRINGTON: REPRESENTATIVE SELECTIONS 26 (Charles Blitzer ed., The Liberal Arts Press, Inc. 1955) (1661). We need not take sides on the question of whether long and complex, or brief and plain, statutes are more open to manipulation, and to facilitating “the rule of men” as distinct from “the rule of law.” For a brief discussion of Aristotle’s influence on Harrington, see James Colton, *James Harrington as Aristotelian*, 7 POL. THEORY 371, 374 (1979). For a contemporaneous emphasis on certain kinds of impartiality, along with a concern for justice, in adjudicating, see 1660: *Matthew Hale’s 18 Rules for Judges*, DUHAIME’S, <http://www.duhaime.org/LawMuseum/LawArticle-1166/1660-matthew-hales-18-rules-for-judges.aspx> (last visited Sept. 2, 2015).

37. *Blackstone’s Commentaries on the Laws of England: Introduction*, THE AVALON

idea of universal equality before the law appears, as well, in works of later writers such as A.V. Dicey<sup>38</sup> and Leonard Hobhouse.<sup>39</sup>

From even this highly selective historical summary, we see the basic idea of an attempted distinction between the rule of law and the rule of persons; some progress in specifying a number of formal, procedural, or process-based components of the rule of law; and even a start on conceptions of the rule of law incorporating substantive rights or other substantive moral values oriented toward the common good.<sup>40</sup> Contemporary understandings of the rule of law, for the most part, elaborate upon, or add further comprehensiveness and precision to, one or more of the classic understandings of the rule of law. Below, I consider the roles of the various virtues mainly in the contemporary, rather than classical, context.<sup>41</sup>

### III. SOME CONTEMPORARY APPROACHES TO THE IDEA OF THE RULE OF LAW

Contemporary writers have reached no precise consensus on the meaning and features of the rule of law, whether in largely descriptive or in normative terms.<sup>42</sup> While there is, thus, no neutral approach to contemporary rule of law theories, some approaches can be used to illustrate the essential, inherently conceptual role of virtue more clearly than others.<sup>43</sup> This is, however, not to suggest any such awareness or intention on the part of the various theorists concerned.

For our purposes, a brief survey of contemporary rule of law theories could certainly focus on the popular eight-component approach of Professor Lon Fuller.<sup>44</sup> This is not to privilege Fuller's approach

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PROJECT, [http://avalon.law.yale.edu/18th\\_century/Blackstone\\_intro](http://avalon.law.yale.edu/18th_century/Blackstone_intro) (last visited Sept. 2, 2015).

38. A.V. Dicey famously opposed the rule of law to arbitrariness, to broad discretionary authority, and to class or personal inequality before the law. See Michael L. Principe, *Albert Venn Dicey and the Principles of the Rule of Law: Is Justice Blind? A Comparative Analysis of the United States and Great Britain*, 22 LOY. L.A. INT'L & COMP. L. REV. 357, 359 (2000) (citing ALBERT V. DICEY, INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION 42 (10th ed. 1961)).

39. See L.T. HOBHOUSE, LIBERALISM AND OTHER WRITINGS 11 (James Meadowcroft ed., Cambridge Univ. Press 1994) (1911) (stating that "the first condition of free government is government not by the arbitrary determination of the ruler, but by fixed rules of law, to which the ruler himself is subject"). For a well-known brief treatment of the history of the idea of the rule of law, see F.A. HAYEK, THE RULE OF LAW 6-17 (1975).

40. See HAYEK, *supra* note 39, at 17-18; HOBHOUSE, *supra* note 39, at 11; Richard H. Fallon, "The Rule of Law" as a Concept in Constitutional Discourse, 97 COLUM. L. REV. 1, 7-9, 55 (1997).

41. See *infra* Part III.

42. For a typology of approaches to the rule of law, see Fallon, *supra* note 40, at 55 (distinguishing historicist, formalist, illegal process, and substantive approaches to the idea of the rule of law). See generally Part III.

43. See Fallon, *supra* note 40, at 55.

44. See FULLER, *supra* note 7, at 33.

relative to that of others, or to beg relevant questions. Convenience in exposition is really all that is sought by our initial focus on Fuller's widely cited account.<sup>45</sup>

Let us consider Professor Fuller's eight requirements of the rule of law, beginning, for convenience, with Professor Margaret Jane Radin's exceptionally concise summary of the requirements: "[F]irst, there must be rules; second those rules must be capable of being followed."<sup>46</sup> Professor Fuller's own account, however, deserves quotation at some length, on the understanding that Fuller is specifying eight, more or less,<sup>47</sup> separate elements, the complete absence of any one of which results not merely in a defective or bad system of law, but in the absence of a system of law, properly understood.<sup>48</sup> Thus, there are, as negatively formulated by Fuller,<sup>49</sup> eight routes to the "end" of failing to make law:

The first and most obvious lies in a failure to achieve rules at all, so that every issue must be decided on an ad hoc basis. The other routes are: (2) a failure to publicize, or at least make available to the affected party, the rules he is expected to observe; (3) the abuse of retroactive legislation, which not only cannot itself guide action, but undercuts the integrity of rules prospective in effect, since it puts them under the threat of retrospective change; (4) a failure to make rules understandable; (5) the enactment of contradictory rules or (6) rules that require conduct beyond the powers of the affected party;<sup>50</sup> (7)

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45. See, e.g., LESLIE GREEN, *THE AUTHORITY OF THE STATE* 8 (1988); MATTHEW H. KRAMER, *OBJECTIVITY AND THE RULE OF LAW* 103 (2007) (referring to "Lon Fuller's famous exposition of the central elements in the rule of law"); JOHN RAWLS, *A THEORY OF JUSTICE* 206-08 (rev. ed., Belknap Press 1999); N.E. SIMMONDS, *LAW AS A MORAL IDEA* 54 n.26 (2007) (stating that Simmonds "take[s] Fuller's eight *desiderata* for the rule of law as constituting an adequate (albeit provisional) account of the archetype of law," and then briefly summarizing the eight criteria); Matthew H. Kramer, *On the Moral Status of the Rule of Law*, 63 *CAMBRIDGE L.J.* 65, 65 (2004) (stating that "the rule of law as understood throughout this article is admirably encapsulated in Fuller's eight principles of legality," and summarizing all eight principles); Andrei Marmor, *The Ideal of the Rule of Law* 1 & n.1 (2008), available at <http://lawweb.usc.edu/users/amarmor/documents> (endorsing most if not all of Fuller's principles, and citing leading jurisprudence scholars John Finnis, Neil McCormick, and Joseph Raz as fellow endorsers); Margaret Jane Radin, *Reconsidering the Rule of Law*, 69 *B.U. L. REV.* 781, 784-85 (1989) (paraphrasing and then seeking to condense Fuller's eight elements); Jeremy Waldron, *How Law Protects Dignity*, 71 *CAMBRIDGE L.J.* 200, 205 (2012); see also *Soglin v. Kauffman*, 418 F.2d 163, 167 (7th Cir. 1969) (citing Fuller's second chapter). For a broader, more general discussion of Fuller's work, see ROBERT S. SUMMERS, *LON L. FULLER* 36-40 (1984).

46. Radin, *supra* note 45, at 785. I set aside the possibility that a rule that is incapable of ever being followed by anyone might, in a sense, not amount to a genuine rule.

