What is Rule by Law?

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Abstract

My aim in this paper is to sharpen the popularly perceived association between rule by law and worries about arbitrary power. I argue that the use of law as a cloak for arbitrary power or rule by law is pathological to the rule of law because it undermines law's capacity to facilitate or guide conduct. My analysis of rule by law pivots on the argument that the rule of law is an ideal of workable legal order understood as a framework of norms for facilitating the interests of legal subjects. The rule of law is therefore a moral idea to the extent that the attempt to construct and maintain such an order requires engaging the legal subject, as a rational moral agent possessed of vital interests. Since rule by law involves the attempt to use the law in a way that does not involve the systematic engagement of the legal subject so conceived but which nevertheless tries to project rule-of-law legitimacy by trading on the rule of law, rule by law strains the rule of law and corrupts the workability of legal order as a framework for facilitating the salient moral interests of legal subjects thus by damaging the rational and moral foundations of legal order. It is therefore apt to conceive of rule by law as a form of juridical pathology.

I. INTRODUCTION

The concept of the rule of law or legality is often contrasted with arbitrary power while the notion of rule by law, on the other hand, is commonly associated with arbitrary power.[1] As one author puts it, rule by law "carries scant connotations of legal *limitations* on government…."[2] Rule by law is most often linked to a scenario where a ruling regime tries to project a veneer of legal and political legitimacy for arbitrary power by exploiting the legal form, in particular the legal rules which may manifest as constitutional and/or legislative provisions. Thus, rule by law is most at home in an authoritarian setting where a ruling regime has complete control over the legislature so that it can change the law as necessary in order to ensure that it can claim that its actions are supported by

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1 It should be noted that one can unpack the concept of rule by law in a way that makes it analogous to a moral conception of the rule of law that is antithetical to the notion of arbitrariness. See Kenneth Winston, "The Internal Morality of Chinese Legalism" *Singapore Journal of Legal Studies,* 2005, p. 13.

2 Brian Z. Tamanaha, *On the Rule of Law: History, Politics, Theory*, Cambridge University Press, Cambridge, 2004, p. 102.

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formal legal rules.[3] However, the criticism that a government is engaged in rule by law can also extend to liberal democratic governments that use the legal form as a cloak for arbitrary power.[4]

In this paper, I develop a theoretical account of rule by law that aims to clarify and sharpen the perceived link between rule by law and arbitrary power. My analysis presupposes that legal subjects are rational moral agents possessed of dignity and self-respect and are therefore bearers of basic rights and interests that give expression to these features of their moral agency. Importantly, I regard the rational and moral dimensions of human agency as, generally speaking, inseparable from the perspective of the legal subject. It follows that for the legal subject, it is only rational to obey law if any given legal order aspires to engage his or her salient moral interests. In concrete terms, this means that it is rational to obey law only if the law systematically attends to values like reasonableness, fairness, impartiality, and equal respect for human rights as values that give expression to the legal subject's sense of self as a moral agent.

In light of this presupposition, I will argue that rule by law involves a conception of law as an instrument of control of legal subjects while trading on a different conception of law as a framework for facilitating the salient moral interests of legal subjects. I will argue that the rule of law is best understood as an ideal of legal order that depends on a conception of legal order as a framework for facilitating these interests. The essential difference between the ideas of control and facilitation emerges in the way these different conceptions of law engage legal subject's agency. When law is conceived as an instrument of social control, the legal subject's rational and moral agency are regarded as severable so that those who deploy the law under this model claim that there is a plausible basis to a claim of legal legitimacy even if the law does not engage the salient moral interests of legal subjects. However, when law is viewed as a framework of facilitation, claims of legal legitimacy are questionable if they do not engage these interests. My argument is that rule by law, in trading upon the rule of law, strains the rational and moral foundations of legitimate legal order and can ultimately undermine the operation of legal order as a framework of norms for facilitating conduct thus making rule by law a form of juridical pathology. The practice of rule by law, like a disease, damages the rational and moral foundations of legal order.

My analysis, which emphasises the perspective of the legal subject as a rational-moral agent when thinking about the legitimacy of legal authority and as underpinning

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[3] Tom Ginsburg & Tamir Moustafa, *Rule by Law: Judicial Politics in Authoritarian Regimes*, Cambridge University Press, Cambridge, 2008. I elaborate the most interesting features of the case studies in the book and the lessons we might learn from these studies in a review article entitled "Judicial Politics in Authoritarian Regimes", *University of Toronto Law Journal,* 2009, Vol. 59:3, pp. 405-41. My aim in this paper is to develop an insight emerging from these lessons: rule by law involves a problem of domination. The analysis presented here expands the linkage between rule by law and the problem of domination briefly sketched in Ratna Rueban Balasubramaniam, "Has Rule by Law Killed the Rule of Law in Malaysia?" *Oxford University Commonwealth Law Journal,* 2008, Vol. 8:2, p.211.