47. But see FULLER, *supra* note 7, at 39 (providing Fuller's assumption of the distinctness of the elements).

48. See *id.*

49. See *id.*

50. Whether people genuinely could have obeyed the law when they, in fact, did not is a



introducing such frequent changes in the rules that the subject cannot orient his action by them; and finally, (8) a failure of congruence between the rules announced and their actual administration.<sup>51</sup>

The point of quoting Fuller at length is not to quibble about Fuller's eight factors, in the sense of any possible overlaps, omissions, undue inclusions, or of tinkering at the margins of any of the elements on Fuller's own terms. The basic "virtues as inherent in the rule of law" argument can be based on Fuller's typologies, or on many others.<sup>52</sup>

Consider first, though, the general character of Fuller's elements of the rule of law, perhaps adding one or more distinctly "substantive" rights into the mix, if one so cares.<sup>53</sup> Consider in particular Fuller's fifth element of the rule of law, which rejects the enactment—and the simultaneous applicability in some given case—of mutually contradictory rules.<sup>54</sup> This element is representative of the largely procedural character of Fuller's element list.<sup>55</sup> Or one might think of the fifth, or any other element above, variously as a matter of a rule, principle, broad doctrine, test, standard, right, or in any similar terms, the merits of the eight elements aside. Our preliminary point is that while it is indeed typical to think of the rule of law, and its arguable components, in formulations similar to Fuller's, all such formulations miss, underplay, or obscure the essentiality of various basic virtues to the rule of law in itself.

Let us emphasize, though, that Professor Fuller's list is hardly unique, in this crucial respect, among contemporary theorists of the rule of law. For the sake of precision, consider, again verbatim, the key parallel formulation of Professor John Finnis:

A legal system exemplifies the [r]ule of [l]aw to the extent (it is a matter of degree in respect of each item of the list) that (i) its rules are prospective, not retroactive, and (ii) are not in any other way impossible to comply with; that (iii) its rules are promulgated, (iv)

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matter of increasing scientific and philosophical interest, as outlined in R. George Wright, *Criminal Law and Sentencing: What Goes With Free Will?*, 5 DREXEL L. REV. 1, 14-15 (2013).

51. FULLER, *supra* note 7, at 39. Fuller's and Hayek's accounts are known for emphasizing the "virtue" of the law in promoting autonomous individual choice, but this sort of virtue in, or in consequence of, the rule of law is not the subject of our interest herein. *See infra* Part IV.

52. *See infra* Part IV.

53. *See supra* notes 3-4 and accompanying text.

54. A subject's simultaneously conforming to two mutually contradictory rules, within the zone of their contradictoriness, could also be beyond the compliance capacities of affected parties, and, thus, also a violation of Fuller's sixth element. *See supra* text accompanying note 50.

55. Jeremy Waldron, *The Rule of Law and the Importance of Procedure*, NELLCO 6 (Oct. 10, 2010), [http://lsr.nellco.org/cgi/viewcontent.cgi?article=1235&context=nyu\\_plltwp](http://lsr.nellco.org/cgi/viewcontent.cgi?article=1235&context=nyu_plltwp).

clear, and (v) coherent one with another; that (vi) its rules are sufficiently stable to allow people to be guided by their knowledge of the rules; that (vii) the making of decrees and orders applicable to relatively limited situations is guided by rules that are promulgated, clear, stable, and relatively general; and that (viii) those people who have authority to make, administer, and apply the rules in an official capacity (a) are accountable for their compliance with rules applicable to their performance and (b) do actually administer the law consistently and in accordance with its tenor.<sup>56</sup>

Note, in particular, that Professor Finnis here delineates the rule of law specifically in terms of rules, in various contexts.<sup>57</sup> Now, we can loosely speak, in a sense, of the “virtues” or favorable moral (and other) effects of any system, including a system entirely constituted by rules. We can speak of the virtues of a steam-propulsion system, compared to some alternative. But, to oversimplify for the moment, a pure system of some sorts of legal or non-legal rules would not, simply as rules, inherently incorporate basic virtues (or vices) as we typically describe them.<sup>58</sup> So much the worse, I shall argue, for typical understandings of the rule of law that ignore or underplay the essentiality of various basic virtues to the (in this respect somewhat misleadingly named) rule of law itself.<sup>59</sup>

Similar observations could be made not only of Fuller’s and Finnis’s systems, but of the eight “rules”<sup>60</sup> or “sub-rules”<sup>61</sup> recently recognized as constitutive of the rule of law by Lord Bingham.<sup>62</sup> Roughly put, Lord Bingham cites accessibility, intelligibility, clarity, and predictability;<sup>63</sup> limitations on judicial discretion;<sup>64</sup> equality in application to relevantly similar cases;<sup>65</sup> “adequate protection of fundamental human rights;”<sup>66</sup> the timely resolution of civil disputes at appropriate cost;<sup>67</sup> the reasonable and appropriate exercise of executive

56. JOHN FINNIS, *NATURAL LAW AND NATURAL RIGHTS* 270-71 (2d ed., 2011).

57. *See id.* Also, see the Fuller-influenced claim by John Rawls that “the conception of formal justice, the regular and impartial administration of public rules, becomes the rule of law when applied to the legal system.” RAWLS, *supra* note 1, at 206 (focusing on the rule of law).

58. *See infra* Part IV.

59. *See infra* Part IV. Note, though, that we need not claim that a legal culture can aspire to no higher goal than adhering to the rule of law, even with substantive elements.

60. Lord Bingham, *The Rule of Law*, 66 CAMBRIDGE L.J. 67, 69 (2007).

61. *Id.*

62. *See id.* at 69-82.

63. *See id.* at 69-70.

64. *See id.* at 72.

65. *See id.* at 73.

66. *Id.* at 75.

67. *See id.* at 77.

and administrative power, subject to judicial review;<sup>68</sup> fairness and openness of adjudicative procedures;<sup>69</sup> and, finally, compliance with relevant obligations under international law.<sup>70</sup> Here again, the emphasis, even regarding substantive rights,<sup>71</sup> is on something like the nature of legal processes and on legal products or outcomes,<sup>72</sup> apart from what we would normally think of as broad genuine virtues, transplanted into a legal or adjudicative context.<sup>73</sup>

The distinguished contemporary legal theorist Joseph Raz offers, as well, eight components of the rule of law,<sup>74</sup> in this instance with less emphasis on substantive rights than those presented immediately above by Lord Bingham.<sup>75</sup> In particular, Professor Raz cites the “principles”<sup>76</sup> of prospectivity, openness, and clarity;<sup>77</sup> the relative stability of the laws;<sup>78</sup> formulating particularized orders through “open, stable, clear, and general rules;”<sup>79</sup> judicial independence;<sup>80</sup> “natural justice”<sup>81</sup> in the sense of open and fair hearings for the sake of “the correct application of the law;”<sup>82</sup> broad but otherwise limited judicial review;<sup>83</sup> realistic accessibility of the courts in terms of money and time;<sup>84</sup> and limits on police and prosecutorial discretion.<sup>85</sup> In this listing, as well, the roles of rules, principles, policies, processes, procedures, rights, and the like, are, again, overwhelmingly prominent, if not utterly exhaustive. The inherent, conceptually essential role of various virtues in constituting the rule of law itself is, again, left unacknowledged, on this and other influential contemporary theories of the rule of law.<sup>86</sup> Crucially, though,

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68. *See id.* at 78.

69. *See id.* at 80.

70. *See id.* at 81-82.

71. *See supra* text accompanying note 53.

72. *See supra* text accompanying notes 50-57.

73. *See infra* Part IV.

74. *See* JOSEPH RAZ, THE RULE OF LAW AND ITS VIRTUE, in LIBERTY AND THE RULE OF LAW 7-11 (Robert L. Cunningham ed., 1979).

75. *See id.* at 7-11.

76. *Id.* at 7.

77. *See id.*

78. *See id.* at 7-8.

79. *Id.* at 8. Note, yet again, the explicit recourse to rules in particular.

80. *See id.* at 10.

81. *Id.*

82. *Id.*

83. *See id.*

84. *See id.* at 10-11.