[4] David Dyzenhaus, for example, discusses the dangers of rule by law in connection to how some liberal democracies have used the legal form to develop anti-terrorism measures that violate the human rights of those subject to such laws. See generally David Dyzenhaus, *The Constitution of Law: Legality in a Time of Emergency* Cambridge University Press, Cambridge, 2006.

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a conception of the rule of law as a framework of facilitation rather than control, draws its theoretical resources mainly from Lon Fuller's jurisprudential insights.[5] However, I also draw theoretical resources from Fuller's main jurisprudential antagonist, H. L. A. Hart. As is well known, Fuller and Hart disagree about how to understand the rule of law. Fuller argues that the rule of law comprises a set of conditions that must be fulfilled if law is to successfully guide conduct. Legal order, in his view, is a framework for facilitating human interaction so that workable legal order must comprise rules that are general, public, intelligible, non-contradictory, stable over time, prospective, and that official action should match declared rule. In his view, these conditions make up an "inner" or "internal" morality of law because the principles are not compatible with the use of law for immoral ends.[6] To support this claim, Fuller points to the breakdown of these principles within Nazi Germany.[7] In addition, Fuller argues that conscientious attention to these principles will orient the law towards moral goodness, even, he thinks, in the case of a tyrannical ruler.[8] Thus, in Fuller's view, the legal form is inherently moral. Hart, on the other hand, argues that the rule-of-law principles Fuller identifies are "compatible with very great iniquity." [9] The basis to Hart's objection is his commitment to legal positivism, a jurisprudential stance which claims that there is a conceptual separation between law and morality. In light of his positivist commitments, Hart argues that these principles are merely rational preconditions to legal order that must be fulfilled if law is to guide conduct but these principles are logically consistent with the use of law for immoral purposes.[10] Therefore, in Hart's view, the legal form is morally neutral.

As I will show, Hart fundamentally understands the rule of law as an ideal built upon an image of law as an instrument of control, an image that does not allow him to make full sense of his own concerns about how the danger of law as a tool of abuse can materialise. Indeed, when we inspect these concerns, we shall see that his claim that the legal form is morally neutral breaks down. Furthermore, what he has to say about this issue requires that we presuppose that the legal form is moral in precisely the way that Fuller argues, namely that for legal order to operate as a framework of rules to guide conduct, one has to take seriously the legal subject as a rational-moral agent where rule-of-law principles are a proxy for engaging the legal subject so conceived. Thus, in developing my argument I show why Hart goes awry in his analysis but my main intention is to draw out what I see as an important and productive linkage between Hart's and Fuller's ideas about how the danger of rule by law can arise. This linkage should not be obscured

[5] A pervasive theme in Fuller's work is the emphasis on the distinction between law as an instrument of social control and law as a framework for human interaction. See, for instance, Lon L. Fuller, "Law as an Instrument of Social Control and Law as a Facilitation of Human Interaction" *Brigham Young University Law Review,* 1975, Vol. 1, p. 89. My explanation of what I describe in the text as the "control" and "facilitative" models of law echo Fuller's account of these differing conceptions of law.

[6] Lon L. Fuller, *The Morality of Law*, rev. ed., Yale University Press, New Haven, 1969, Chapter 2.

[7] Lon L. Fuller, "Positivism and the Ideal of Fidelity to Law – A Reply to Professor Hart", *Harvard Law Review,* 1958, Vol. 31:4, pp. 650-657.

[8] *Ibid*, at p. 645.

[9] H. L. A. Hart, *The Concept of Law*, 2nd ed., Oxford University Press, Oxford, 1994, p. 207.

[10] H. L. A. Hart, "Book Reviews: The Morality of Law" Harvard Law Review, 1964-1965, Vol. 78, p. 1281.

by their disagreement about whether rule-of-law principles are also moral principles of legal order.

II. THE CONTROL MODEL OF LAW

At the core of legal positivism is the Separation Thesis, the thesis that there is no necessary connection between law and morality. [11] The basis to the Separation Thesis lies in the idea that law is a social construct, such that the moral goodness of law is dependent upon the moral character of a society and its legal officials. In support of the Separation Thesis, legal positivists point to the existence of immoral laws and wicked legal systems. Hart, in developing his theory of legal positivism is faithful to this line of reasoning. He explains that law comprises a "union of primary and secondary rules."[12]

Primary rules are rules of conduct while secondary rules are institutional rules governing the making, interpretation, and enforcement of primary rules. The most important secondary rule is the "rule of recognition," a rule which enables a society authoritatively to identify valid law by stipulating criteria that marks off legal norms from other norms of conduct.[13] The rule of recognition performs an epistemological function by enabling legal subjects to identify what counts as law without which there would be uncertainty about what the law requires. In keeping with the view that the moral goodness of law depends upon the moral character of legal officials, the criteria of the rule of recognition is to be discerned by looking at the grounds that inform how legal officials decide what counts as valid law.[14] These grounds, Hart says, need not reflect morally good values so that the rule of recognition need not stipulate morally good values as a criterion for judgments of legal validity.[15]