85. *See id.* at 11. Note that Professor Raz claims neither the comprehensiveness nor the self-evidence, without elaboration, of his list. *See id.*

86. *See, e.g.,* RONALD A. CASS, THE RULE OF LAW IN AMERICA 4, 6-7, 11-12 (2001) (emphasizing, for example, “fidelity to rules” and “principled predictability” as crucially distinct from the embodied decision-makers); JURGEN HABERMAS, BETWEEN FACTS AND NORMS:

the relevant virtues cannot be reduced to any combination of the rules, principles, policies, processes, procedures, rights, etc., upon which contemporary theorists focus in describing the rule of law.<sup>87</sup> Acting with prudence or practical wisdom will often require much more than

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CONTRIBUTION TO A DISCOURSE THEORY OF LAW AND DEMOCRACY 449 (William Rehg trans., 1996) (“[T]here is a conceptual or internal relation, and not simply a historically contingent association, between the rule of law and democracy.”); F.A. HAYEK, THE CONSTITUTION OF LIBERTY 149 (1960) (“[A] general rule that everybody obeys, unlike a command proper, does not necessarily presuppose a person who issued it. It also differs from a command by its generality and abstractness.”); F.A. HAYEK, LAW, LEGISLATION AND LIBERTY: RULES AND ORDER 55 (1973); F.A. HAYEK, THE ROAD TO SERFDOM: A CLASSIC WARNING AGAINST THE DANGERS TO FREEDOM INHERENT IN SOCIAL PLANNING 112-13 (1944) (focusing on pre-existing, announced, fixed, more or less general rules amounting to data points for individual planning); DAVID LYONS, ETHICS AND THE RULE OF LAW 199 (1984) (“An official who is charged with applying the criminal law should generally be preoccupied with fidelity to its rules and should not attempt to deal with cases by seeking to serve the values that the rules are designed to serve.”); Frederick Schauer, *Rules and the Rule of Law*, 14 HARV. J.L. & PUB. POL’Y 645, 648-50 (1991) (distinguishing rule-based decision-making; particularistic decision-making; and particularistic decision-making actually guided by general rules); Jeremy Waldron, *The Concept and the Rule of Law*, 43 GA. L. REV. 1, 44 (2008) (relating the idea of law itself to that of the rule of law and stating that “systematicity is associated with the Rule-of-Law requirement of consistency or integrity; . . . the existence of general norms is associated with the Rule-of-Law requirements of generality, publicity, and stability; and . . . the existence of . . . courts is associated with the Rule-of-Law requirement of procedural due process”); see also *id.* at 5 (the rule of law as opposing arbitrariness, oppressiveness, or short-circuiting of legal norms and procedures). For commentary on F.A. Hayek’s discussion of rules as data points, see, for example, Todd Zywicki, *Economic Uncertainty, the Courts and the Rule of Law*, 35 HARV. J.L. & PUB. POL’Y 195, 196-97 (2012). Of particular interest is the discussion generated by Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175 (1989). Justice Scalia argues that judicial totality of the circumstances tests tend, more than rules, to undermine uniformity, predictability, and certainty in the law, with worsening consequences as regulations proliferate and are increasingly used to punish opponents. See *id.* at 1179. Scalia recognizes that totality of the circumstances tests and balancing tests are sometimes unavoidable. See *id.* at 1186-87. He wishes, rather, to increase the percentage of legal determinations reflecting some general rule. See *id.* Professor Lawrence Solum has responded valuably to Justice Scalia’s arguments. See generally Lawrence B. Solum, *A Law of Rules: A Critique and Reconstruction of Justice Scalia’s View of the Rule of Law* (2002), available at <http://papers.ssrn.com/abstract=303575>. Professor Solum recognizes that “the rule-of-law values of publicity, certainty, uniformity, and predictability of the law are very important values.” *Id.* at 22. Solum argues, however, that “ad hoc balancing tests may actually provide more constraint than general rules.” *Id.* at 8. This reflects the possibility that a more general rule may “also be more ambiguous and hence . . . less constraining and predictable in its application.” *Id.* at 22. Of course, certainty and predictability in the law may be of negative rule of law value when they exist for the wrong reasons. The utter predictability of a court, for example, that always rules for favored groups and against disfavored groups, regardless of the facts or the law, would overall reflect the undermining, rather than the flourishing, of the rule of law. In addition to the problem of ambiguity noted by Professor Solum, general rules may also lose predictability value to the extent that the general rules in question are vague. See Shane, *supra* note 4, at 23 (discussing frequent vagueness in the law). More dramatically, Timothy Endicott has argued that “[n]ot every law need be vague, but legal systems necessarily have vague laws. So we can go so far as to say that vagueness is an essential feature of law. . . . The rule of law entails both the presence and absence of arbitrary government.” Timothy A.O. Endicott, *The Impossibility of the Rule of Law*, 19 OX. J. LEGAL STUD. 1, 6 (1999).

87. See *supra* Part III.

applying some rule or principle, etc., to a given case. Selecting from among applicable rules or policies may call for practical wisdom, and the rule of law, coherently understood, requires concepts of virtue.

Not surprisingly, the same lack of acknowledgment of the essential role of virtues<sup>88</sup> is a feature not only of contemporary theoretical work, but of international organizational documents,<sup>89</sup> as well as of the work of prominent non-governmental organizations.<sup>90</sup> Even less surprising, then, is a similar lack of acknowledgement in the actual judicial cases.

Any number of case opinions refer explicitly, even if briefly, to the idea of the rule of law. Among the most memorable, certainly, would be the classic *Papachristou v. City of Jacksonville*.<sup>91</sup> Jacksonville's colorfully drafted vagrancy ordinance provided for the arrest and conviction of anyone meeting the following description:

rogues and vagabonds, or dissolute persons who go about begging, common gamblers, persons who use juggling or unlawful games or plays, common drunkards, common night walkers, thieves, pilferers or pickpockets, traders in stolen property, lewd, wanton and lascivious persons, keepers of gambling places, common railers and brawlers, persons wandering or strolling around from place to place without any lawful purpose or object, habitual loafers, disorderly persons, persons neglecting all lawful business and habitually spending their time by frequenting houses of ill fame, gaming houses, or places where alcoholic beverages are sold or served, persons able to work

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88. Again, anyone is free to call any desired quality of the rule of law, such as prospectivity, a "virtue" of the rule of law. My use of the term "virtue" will, however, not be so broad as to include every quality desired of the rule of law, or essential to the rule of law, including prospectivity.

89. See, e.g., G.A. RES. 67/1, U.N., 67TH SESS., U.N. DOC. A/RES/67/1 (Nov. 30, 2012) (seeking to define the rule of law, at the national and international level, and the rule of law's relation to human rights, equality, democracy, and economic growth); U.N. Secretary-General, *Delivering Justice: Programme of Action to Strengthen the Rule of Law at the National and International Levels*, at 2, U.N. Doc. A/66/749 (Mar. 16, 2012) (discussing the rule of law as a "principle of governance" consistent with "international human rights").

90. See, e.g., *What is the Rule of Law?*, WORLD JUSTICE PROJECT, <http://worldjusticeproject.org/what-rule-law> (last visited Sept. 2, 2015); see also Diarmuid F. O'Scannlain, *The Rule of Law and the Judicial Function in the World Today*, 89 NOTRE DAME L. REV. 1383, 1387 (2014) (discussing the World Justice Project). The World Justice Project has worked in particular on the many complications of attempting to "measure" the rule of law. See generally Juan C. Botero & Alejandro Ponce, *Measuring the Rule of Law* (The World Justice Project, WPS No. 001, 2010), available at <http://ssrn.com/abstract=1966257> (discussing the World Justice Project and focusing on nine dimensions of the rule of law). For a discussion pursuing similar questions, see also Tom Ginsburg, *Pitfalls of Measuring the Rule of Law*, 3 HAGUE J. RULE L. 269, 275 (2011); Daniel B. Rodriguez et al., *The Rule of Law Unplugged*, 59 EMORY L.J. 1455, 1471-72 (2010); Stefan Voigt, *How to Measure the Rule of Law*, 65 KYKLOS 262, 268-76 (2012).