Hart's vision of legal order can be characterized as expressing a "control" model of law.[16] As the word "control" suggests, law's role is to control legal subjects to enable workable legal order. An underlying assumption of the control model of law is that legal subjects cannot be counted on, of their own accord, to cooperate in ways that would enable the maintenance of such order.[17] To ensure workable legal order, there has to be a sovereign lawgiver with absolute legal authority to decide how best to maintain legal order. Since the legal subjects are not capable on their own of cooperating to ensure workable legal order, the legal subject's judgments about how best to maintain legal order are not systematically relevant to the sovereign's judgments on that matter. Rather, the sovereign's judgments about how best to maintain workable legal order are final. They

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[11] For an elaboration of the Separation Thesis and its various meanings within the positivist tradition, see James Morauta, "Three Separation Theses", *Law & Philosophy*, 2004, Vol. 3:2, p. 111.

[12] Hart, *supra* note 9 at p. 84.

[13] *Ibid*. at pp. 94-96.

[14] *Ibid*. at p. 101.

[15] *Ibid*. at p. 200.

[16] At various points in *The Concept of Law*, Hart explicitly says that law is an instrument of social control. However, he also thinks that law should guide conduct and therefore ambiguates between both views. The argument that is to follow shows that the notion of "control" would run against the notion of "guidance" because both involve different conceptions of human agency. Hart is not sufficiently sensitive to this point and what follows from his view about rule-of-law principles is the idea that guidance is analysed.

need not engage the legal subject's salient moral interests except to the extent that the lawgiver thinks that addressing such interests are pertinent to the project of maintaining legal order.

Within this view, the role of the legal subject within legal order is primarily that of a passive recipient of law which transmits the judgments of the lawgiver to the legal subject through legal rules.[18] The subject is then expected to understand the rules and to obey accordingly. He or she is constructed as a fundamentally rational agent who is capable of understanding and obeying rules but the subject's role in framing and interpreting legal rules is subordinate to the lawgiver's judgments on these issues. In conceiving of the legal subject as a rational agent, the control model of law does not presume that that agency necessarily connects with the legal subject's sense of self as a moral agent. The operation of legal order under the control model only requires engagement with the former but not the latter. The control model of law echoes the proposition expressed in the Separation Thesis. Since the lawgiver's judgments about how best to maintain legal order does not need to engage the salient moral interests of legal subjects, the Separation Thesis captures this point in the claim that there is no necessary connection between law and morality.

What is striking about Hart's view, however, is that he resists the idea that there could be a legal order that is wholly indifferent to the salient moral interests of legal subjects, an idea that logically follows from the control model of law. If the rational agency of the legal subject can be severed from the subject's moral agency, then, in theory, it should be possible to imagine a legal order that is devoted to wholly immoral ideas and practices. However, Hart rejects this idea. He argues that formal legal order must reproduce a "minimum content of natural law" that embodies certain fundamental moral prescriptions.[19] Supposing that formal legal order should aim at promoting the survival of the group, laws must reproduce such content without which "men, as they are, would have no reason for obeying voluntarily any rules…."[20] Given certain facts about human nature and the world in which we live, among them, the fact that humans are physically vulnerable, have limited strength of will and character, and the fact that there are limited resources: the law must protect from harm, create rules for promise-keeping, and protect property. Without these protections, the survival of the group would be imperiled. If the law failed to provide these minimum moral protections, Hart says, it would be irrational to cooperate to maintain legal order; it would be irrational to see law as a source of binding obligation. In taking this view, Hart seems to suggest that the legal

[17] This is evidenced by Hart's discussion of a "minimum content" of natural law to legal order, an idea I will explain later. That discussion shows that Hart understands legal order to be a necessary precondition for group survival. In the absence of order, legal subjects would live in a state of nature." In the notes related to this discussion in the main text, Hart says he is following Hume and Hobbes. See Hart, *supra* n 9, at p. 303.

[18] My explication of the control model is broadly consistent with the image of law that is at the root of the positivistic tradition where law is fundamentally characterized through the legislative form as the appropriate form through which to transmit the judgments of a lawgiving authority whether for purposes of maintaining order or for the purposes of pursuing a particular conception of political rule. See David Dyzenhaus, "The Genealogy of Legal Positivism", *Oxford Journal of Legal Studies*, 2004, Vol. 1 p. 39.

[19] Hart, *supra* n 9 at pp. 193-200.