91. 405 U.S. 156 (1972).

but habitually living upon the earnings of their wives or minor children . . . .<sup>92</sup>

The Supreme Court declared the ordinance void for vagueness—an offense against due process<sup>93</sup>—and held that the ordinance “encourages arbitrary and erratic<sup>94</sup> arrests and convictions”<sup>95</sup> and confers “unfettered discretion” on the police.<sup>96</sup>

The *Papachristou* Court’s explicit discussion of the rule of law was quite brief.<sup>97</sup> But the ordinance’s vagueness, lack of notice of the scope of its prohibitions, and the manipulability of its enforcement possibilities moved the Court to write in “rule of law” terms.<sup>98</sup> Specifically, the Court declared that “[l]iving under a rule of law entails various suppositions, one of which is that ‘all persons are entitled to be informed as to what the State commands or forbids.’”<sup>99</sup>

The Court, thus, does not attempt in *Papachristou* to inventory all of the elements of the rule of law.<sup>100</sup> But we can fairly point out that the Court’s discussion of the rule of law may reasonably be read as referring to rules, principles, policies, norms, events, and states of affairs, as well as to rights—but not to anything remotely akin to a familiar basic virtue.<sup>101</sup> More importantly, other cases referring explicitly to the rule of law, in its various other dimensions, are similarly oblivious.<sup>102</sup> Overlooking the virtues in characterizing the

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92. *Id.* at 156 n.1.

93. *Id.* at 162; *see also* *Connally v. Gen. Constr. Co.*, 269 U.S. 385, 391 (1926) (discussing the concept of vagueness).

94. Here, as on other occasions, the Court objects to vague language as enabling erratic, unpredictable, or random enforcement practices where they also note, or might have noted, the potential for quite predictable and systematically unequal enforcement with regard to particular disfavored groups. *See Papachristou*, 405 U.S. at 170-71; *Desertrain v. Los Angeles*, 754 F.3d 1147, 1157 (9th Cir. 2014) (quoting *Papachristou*, 405 U.S. at 170-71).

95. *Papachristou*, 405 U.S. at 162.

96. *Id.* at 168.

97. *See id.* at 162.

98. *Id.*

99. *Id.* (quoting *Lanzetta v. New Jersey*, 306 U.S. 451, 453 (1939)). The *Papachristou* “rule of law” language is, in turn, quoted in *FCC v. Fox Television Stations*, 132 S. Ct. 2307, 2317 (2012); *United States v. Caseer*, 399 F.3d 828, 834 (6th Cir. 2005); and *Miranda v. Southern Pacific Transportation Co.*, 710 F.2d 516, 525, 527 (9th Cir. 1983) (Alarcon, J., concurring in part and dissenting in part).

100. *See Papachristou*, 405 U.S. at 162, 171.

101. *See infra* Part IV. As we shall see, “justice” is classically thought of as one of the basic or cardinal virtues, and virtually every case opinion, whatever its nature, can be said to seek an outcome in accordance with justice. But, justice as a classic cardinal virtue and justice as the outcome to be pursued by a court are clearly not defined in the same way. *See infra* Part IV. Thus, a judicial opinion seeking the legally right or just outcome does not necessarily seek or honor justice in the sense of the classic virtue of character.

102. *See, e.g., Harris v. Hutchinson*, 209 F.3d 325, 330 (4th Cir. 2000).

rule of law is, thus, endemic to the case law, as well as to the broader theoretical discussions.<sup>103</sup>

Merely as a further example drawn from the cases, consider the Court's discussion of the rule of law in *Landgraf v. USI Film Products*,<sup>104</sup> in which the Court considers fairness,<sup>105</sup> the "opportunity to know what the law is,"<sup>106</sup> the opportunity "to conform [one's] conduct"<sup>107</sup> to the law, the importance of "settled expectations,"<sup>108</sup> and the related value of giving people appropriate "confidence about the legal consequences of their actions."<sup>109</sup> The cases also discuss the principle of "treating like cases alike,"<sup>110</sup> uniformity in applying the law,<sup>111</sup> the value of expeditious resolution of disputes and avoidance of delay,<sup>112</sup> the "public performance of the judicial function,"<sup>113</sup> and "an independent bar."<sup>114</sup>

It is, in a way, understandable that we think of the various elements of the rule of law as matters of rules, principles, policies, norms, procedures, decision-making structures, processes, doctrines, standards, tests, and perhaps substantive rights. But, as I shall now suggest, the rule of law in its very essence calls upon a distinct category and dimension—that of virtue, and of several distinct virtues in particular, beginning with the crucial virtue of practical wisdom.<sup>115</sup>

#### IV. PRACTICAL WISDOM, SOME ALLIED VIRTUES, AND THE RULE OF LAW

If we happen to think of the virtue of practical wisdom, prudence, or the Aristotelian conception of *phronesis* largely in terms of the exercise of discretion, it is not difficult to view practical wisdom,

103. See RAZ, *supra* note 74, at 11. See generally *In re Phenylpropanolamine Prods. Liab. Litig.*, 460 F.3d 1217 (9th Cir. 2006).

104. 511 U.S. 244 (1994).

105. *Id.* at 265.

106. *Id.*

107. *Id.*

108. *Id.*

109. *Id.*

110. See, e.g., *Getsy v. Strickland*, 577 F.3d 320, 333 (6th Cir. 2009) (Merritt, J., dissenting from denial of rehearing en banc) (quoting Aristotle); *Getsy v. Strickland*, 495 F.3d 285, 314, 324 (6th Cir. 2007) (en banc) (Merritt, J., dissenting) (quoting Aristotle). But cf. Peter Westen, *The Empty Idea of Equality*, 95 HARV. L. REV. 537, 542, 560, 579-80 (1982) (discussing the idea of equality as either empty or superfluous and confusing).

111. See, e.g., *Harris v. Hutchinson*, 209 F.3d 325, 330 (4th Cir. 2000).

112. See, e.g., *In re Phenylpropanolamine Prods. Liab. Litig.*, 460 F.3d 1217, 1227 (9th Cir. 2006).

113. *Todd v. Daewon Am., Inc.*, 2014 WL 2608454 at \*2 (M.D. Ala. June 11, 2014).

114. *United States v. Reid*, 214 F. Supp. 2d 84, 96 (D. Mass. 2002).

115. See *infra* Part IV.

understood as discretion, as separable from, if not opposed to, the rule of law.<sup>116</sup> Arguably, the well-known rule of law theorist Friedrich Hayek adopts this course with particular clarity.<sup>117</sup>

But, what if we focus specifically on fundamental rule of law elements, such as equality, in the sense of treating relevantly similar cases alike and relevantly dissimilar cases not-alike?<sup>118</sup> Or on making a complex attempt at regulation appropriately understandable, at least to the primarily affected members of the public?<sup>119</sup> Or on making the law—perhaps with regard to traffic safety and speed limits, alcohol, or sexuality—performable by the public?<sup>120</sup> Or on some degree of stability and predictability in the law, in the context of optimally protecting one or more substantive rights?<sup>121</sup> Or on avoiding abusive, if not necessarily all, retroactive legislation or adjudication?<sup>122</sup> Or on carrying out complex legislative programs in ways consistent with their purported purposes?<sup>123</sup> Or on ensuring that some particular law, perhaps desirable on its face, does not unduly undermine a separate law or regulatory program?<sup>124</sup> Or on avoiding changes in a law or regulatory program that would count as unduly or excessively frequent?<sup>125</sup> Or on making law at all in a rapidly evolving and poorly understood subject area,<sup>126</sup> or contrary to the values of simplicity, understandability, and compliance?<sup>127</sup> Or on avoiding undue delay in resolving legal issues, given the value of accuracy and fairness in resolving such issues?<sup>128</sup>

A moment's reflection on each of these fundamental dimensions of the rule of law, as widely understood, leads to a crucial conclusion: the specific virtue of practical wisdom—setting aside for the moment all

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116. See Eugene F. Miller, *Prudence and the Rule of Law*, 25 AM. J. JURIS. 181, 181-82 (1979).