[20] *Ibid*. at p. 193.

subject's rational agency cannot be severed from the subject's moral agency, running against the control model of law that underpins his positivist stance.[21]

Hart does not think, however, that his recognition that legal order must incorporate a minimum moral content undermines his positivist stance and the Separation Thesis.[22] Here, it instructive to consider his discussion about this minimum moral content in his earlier Harvard Law Review essay defending the Separation Thesis.[23] He contends with two arguments that attempt to refute that thesis which point to the fact that every legal order must express a minimum moral content thus revealing a necessary connection between law and morality at the level of legal order. The arguments are: first, the need for law to incorporate a minimum moral content shows that legal order is moral and second, since legal order comprises general rules of conduct, the generality of rules as applying to classes of conduct and groups of people triggers the operation of the principle of treating like cases alike. This principle, it is argued, is associated with the notions of fairness and impartiality showing a connection between legal order and justice.[24]

Hart's reply to these arguments invokes the thought that there can be wicked laws and wicked legal order. He argues that even though legal order must affirm a minimum moral content, that moral content need not be extended to all legal subjects. Instead, law can create a double standard by protecting the interests of one group at the cost of undermining the interests of another. A ruling regime can use the law to protect the salient moral interests of a select group at the cost of indifference to an outsider group. Speaking about this scenario, Hart says that the law could apply with "pedantic impartiality as between the persons affected, laws, which were hideously oppressive, and might deny to a vast rightless slave population the minimum benefits of protection from violence and theft…."[25] In using the phrase "pedantic impartiality" Hart means that the law could adhere to the principle of treating like cases alike, that is, by stipulating that a particular group should be enslaved in this way and then by equally oppressing all who fall within this group. This is meant to show that the principle of treating like cases alike only reflects the principle of "justice in the administration of the law, not justice of the law."[26] In Hart's

[21] Kristen Rundle's discussion of Hart's minimum content of natural law is instructive here. In her view, Hart's discussion on this issue has to suppose a moral conception of the person as the fundamental basis to workable legal order. The argument I am making with respect to the ambiguities in Hart's position makes the same point. See Kristen Rundle, "The Impossibility of an Exterminatory Legality: Law and the Holocaust" *University of Toronto Law Journal,* 2009, Vol. 59, p. 112.

[22] One reason why Hart does not think the minimum content of natural law undermines the Separation Thesis as a conceptual truth about law is the fact that that content is dependent upon certain contingent facts about human nature. To make this point, he indulges in a philosophical fantasy to show that if human beings were invulnerable or able to process nutrients from the air so that limited resources would not be a problem, there would be no need for law to reproduce such content, thus leaving the Separation Thesis intact. Hart does not seem to see, however, that his philosophical fantasy is fundamentally a fantasy of dehumanisation so that we would no longer be talking about legal order as an order for human beings. It seems to me, therefore, that this argument strengthens rather than weakens the claim that formal legal order has to be predicated upon a moral conception of the legal subject thereby undercutting the control model of law that animates the Separation Thesis. See his explication of this fantasy in Hart, *supra* n 9 at pp. 95-200.

[23] H. L. A. Hart, "Positivism and the Separation between Law and Morals" *Harvard Law Review*, 1958, Vol. 31:4, p. 593.

[24] *Ibid*. at pp. 623-624.

[25] *Ibid*. at p. 624.

[26] *Ibid*.

view, the principle is merely formal and does not generate a substantive moral criterion of equality, as exemplified by the possibility of law operating to maintain an oppressive double-standard. It is only if law did not affirm the minimum moral protections at all by failing to extend these protections to anyone that we would see the deterioration of legal order into a set of "meaningless taboos."[27] But if the problem is only that there is a double-standard, there remains something we can recognize as a legal system. However, those who are its victims, Hart says, would have "no reason to obey law except fear and would have every moral reason to revolt."[28]

In my view, these arguments do not support the Separation Thesis and the conception of human agency associated with the control model that underpins that Thesis. To see the point, let me start with Hart's comments about what law might appear to be like from the perspective of those oppressed the slaves in his example. The claim that they would not have any reason to obey law conveys that they have no rational reason to see law as binding presumably because the law fails to engage their moral agency. This failure suggests that the legal subject's perception of law as a source of normative obligation is seen to have a moral basis. More than that, it suggests that the subject's exercise of rational agency in recognizing legal norms and in orienting their conduct to such norms is fundamentally dependent upon law's engagement with their moral agency. This point is further evidenced by Hart's claim that if there is a widespread failure to affirm the minimum moral content, the law would sink to the status of "meaningless taboos." Hart's claim suggests there is a rational breakdown in the sense that law's capacity to guide conduct now disappears. Again, this suggests that for law to operate rationally as a guide to conduct, law must engage the moral agency of the legal subject. For there to be legal order, there has to be systematic engagement with the rational and moral aspects of human agency, and these aspects are not, contrary to the control model, severable.

Despite his apparent claims to the contrary, Hart's line of analysis seems to involve the thought that workable legal order requires engaging the rational and moral agency of the legal subject and can be seen more clearly if we think through the argument by reference to Hart's rule of recognition. Recall that the rule of recognition plays an epistemological function in enabling legal subjects to identify what is to count as a legal norm. Unless they can identify such norms, law cannot guide conduct. His arguments suggest that at a conceptual level, the rule of recognition cannot perform its epistemological function if it comprises wholly immoral ideas; legal rules would be reduced to nonsense ("meaningless taboos"). This, in turn, implies the epistemological function of the rule of law is fundamentally dependent upon the idea that the rule is capable of engaging the legal subject's moral agency.[29]

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[27] *Ibid*.

[28] *Ibid*.

[29] A similar point is made by Robert Alexy in his argument that the concept of law includes a "claim to correctness" so that in a "senseless" social order, there is no law because there is no claim to correctness. Alexy's point connects the epistemological function that law must play in ordering conduct with the idea that law must systematically aspire to engage the moral interests of legal subjects. See Robert Alexy, *The Argument from Injustice: A Reply to Legal Positivism*, trans. by Bonnie Litschewski Paulson & Stanley L. Paulson, Clarendon Press, Oxford, 2002, pp. 32-33.

The further point to draw, then, is that contrary to Hart's claim that the principle of treating like cases alike is merely a formal principle that speaks to justice in the administration of the law, but not justice of the law, the rule-like character of legal order is a substantively moral idea. If the rule of recognition cannot perform its epistemological function when the practices that underlie the rule are wholly immoral, then this suggests that for legal rules to operate as guides to conduct, these rules have to have a foundation in morality, that is, they have to have a foundation in a conception of the legal subject as a moral agent who is a bearer of salient moral interests. More precisely, legal subjects have to be able to perceive legal rules as resting in such a foundation to be able to see legal rules as flowing from a systematic engagement with these interests, and through such engagement, with their moral agency. If that is the case, the values of fairness and impartiality associated with the principle of treating like cases alike are highly substantive because, from the legal subject's perspective, those values are material to the law's engagement with their moral agency.

All of this amounts to what I think is a fairly basic point: law cannot guide conduct unless legal subjects respect law. And respect for law will not be forthcoming if legal order does not operate on the basis that the rational and moral agency of legal subjects is severable. The reason why these aspects of agency are not severable is simply because legal subjects do not think they are. Hart's commitment to the Separation Thesis, and the central logic of the control model which underlie that thesis, do not allow him to engage with these ideas.

Indeed, what I think has happened here is that Hart's commitment to the Separation Thesis leads him to be insufficiently sensitive to the difference between immoral laws and immoral legal order. The claim that there can be valid but immoral laws is not implausible and so Hart is right to think that that is an aspect of reality that a theory of law should capture. But as we have seen, the claim that there can be legal order wholly devoted to immorality is a claim that even he resists. Yet, because he wants to defend the Separation Thesis, he struggles to find ways to show how legal order is not a moral idea. However, the example he gives, the example of the "rightless slave population" illustrates that law can be used to sustain a double-standard of unequal treatment between persons where their salient moral interests are concerned, shows only that, a double-standard. It does not show that legal order is not a moral idea. It only shows that the law reflects an inconsistent commitment to morality. The Separation Thesis, however, and the logic of the control model do not deliver the resources with which to engage this mixed reality. The grip of this logic falsely suggests that the right conclusion to draw from a mixed situation is that the rule of law is not a moral concept.[30] The logic of the control model of

[30] For an argument that Hart and other positivists (notably, Joseph Raz) do not adequately see that there will be pressure on the Separation Thesis once one acknowledges the difference between particular laws that are immoral and immorality at the level of legal order, see David Dyzenhaus, "The Legitimacy of the Rule of Law", David Dyzenhaus, Murray Hunt & Grant Huscroft, eds., *A Simple Common Lawyer: Festschrift for Michael Taggart* Hart Publishing, Oxford, 2009, p. 33.

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law cannot generate the resources to make sense of the idea of "respect for law" without which one can't understand legal obligation. As I will now show, even by Hart's own account of the dynamics that lead to rule by law, one has to make sense of that idea.[31]

III. EXPLOITING RESPECT FOR LAW

Jeremy Waldron's analysis of these dynamics as he gleans from Hart's *Concept of Law* is instructive.[32] According to Waldron, Hart's analysis in that work conveys a somber message: the rise of formal legal order may well result in the use of law as a tool of abuse so that legal order is not a mark of moral progress for a society. This is to make a stronger claim than the Separation Thesis, which holds only that there is no necessary connection between law and morality. Waldron thinks that one can draw out a stronger and darker point about law from Hart's arguments, namely that with the rise of legal order, there emerges a danger that law may well become a source of oppression. He explains that the interplay of two main dynamics speak of this danger. First, with the rise of a legal bureaucracy and legal officials who make, interpret, and enforce law, legal subjects are likely to take a passive attitude towards legal authority because they are not actively participating in these processes. Second, when legal subjects develop such an attitude, what Hart himself characterises as a "sheep-like" attitude, legal officials may find it plausible to contemplate using the law as a tool for serving their own interests at the cost of failing to affirm the interests of legal subjects.[33] This creates a situation where legal officials can capture the formal institutional apparatus of legal order to achieve their oppressive ends, because officials can exploit the legal subject's uncritical sense of respect for legal authority. So the idea of respect for legal authority is fundamental to understanding this danger.