117. See *id.* at 182.

118. See *supra* notes 57, 110 and accompanying text.

119. See, e.g., *supra* text accompanying note 51 (Fuller's fourth criterion).

120. See, e.g., *supra* text accompanying note 51 (Fuller's sixth and seventh criteria).

121. See, e.g., *supra* text accompanying note 51 (Fuller's seventh criterion in the context of any substantive (human) right one wishes to build into the idea of the rule of law).

122. See, e.g., *supra* text accompanying note 51 (Fuller's third criterion). This is not to suggest that all retroactive legislation is either unpredictable or unjustifiable.

123. See, e.g., *supra* text accompanying note 51 (Fuller's eighth criterion). Discerning legislative purposes may require some degree of virtues such as practical wisdom.

124. See, e.g., *supra* text accompanying note 51 (Fuller's fifth criterion). Noticing aggregate effects of separately harmless statutes may also require a degree of practical wisdom.

125. See, e.g., *supra* text accompanying note 51 (Fuller's seventh criterion, in a distinct respect).

126. See, e.g., *supra* text accompanying note 51 (Fuller's first criterion).

127. See, e.g., *supra* text accompanying note 51 (Fuller's fourth, fifth, and sixth criteria).

128. See *supra* text accompanying notes 69, 86, 110.



other potentially relevant virtues—is deeply implicated in nearly all of the elements of the rule of law.

Practical wisdom, crucially, is a part not only of implementing a well-established and independent rule of law—of executing properly a pre-existing rule of law<sup>129</sup>—but of the very idea of the rule of law itself.<sup>130</sup> It is without a doubt that we want the rule of law to operate well in practice, all else being equal, and practical wisdom and other virtues are a part of this. But, as we work through most, if not all, of the rule of law elements, such as treating relevantly similar cases alike, we see that discerning what counts as a relevant similarity—a part of the element itself—calls for at least some minimal degree of practical wisdom, among other virtues.<sup>131</sup> With no practical wisdom, or other virtue if we set aside practical wisdom, what informs our good faith judgment as to what counts as a genuinely relevant similarity or dissimilarity?

There is of course no guarantee that what we think to be practically wise will actually turn out to be practically wise, on anyone's standards. And, thus, there is no guarantee that our attempts to distinguish relevant from irrelevant considerations will succeed. But, we are not guaranteed the rule of law merely by desiring it. The rule of law may well be a matter of degree, so the occasional, or even frequent, lack of complete virtue need not be fatal to the rule of law, overall or in any particular respect.<sup>132</sup> But this does not excise the virtue of practical wisdom from the discerning of relevant and irrelevant similarities.

We shall not tediously work through the virtue of practical wisdom as essential to various other elements of the rule of law, one by one. Practical wisdom is essential to judgments as to a proper balance of stability and change in the law,<sup>133</sup> to judgments that discern and preserve harmony of purposes in and among the laws, to judgments as to abusive

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129. See Claudio Michelon, *Practical Wisdom in Legal Decision-Making 2* (U. of Edinburgh Sch. of Law, Working Paper No. 2010/13), available at <http://ssrn.com/abstract=1585929> (2010) (stating that “legal decision-making by public officials . . . can only be carried out appropriately if those officials possess certain virtues”). It is possible to argue that a legal system does not exist at all unless it is carried into execution or implemented sufficiently well. The rule of law may come in degrees. See *infra* note 135. But, this does not show that a rule of law system does not exist at all if there are, say, unintended and unsystematic blunders in executing the rule of law. For further discussion of the virtue of practical wisdom and other virtues in the context of applying the rule of law, see BRIAN Z. TAMANAHA, *ON THE RULE OF LAW: HISTORY, POLITICS, THEORY* 125-26 (2004); and Lawrence B. Solum, *Virtue Jurisprudence: A Virtue-Centered Theory of Judging*, 34 *METAPHILOSOPHY* 178, 201 (2003).

130. Solum, *supra* note 129, at 125-26.

131. Michelon, *supra* note 129, at 22-23.

132. See, e.g., *supra* note 57 and accompanying text.

133. Professor Joseph Raz holds that what he calls the principle of required stability in the rule of law “cannot be usefully subjected to complete legal regulation. It is largely a matter for wise governmental policy.” RAZ, *supra* note 74, at 8.

retroactivity, and so on.<sup>134</sup> My thesis as to the essentiality of virtue to the rule of law is upheld even if only one virtue is essential to only one necessary element of the rule of law. We also need not link the virtues directly to all of the various elements of the rule of law. But, it is closer to the truth to think of one or more virtues as linked to all of the elements of the rule of law than to none of them.

The status and role of practical wisdom in the rule of law should be generally clear on the basis of mainstream understandings of what the virtue of practical wisdom amounts to. But, it might be helpful at this point briefly to refer to classical and modern accounts of this particular virtue. Thus, for Aristotle, practical wisdom, or excellence in deliberation,<sup>135</sup> combines “scientific knowledge of the universal with the sort of experienced eye that enables [the practically wise person] to apply it effectively in particular cases,”<sup>136</sup> a quality we might call “astuteness.”<sup>137</sup> Practical wisdom requires correctness of desire,<sup>138</sup> which should encompass “the common good of the multitude;”<sup>139</sup> correctness of one’s beliefs and assertions;<sup>140</sup> and “correctness of the calculation or deliberation”<sup>141</sup> on which such assertions rely.<sup>142</sup>

Importantly, the capacities relevant to practical wisdom can be developed to greater or lesser degrees.<sup>143</sup> Thus, “[t]he wise person grasps the right reasons and values at the appropriate time and changes her perspective accordingly.”<sup>144</sup> But, practical wisdom is manifested not only in thought, but in decision and action.<sup>145</sup> Most importantly for our purposes, we should not expect practical wisdom to be reducible to some formula, rule, principle, or policy, or combination thereof. Practical wisdom is, instead, complex,<sup>146</sup> multidimensional,<sup>147</sup> partly contextual or

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134. *Id.*

135. See ARISTOTLE, NICOMACHEAN ETHICS bk. VI, at § 5 (W.D. Ross. Trans., digireads.com 2005) (c. 350 B.C.E.); SARAH BROADIE, ETHICS WITH ARISTOTLE 242 (1991).

136. C.D.C. REEVE, ACTION, CONTEMPLATION, AND HAPPINESS: AN ESSAY ON ARISTOTLE 150 (2012).

137. BROADIE, *supra* note 135, at 242.

138. See REEVE, *supra* note 136, at 131.

139. See AQUINAS, *supra* note 24, at qu. 47, art. 10 (providing the Aristotle-influenced account); see also Katherine J. Bangen, et al., *Defining and Assessing Wisdom: A Review of the Literature*, 21 AM. J. GERIATRIC PSYCHIATRY 1254, 1263 (2013).

140. See REEVE, *supra* note 136, at 131.

141. *Id.*

142. See *id.*

143. See Valerie Tiberius, *Wisdom and Perspective*, 102 J. PHIL. 163, 174-75 (2005).

144. *Id.* at 175.