When we turn to Hart's proposed solution to the danger that law can become a tool of abuse, it is apparent that when he looks at the issue from the perspective of the legal subject, he is compelled to give the idea of respect for law a prominent place as a context for his suggested answer to the danger of that law can be used as a tool of abuse. Through this answer, Hart hopes to empower legal subjects against this danger. He says:

> So long as human beings can gain sufficient co-operation from some to enable them to dominate others, they will use the forms of law as one of their instruments. Wicked men will enact wicked rules which others will enforce. What is surely most needed in order to make men clear-sighted in confronting the official abuse of power, is that they should preserve the sense that the certification of something as legally valid is not conclusive of the aura of majesty or authority which the official system may have, its demands must in the end by be submitted to a moral scrutiny.[34]

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31 Hence, some legal positivists argue, contrary to Hart, that law is not a source of obligation at all so that they are skeptical of the idea of legal normativity. See Jules Coleman, "On the Relationship between Law and Morality" *Ratio Juris,* 1989, p. 66.

32 Jeremy Waldron, "All We Like Sheep", *Canadian Journal of Law & Jurisprudence*, 1999, Vol. 2, p. 169.

33 Hart, *supra* n 9, at p. 117.

34 *Ibid*. at p. 210.

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Notice that Hart's characterisation of the problem of rule by law involves having to reckon with the legal subject's sense of respect for legal authority. Essentially, he says that legal subjects must be critically minded and refrain from conflating that sense of respect with moral goodness. So the character of the problem seems to be that legal officials may exploit the legal subject's sense of respect for law. Hart tries to arm legal subjects with a defence against that exploitation. His proposed solution is that legal subjects should draw a bright-line distinction between claims of legal validity and the question of whether it is morally justified to obey law.

The difficulty with this view, however, is that if the basis to their sense of respect for law lies in the conviction that claims of legal legitimacy flow from a moral foundation to legal order, then that distinction may not be easy to draw. Indeed, Waldron's account of the dynamics that may lead to the use of law as a tool of abuse suggests that legal officials will count on this idea in trying to use law as a tool of abuse. They will try to use law as a cover for that abuse, in the hope that legal subjects will ultimately defer to their claim of legality and act in accordance with law out of respect for legal authority. Given that subject's moral sense for whether a law is morally troubling could well depend upon this sense of respect for legal authority, I think Hart is asking for the drawing of a line that may be very difficult to draw so that, consequently, his proposal does not empower the legal subject.[35]

At first blush, Hart's proposal would be wholly ineffective in situations when a ruling power engages in grossly immoral actions for the simple reason that when a power wishes to engage in acts of gross immorality, it is likely to do so extra-legally. It will not create a law for that purpose so that a legal subject can adjudge it as valid but immoral.[36] When we consider how his proposal would fare with respect to actions that fall beneath the threshold of gross injustice, his solution fares no better. As noted above, the major problem here is that the making of a judgment of immorality may be difficult precisely because of the legal subject's sense of respect for legal authority. Even in the case of laws allowing for detention without trial, we cannot clearly say that they are clear examples of immoral laws.[37] Especially if a ruling regime uses such a law in the context of claiming that it is necessary to preserve national security, legal subjects may defer to that claim precisely because there may appear to be some plausibility to this claim and because the power is yoked to a legal framework that projects a level of rule-of-law legitimacy. Judges may find it difficult to reject the government's arguments, in part, because it is

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[35] This problem is a central part of Fuller's reply to Hart's 1958 Harvard Law Review essay defending the Separation Thesis. See generally, Lon L. Fuller, "Positivism and the Ideal of Fidelity to Law – A Reply to Professor Hart" *Harvard Law Review*, 1958, Vol. 31:4, p. 630.

[36] For example, military dictatorships in South America engaged in the torture and "disappearing" of political opponents. These dictatorships tended to engage in covert action that did not involve the use of law when engaging in such actions. See Brendan Pereira, "Of Judges and Generals: Security Courts under Authoritarian Regimes in Argentina, Brazil, and Chile" in Ginsburg & Moustafa, *supra* n 3, at p. 26.

[37] Indeed, there is reason to suppose that we cannot think about the immorality of indefinite detention without drawing resources from the law itself. See Ratna Rueban Balasubramaniam, "Indefinite Detention: Rule by Law or Rule of Law?", Victor Ramraj, ed., *Emergencies and the Limits of Legality*, Cambridge University Press, Cambridge, 2008, Chapter 5.

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difficult to say that there is no moral cogency to the government's stance. [38] This fact also explains why constitutional liberal democracies post 9/11 has successfully been able to implement anti-terrorism laws and policies that violate human rights without too much judicial resistance. There is a sentiment shared amongst many judges that it may be justified to limit the human rights of non-citizens if doing so may enhance the safety and security of the citizenry.[39] In all of these instances, one of the major difficulties is that it is not easy to say that the government's stance is immoral to such a degree that its actions should engender moral outrage. And this murkiness stems from the fact that these governments also claim that such actions are legally legitimate, a claim that influences perceptions of the moral legitimacy of their actions. The fact that such judgments are murky (in the way described above), suggests that Hart's claim that one should draw a bright line distinction between legal validity and morality, unrealistic. The basic problem is that the legal subject's sense of moral right and wrong is heavily influenced by law itself so Hart's solution to the danger of immoral law involves asking them to easily unweave what is, from their perspective, likely to be two very connected things.

In order to begin to make sense of the problem with rule by law and its manifestation as the use of the legal form as a cloak for arbitrary power, I want to draw out how Hart's analysis of the concept of law contains an important truth that helps to illuminate the problem with rule by law. While Hart is wrong to inflate the idea of control as the main image of legal order, his analysis spotlights that the elements of the control model are related to the danger of rule by law. Rule by law seems to involve an attempt by legal officials to impose a dynamic of control where their judgments about how legal order should operate and what the law requires should supersede the interests of legal subjects. Furthermore, Hart uses an idea that helps to bring out an important aspect of rule by law, the idea of domination in saying that the danger of law becoming a tool of abuse stems from the desire to dominate legal subjects.

Phillip Pettit's analysis of the problem of domination helps to sharpen the linkage between control and domination.[40] According to Pettit's characterisation of the problem, A can dominate B if A has the capacity to interfere with B's ability to exercise choice over his/her salient moral interests without accounting to B for that interference. [41] Importantly, A need only possess the capacity to interfere with B's salient moral interests; A need not actually interfere. It suffices that B knows that A can interfere without accounting to B in order for there to be domination thus leading B to condition his or her choices in an effort to avoid A's interference. It follows that even if A is benevolent towards B, the problem of domination does not disappear. [42] As long as B knows that A can interfere

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38 Oren Gross, "Chaos and Rules: Should Responses to Violent Crises Always be Constitutional?", *Yale Law Journal*, 2002-2003, Vol. 112, p. 1034.

39 This is the principal theme of David Cole's important book, *Enemy Aliens: Double Standards and Constitutional Freedoms in the War on Terrorism*, The New Press, New York, 2003.

40 Phillip Pettit, *Republicanism: A Theory of Freedom and Government*, Oxford University Press, Oxford, 1997.

41 Pettit sets out three conditions as characterising the problem of domination when an authority has: a) the capacity to interfere; b) on an arbitrary basis; c) in certain choices that the other is in a position to make. *Ibid*. at p. 52.

42 *Ibid*. at pp. 63-64.

without ever having to account to B for such interference, there remains a problem of domination since B's moral agency is nevertheless crimped as B suffers a loss to his or her freedom. B cannot see him or herself as an equal to the authority. In Pettit's words, this dynamic teaches us that when we are dominated, we cannot "look the authorities in the eye, confident of knowing where we stood and of not being subject to capricious judgment." [43] The problem of domination thus involves a situation where one party has control over the other in the sense that the former can make judgments affecting the salient moral interests of the latter without accounting to the latter so that the latter is not seen as a relevant participant in the making of such decision. Indeed, the perspective of the latter is not relevant at all to the making of such decisions. The result is that the victim of domination suffers a crimping of his or her moral agency, indeed, an impairment of that person's sense of moral agency as his or her sense of self-respect and dignity is negatively affected resulting in a feeling of vulnerability and disempowerment.

IV. THE FACILITATIVE MODEL OF LAW

To make sense of rule by law as juridical pathology, one needs to see how the attempt to use law as a tool of domination through principally requiring an approach to law that reflects the control model of law, ironically, trades upon a different vision of legal order than that constructed through the lens of the control model of law. Instead, with Fuller, one needs to understand legal order and the rule of law as an ideal of legal order predicated upon a vision of law as a framework of rules for facilitating human interaction, what I shall refer to as the "facilitative model" of law.[44] On this view, the role of formal legal order is to enable legal subjects to pursue their interests, especially their salient moral interests. Unlike the control model of law which supposes that legal subjects are incapable on their own of interacting in ways that would enable workable legal order, the facilitative model of law presupposes that they are fully able to do so.[45] It resists the notion that in the absence of formal legal order, there would be chaos and disorder. Therefore, under the facilitative model of law, it is a mistake to think that one requires a sovereign lawgiver to control legal subjects.[46] Rather, the role of the lawgiver is that

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[43] *Ibid*. at vii.

[44] Lon L. Fuller, "Law as an Instrument of Social Control and Law as a Facilitation of Human Interaction", *Brigham Young University Law Review,* 1975, p. 89.