145. See Bangen, *supra* note 139, at 1263.

146. See *id.*

147. See *id.*; Jeffrey A. Greene & Scott C. Brown, *The Wisdom Development Scale: Further Validity Investigations*, 68 INT’L J. AGING & HUM. DEV. 289, 292 (2009) (citing the interrelated

situational, and holistic;<sup>148</sup> and, therefore it is somehow greater than the sum of its inputs.<sup>149</sup>

Practical wisdom does in fact seem to be the single virtue most central to the elements of the rule of law, but a case can be made for other virtues, as well. The cardinal virtues, beyond practical wisdom, for example, are often taken to include fortitude or courage, temperance or appropriate self-restraint, and justice in the sense of a sustained disposition to afford to other persons that which is due and appropriate.<sup>150</sup> Broader surveys of basic virtues have added the ideas of humanity<sup>151</sup> and of transcendence.<sup>152</sup> Of course, somewhat different lists and typologies of basic virtues are possible.<sup>153</sup>

If legislators and judges acknowledge the importance of treating like cases alike and relevantly dissimilar cases in some other way, are any virtues other than practical wisdom then required?<sup>154</sup> It clearly seems so, even though the essentiality of other virtues in large measure may be conspicuous only in dramatic or unusual contexts, or only after prolonged reflection. Consider, for example, judges who balance legal stability<sup>155</sup> with substantive rights<sup>156</sup> in a context in which highly vocal and deeply emotional popular resentment of the judge's decision is assured.<sup>157</sup> In such cases, at least, treating like cases alike may well

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dimensions of "Self-Knowledge, Understanding of Others, Judgment, Life Knowledge, Life Skills, and Willingness to Learn" and discussing judgment as involving "perception and discernment"); Richard Hawley Trowbridge, *Waiting for Sophia: 30 Years of Conceptualizing Wisdom in Empirical Psychology*, 8 RES. HUM. DEV. 149, 150 (2011) (citing the dimensions of "self-knowledge, self-integration, nonattachment, self-transcendence, and compassion, as well as a deeper understanding of life" and seeking to integrate practical and theoretical wisdom).

148. See Bangen, *supra* note 139, at 1263; see also *supra* note 8.

149. See Bangen, *supra* note 139, at 1263; see also Rosalind Hursthouse, *Virtue Ethics*, STAN. ENCYCLOPEDIA OF PHIL., <http://plato.stanford.edu/entries/ethics-virtue> (last visited Sept. 2, 2015) (discussing even rule-oriented moral theorists as recognizing the independent importance of practical wisdom).

150. See, e.g., PAUL BLOOMFIELD, *THE VIRTUES OF HAPPINESS: A THEORY OF THE GOOD LIFE* 175-76 (2014) (seeking to briefly define the four cardinal virtues). See generally JOSEF PIEPER, *THE FOUR CARDINAL VIRTUES: PRUDENCE, JUSTICE, FORTITUDE, TEMPERANCE* (Richard Winston et al. trans., Univ. of Notre Dame Press 1966).

151. See CHRISTOPHER PETERSON & MARTIN E.P. SELIGMAN, *CHARACTER STRENGTHS AND VIRTUES: A HANDBOOK AND CLASSIFICATION* 36-38 (2004).

152. See *id.* at 36, 38-39; Trowbridge, *supra* note 147, at 150-54.

153. See, e.g., ROBERT C. ROBERTS & W. JAY WOOD, *INTELLECTUAL VIRTUES: AN ESSAY IN REGULATIVE EPISTEMOLOGY* 219-21, 236-37, 257-58, 286-92 (2007) (focusing on appropriate cautiousness, humility, autonomy, and generosity, beyond the four traditional cardinal virtues).

154. See *supra* note 118 and accompanying text.

155. See *supra* note 125 and accompanying text.

156. See *supra* note 125 and accompanying text. For a useful overview, see TAMANAHA, *supra* note 129, at 102-13.

157. See TAMANAHA, *supra* note 129, at 102-03; see also Scalia, *supra* note 86, at 1180.

require a special degree of the basic virtue of courage,<sup>158</sup> in the sense of braving “what is generally supreme in a democracy: the popular will.”<sup>159</sup>

Or consider the rule of law imperative to treat like cases alike in contexts of technical complexity and various other uncertainties. Here, it seems, the elements of the rule of law in themselves require a category encompassing the virtue of humility<sup>160</sup> and the vice of arrogance.<sup>161</sup> Humility, it has been said, “is the extreme awareness of the limits of all virtue and of one’s own limits as well. This discretion is the mark . . . of perfect lucidity . . . .”<sup>162</sup>

The argument for the essentiality of the virtues, thus, does not rely on the classic virtue of justice as a virtue of persons, as defined from the time of Plato.<sup>163</sup> We are today more used to speaking of justice as an outcome, or even as a process, than as a virtue of persons. But, it would certainly be possible to link justice as the virtuous disposition to give to everyone what is their due<sup>164</sup> to one or more rule of law elements, including certainly that of routinely treating like cases alike, and relevantly dissimilar cases correspondingly not-alike,<sup>165</sup> or accommodating substantive rights.<sup>166</sup> Such an argument regarding justice might indeed seem too easy to be meaningful. The personal virtue of justice may be too hard to distinguish from the just outcome or the process of treating like cases alike, an element of the rule of law. Though it might seem that I was thereby simply defining the rule of law in terms of a virtue, I instead set aside the argument for the virtue of justice in particular as potentially confusing and certainly unnecessary to my basic argument.

Let us take it as established, then, that one or more basic virtues are inescapably inherent in the very idea of the rule of law.<sup>167</sup> Thinking of the idea of the rule of law, in itself, in terms solely of rules, principles,

158. See Scalia, *supra* note 86 at 1180.

159. *Id.* In the extreme case, consider the predictable and sustained hostile reactions to treating like cases alike in a succession of basic civil rights cases. See generally JACK BASS, TAMING THE STORM: THE LIFE AND TIMES OF JUDGE FRANK M. JOHNSON, JR., AND THE SOUTH’S FIGHT OVER CIVIL RIGHTS 207-18 (2003); Ronald J. Krotoszynski, Jr., *Equal Justice Under Law: The Jurisprudential Legacy of Judge Frank M. Johnson, Jr.*, 109 YALE L.J. 1237, 1239-40 (2000).

160. See, e.g., ANDRE COMTE-SPONVILLE, A SMALL TREATISE ON THE GREAT VIRTUES: THE USES OF PHILOSOPHY IN EVERYDAY LIFE 140-48 (Catherine Temerson trans., 2001) (1996).

161. See Valerie Tiberius & John D. Walker, *Arrogance*, 35 AM. PHIL. Q. 379, 382 (1998).

162. COMTE-SPONVILLE, *supra* note 160, at 140.

163. See ARISTOTLE, *supra* note 135, at bk. I, § 5; Michael Slote, *Justice as a Virtue*, STAN. ENCYCLOPEDIA OF PHIL., <http://plato.stanford.edu/entries/justice-virtue> (last visited Sept. 2, 2015). See generally PLATO, *supra* note 21.

164. See ARISTOTLE, *supra* note 135, at bk. V.

165. See *supra* note 121 and accompanying text.

166. See *supra* notes 124, 157 and accompanying text.

167. See Fallon, *supra* note 40, at 56.

policies, standards, tests, processes, structures, rights, and so on will, thus, not suffice. But, there are no obvious logical barriers to revising our understanding of the rule of law in this regard. Thinking as well of the roles, actual and possible, of the basic virtues does not require us to pay some substantial price in public policy terms, including in the justice of legal outcomes.

In fact, it is entirely plausible that thinking of the rule of law more distinctly in terms of virtues could have beneficial effects on the rule of law's various processes and outcomes, at every stage thereof. Think of the rule of law in practice, in our time and place. Consider the making of statutes, the conduct of trials, the administration and enforcement of the law, or even Supreme Court adjudications. Can we say that the rule of law in those contexts, manifests, in particular, no significant motivational or cognitive biases, or biases of belief, decision-making, or behavior?<sup>168</sup> That seems unlikely. Could not a reflective, well-considered, virtue-guided approach, among other approaches, meaningfully address at least some of those biases?

Consider in particular some systematic biases potentially manifested by legal systems under a rule of law. The Nobel Prize-winning behavioral psychologist Daniel Kahneman has discussed biases, such as: the neglect of quantity in emotional contexts;<sup>169</sup> political preferences as determining the persuasiveness of arguments;<sup>170</sup> the arbitrary "anchoring" of judgments and behavior by some environmental cue;<sup>171</sup> judgments as biased by the novelty, poignancy, and the psychological "availability" of some data;<sup>172</sup> biases in favor of cognitive consonance or the sheer tidiness and simplicity of overall belief;<sup>173</sup> the tendency to either overweight or to ignore relatively small risks;<sup>174</sup> the tendency to ignore or undervalue the representativeness, or the underlying background likeliness or unlikeliness, of some explanation;<sup>175</sup> the tendency to find the interesting, vivid, or stereotypic conjunction of two separate qualities to somehow be more likely than either one of the two events by itself;<sup>176</sup> the tendency to see causal

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168. For an extensive listing, as opposed to an authoritative analysis, of a large number of potentially relevant cognitive biases, see *List of Cognitive Biases*, WIKIPEDIA, [http://en.wikipedia.org/wiki/List\\_of\\_cognitive-biases](http://en.wikipedia.org/wiki/List_of_cognitive-biases) (last visited Sept. 2, 2015).

169. See DANIEL KAHNEMAN, THINKING, FAST AND SLOW 92-93 (2011).

170. See *id.* at 103.

171. See *id.* at 125-26.

172. See *id.* at 138-39.

173. See *id.* at 139-40.

174. See *id.* at 143-44.

175. See *id.* at 151.

176. See *id.* at 158.

relationships where there are really only random fluctuations;<sup>177</sup> the adverse effects of “groupthink” and a sustaining community of support thereof;<sup>178</sup> “planning” biases toward unduly low cost estimates and unduly high predictions of use;<sup>179</sup> a related broader bias toward unduly optimistic predictions;<sup>180</sup> and the difficulty in seeing the flaws and limits of a theory once it has been personally adopted and (successfully) used.<sup>181</sup>

Each of these biases is certainly found outside the operation of the law, but it is also difficult to believe that any such bias is absent from familiar legislative, administrative, and adjudicative institutions, operating under the rubric of the rule of law. The courts have repeatedly cited Professor Kahneman’s work, and the various biases as manifested in various legal and non-legal contexts.<sup>182</sup> And beyond that of Professor Kahneman specifically, scholarly treatments of cognitive biases, fallibilities, limits, and vices generally seem no less applicable to rule of law actors than to private sector decision-makers.<sup>183</sup>

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177. See *id.* at 175-76; see also NASSIM NICHOLAS TALEB, *FOOLED BY RANDOMNESS: THE HIDDEN ROLE OF CHANCE IN LIFE AND IN THE MARKETS* (2d ed., 2005).

178. See KAHNEMAN, *supra* note 169, at 217; see also IRVING L. JANIS, *VICTIMS OF GROUPTHINK: A PSYCHOLOGICAL STUDY OF FOREIGN-POLICY DECISIONS AND FIASCOES* 2-6 (1972); Paul Hart, *Irving L. Janis' Victims of Groupthink*, 12 *POL. PSYCHOL.* 247, 251 (1991).

179. See KAHNEMAN, *supra* note 169, at 249-51.

180. See *id.* at 255-56.

181. See *id.* at 276-77.

182. See, e.g., *Carmody v. Bd. of Trs.*, 747 F.3d 470, 475 (7th Cir. 2014) (discussing how multiple biases are conceivably at work in a state university employment decision, suggesting the superiority of a pre-termination rather than a post-termination hearing for due process value); *United States v. Ingram*, 721 F.3d 35, 40 (2d Cir. 2013) (discussing the possibility that “anchors” and anchoring effects might affect judicial sentencing outcomes); *Grant v. Trammell*, 727 F.3d 1006, 1026 (10th Cir. 2013) (discussing the possible relevance of the “conjunction fallacy” in connection with the judicial appellate doctrine of cumulative error); *Expressions Hair Design v. Schneiderman*, 975 F. Supp. 2d 430, 436-37 (S.D.N.Y. 2013) (challenging regulation as arguably involving a consumer perception “framing effect” in which credit card surcharges are perceived negatively, but an equivalent cash discount is perceived positively).

183. See, e.g., JOSEPH T. HALLINAN, *WHY WE MAKE MISTAKES* ch. 10 (2009) (noting the roles of overconfidence, pride, stubbornness, and the virtue of appropriate humility); Heather Battaly, *Epistemic Self-Indulgence*, 41 *METAPHILOSOPHY* 214, 215 (2010) (discussing the vice of self-indulgence as opposed to the virtue of temperance); Wayne Riggs, *Open-Mindedness*, 41 *METAPHILOSOPHY* 172, 185 (2010) (recommending “self-knowledge and self-monitoring” to avoid or limit the vice of closed-mindedness); Ilan Yaniv & Shoham Choshen-Hillel, *Exploiting the Wisdom of Others to Make Better Decisions: Suspending Judgment Reduces Egocentrism and Increases Accuracy*, 25 *J. BEHAV. DEC. MAKING* 427 (2012) (explaining how “judges” who hold preconceived opinions as tending to discount unduly the opinions of others and to thus persist in their own prior opinions). See generally THOMAS GILOVOICH, *HOW WE KNOW WHAT ISN'T SO: THE FALLIBILITY OF HUMAN REASON IN EVERYDAY LIFE* (1991) (noting the relations among recognizing one’s fallibility and the virtues of self-awareness, practical wisdom more generally, appropriate modesty, and realistic humility).

Sometimes, the effects of vices and the lack of virtues can be minimized by largely mechanical techniques and structural manipulations, as by judicial recusal, the appellate process, or the separation of powers and checks and balances.<sup>184</sup> Beyond some point, however, direct attention to reflective solutions, and in particular to virtues and vices, in the operation of the rule of law takes on increasing importance. Of course, some possible ways of taking virtues and vices into account will be intrusive, self-defeating, counterproductive, coercive, or even tyrannical. But, in more benign forms, uncoerced attention to virtues can promote the rule of law and its more effective operation.<sup>185</sup>

A partial remedy for official groupthink, for example, is the cultivation of the virtues of practical wisdom and of certain forms of courage.<sup>186</sup> Other defects of judgment, throughout the rule of law process, can be addressed through the virtues of appropriate self-control, self-discipline or temperance, and through self-monitoring as an aspect of the virtue of practical wisdom.<sup>187</sup> A recognition of one's own fallibility in official decision-making, or of one's relevant limitations in general, can involve the virtues of self-awareness, modesty, courage, and appropriate humility.<sup>188</sup> Acting meaningfully on the recognition of one's vices and limitations may require the virtue of fortitude or courage.<sup>189</sup> In only slightly different terms, the rule of law can be enhanced in any or all of its dimensions by the intelligent exercise of the often underemphasized virtue of self-criticality.<sup>190</sup>

A leading scholar on the exercise of judgment has concluded that "[g]ood judgment . . . is a precarious balancing act. . . . We need to cultivate . . . self-overhearing, to learn how to eavesdrop on the mental conversations we have with ourselves as we struggle to strike the right balance between preserving our existing worldview and rethinking core

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184. See HAMILTON, MADISON & JAY, *THE FEDERALIST WITH LETTERS OF "BRUTUS"* 51 (Terence Ball ed., 2003).

185. See, e.g., Riggs, *supra* note 183, at 185.

186. See KAHNEMAN, *supra* note 169, at 92-93.

187. See *id.* at 153.

188. See COMTE-SPONVILLE, *supra* note 160, at 140.

189. See, e.g., N.J.H. Dent, *The Value of Courage*, 56 *PHILOSOPHY* 574, 574 (1981).

190. See Richard P. Larrick, *Debiasing*, in *BLACKWELL HANDBOOK OF JUDGMENT AND DECISION MAKING* 322 (Derek J. Koehler & Nigel Harvey eds., 2007) (noting the logic of "pre-emptive self-criticism"); Philip E. Tetlock, *Intuitive Politicians, Theologians, and Prosecutors: Exploring the Empirical Implications of Deviant Functionalist Metaphors*, in *HEURISTICS AND BIASES: THE PSYCHOLOGY OF INTUITIVE JUDGMENT* 589-92 (Thomas Gilovich et al. 2002) (listing and discussing biases and possible modes of decisionmaker accountability, including the exercise of appropriate self-criticality).

assumptions.”<sup>191</sup> This perspective, which calls for self-distancing, self-criticality, practical wisdom, a proper humility, and a certain measure of courage, nicely illustrates the centrality of the uncoerced cultivation of the virtues to potential enhancement of the rule of law.

## V. CONCLUSION

Typically, we think that some combination of the ideas of rules, principles, structures, policies, doctrines, standards, processes, tests, and rights, would suffice to describe the idea of the rule of law. But as we have seen, this is not so. Instead, considerations of virtue, including in particular the virtue of practical wisdom, are inherent in the idea of the rule of law. Once we recognize this, we then have additional grounds for exploring the ways in which encouraging the relevant virtues can promote not just a coherent understanding of the rule of law, but also rule of law values, and the enhanced operation of the rule of law.

Thinking of the rule of law as inherently virtue-infused, thus, encourages us to reflect upon the various ways in which the rule of law, in concept and in operation, could be enhanced by attending, prudently and non-coercively, to the most relevant virtues (and vices) of character. Encouragingly, rule of law actors can generally take affirmative steps with regard to cultivating virtues such as appropriate humility, courage, and the various aspects, including self-criticality, of the crucial virtue of practical wisdom.<sup>192</sup>

A bit more could be said, however, about some of the assumptions adopted above. One might ask how current understandings of the idea of the rule of law can possibly be incoherent, given that we do seem to be operating a sustained rule of law system. The short answer is that muddling through, more or less uneventfully, over any length of time does not guarantee genuine underlying coherence. There could, by way of analogy, be accrediting organizations that legitimize groups founded on logically defective premises.<sup>193</sup> Less dramatically, but within the field of the law, for example, we have had a functioning Endangered Species Act for more than forty years.<sup>194</sup> Does that mean that the fundamental

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191. PHILIP E. TETLOCK, *EXPERT POLITICAL JUDGMENT: HOW GOOD IS IT? HOW CAN WE KNOW?* 215 (2005); *see also* KEITH STANOVICH, *RATIONALITY AND THE REFLECTIVE MIND* chs. 2-3 (2010) (discussing the possibility of reflection-driven limitations on the roles of algorithmic thinking and of cognitive biases).

192. *See supra* text accompanying notes 192-97.

193. For further discussion, *see generally*, JORDAN ELLENBERG, *HOW NOT TO BE WRONG: THE POWER OF MATHEMATICAL THINKING* (2014).

194. *See* Endangered Species Act of 1973, Pub. L. No. 93-205, 87 Stat. 884 (codified as amended at 16 U.S.C. §§ 1531-1544 (2012)).



idea of a “species,” for purposes of the Act, as defined by the Act itself or elsewhere, simply must be coherent?<sup>195</sup> Does the operation of any statute in general mean that the statute must necessarily be contributing to fulfilling the statute’s stated formal purposes? Clearly not. In general, there can be no guarantee that ongoing institutions are deeply coherent.<sup>196</sup> And, no such guarantee of deep coherence applies, certainly, to what we experience and classify under the ongoing rule of law.<sup>197</sup>

A final question one might ask, skeptically, about the rule of law itself, as supposedly distinct from the rule of law as carried out in practice: Is there really any viable such distinction? This can be a tricky matter. Let us in response first think by analogy. We think of beautiful objects as beautiful, heavy objects as heavy, and blue objects as blue, but we clearly need not think of the idea of beauty itself as beautiful, heaviness itself as heavy, or the idea of blueness as blue. An idea or concept and its manifestations in practice need not share all their essential elements. This certainly suggests that the idea of the rule of law itself is not reducible to the rule of law in actual practice.

In the rule of law context, it may help to focus on an element of the rule of law that does not seem to essentially involve any of the basic virtues to any interesting degree. Consider in particular the familiar idea that under the rule of law, any particular law must be somehow duly promulgated.<sup>198</sup> Commonly, this will involve something like the availability of the text of some newly adopted statute.<sup>199</sup> Unless we want to stretch the ideas of the basic virtues, it seems sensible to say that as important as promulgation of the law may be, mere promulgation of a law does not essentially or inherently require the exercise, to whatever degree, of any basic virtue. Virtue is, thus, perhaps not of the essence to promulgating the law. If someone insists, they could say, for example, that Judge Frank M. Johnson was in a sense promulgating the civil rights

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195. For the statutory definition of “species,” which seems to itself incorporate references to species, sub-species, and to interbreeding, see, 16 U.S.C. § 1532(16). For discussion, see Karl Gleaves et al., *The Meaning of “Species” Under the Endangered Species Act*, 13 PUB. LAND L. REV. 25, 27 (1992).

196. Christian Talley, *PETA is a Morally Incoherent Organization*, VAND. POL. REV. (Jan. 29, 2015, 8:46 PM), <http://www.vanderbiltpoliticalreview.com/peta-is-a-morally-incoherent-organization> (illustrating PETA’s incoherent stances).

197. See FULLER, *supra* note 7, at 39 (discussing the challenges that may accompany the rule of law).

198. See, e.g., AQUINAS, *supra* note 24, at qu. 90, art. 4; *supra* text accompanying notes 50-51 (Fuller’s second criterion); *supra* text accompanying note 51 (Fuller’s third criterion).

199. *But cf.* AQUINAS, *supra* note 24 (discussing the promulgation of the natural law).

law during his tenure,<sup>200</sup> and that he distinctly manifested the virtue of courage or fortitude in doing so.<sup>201</sup>

But, if we do assume that Judge Johnson was promulgating the law at some pure conceptual level, and not carrying out the rule of law, the very distinctiveness of his remarkable courage might suggest that courage and the vices of cowardice or foolhardiness are not intrinsic to promulgating the law. We tend, more naturally, though, to think that if Judge Johnson was promulgating the law in any sense, he was just carrying out, implementing, or putting into practice that element of the rule of law. On this view, Judge Johnson was more uncontroversially displaying courage and fortitude merely in carrying out the rule of law.

It, thus, seems that even if the virtue of courage and its corresponding vices are not essential to the idea of promulgating the law, courage can still be clearly displayed, at least occasionally, in carrying out or engaging in the promulgation of the law under particular circumstances. But, this fact itself actually illustrates the basic distinction at issue. As we have assumed above, the rule of law, as a concept, is distinguishable from the rule of law as carried out into practice, well or ill, under particular circumstances.<sup>202</sup>

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200. See *supra* note 159.

201. See *supra* note 159.

202. This is not to deny that there can be borderline cases regarding whether the law has been promulgated at all, apart from cases in which the law has admittedly been promulgated, but perhaps foolishly, wickedly, or otherwise poorly. In this context, we might wonder about the Emperor Nero's deliberate practice of posting new edicts in places physically difficult to access. See Scalia, *supra* note 86, at 1179.

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