[45] A persistent theme in Fuller's thought is that formal legal order should not be the principal foci for understanding legal normativity. It follows for Fuller, that it is a mistake to analyse the concept of law by reference to the idea of a sovereign authority. Hence, he says, "[t]he bulk of human relations find their regulation outside the field of positive law, however that field may be defined. The existing body of positive law in general serves only to fill that comparatively narrow area of possible dispute where conflicts are not automatically resolved by reference to tacitly accepted conceptions of rightness." Lon L. Fuller, *Law in Quest of Itself*, Beacon Paperback, Northwestern University, 1940, p.111.

[46] Thus, Fuller resists the idea that one should understand law as a top-down system of rules backed by sanctions. Interestingly, Hart also rejects this view by distancing himself from John Austin's command theory of law which holds that law comprises the commands of an uncommanded commander habitually obeyed by legal subjects out of fear of sanction. However, Fuller criticises Hart for failing to follow the logical path of this distancing, namely in failing to see that if one moves away from a top-down picture of law, then one has to embrace a moral conception of law rooted in the idea that the very notion of workable legal order is a moral idea. See Fuller, *supra* n 7, at pp. 638-644.

of a manager of legal order in ensuring that legal rules will track the interests of legal subjects, especially their salient moral interests.[47] In this regard, the lawgiver does not enjoy the power to pass final judgment on how best to maintain legal order. Instead, that power rests with legal subjects whose lived experience under the law means they are best placed to make that judgment. Thus, under the facilitative model of law, the lawgiver's judgments about how to maintain legal order are always provisional upon a testing by legal subjects. Upon that testing, the lawgiver must adjust his decisions in light of the feedback that arises through that testing and engage in self-correction. The facilitative model of law embraces a different conception of human agency than that implicit in the control model of law. It supposes that the legal subject is possessed of both rational and moral agency and that both dimensions of the legal subject's agency cannot be severed from each other because, from the perspective of the legal subject, these dimensions of human agency are connected. A sense of self as a rational agent is tied to a sense of self as a moral agent who is possessed of dignity and self-respect. Therefore, it is only rational for the legal subject to see law as a source of binding obligation if legal order systematically engages the subject's moral agency. For there to be such engagement, it is crucial that the subject is an active participant in the project of maintaining legal order. This, again, differs from the control model which portrays legal subjects as passive recipients of law.[48]

It is through this package of ideas encapsulated in the facilitative law of legal order that we can more fully appreciate the moral significance of rule-of-law principles and why Hart is wrong to dismiss these principles as purely rational preconditions to legal order. To see how, we need to go back to Hart's observation that the operation of legal order understood as a framework for conduct entails the principle of treating like cases alike. Hart treats this principle as a narrow formal one because he is reasoning from within a control model of law which sees law as an instrument for conveying the final judgments of the lawgiver to legal subjects constructed as passive recipients of law. Under the grip of this thinking, he sees the principle as a narrow formal principle because the legal subject's rational agency is supposedly severable from the subject's moral agency. On the facilitative model of legal order, however, the principle of treating like cases alike becomes a proxy for engaging the moral agency of legal subjects. When the lawgiver chooses to rule through rules, this choice must engage the legal subject's rational agency in purporting to ask legal subjects to understand and obey legal rules. Since from the perspective of the legal subject, the subject's rational agency cannot be severed from the subject's sense of self as a moral agent, the subject will likely perceive

47 My use of the term "manager" may seem jarring as a description of the role of the lawgiver since Fuller explicitly associates the positivist view of law with a form of social ordering he calls "managerial direction." However, the term "manager" is apt because I am talking about the role of the lawgiver as a manager of legal order and its rules in ensuring that the rules track the interests of legal subjects not as a manager of persons who are deemed subordinate to a superior. The latter expresses the dynamic of control I outline in the paper and is reflected in managerial direction. For an elaboration of "managerial direction," see Fuller, *supra* n 6, at pp. 217-215.

48 "…the analytical positivist sees law as a one-way projection of authority, emanating from an authorized source and imposing itself on the citizen….[L]aw is seen as simply acting on the citizen – morally or immorally, justly or unjustly, as the case may be." *Ibid*. at p. 192.

this enterprise of trying to construct legal order as engaging his or her moral agency.[49] Therefore, the lawgiver's duty to respect rule-of-law principles underscores a "bond of reciprocity" between the lawgiver and legal subjects.[50] The character of that bond requires that the lawgiver adhere to rule-of-law principles failing which it will not be rational for the subject to obey law. And through that adherence, the subject is entitled to expect that the lawgiver will discharge his/her duty with a view to serving the interests of legal subjects. Thus, through the lens of the facilitative model of legal order, where the rational and moral dimensions of the subjects are connected, the principle of treating like cases alike, which is implicit in legal order, is a substantively moral idea. It conveys not only that legal subjects are rational agents under law, they are also moral equals under law and so that the law should aspire to protect their salient moral interests in service of their equal moral agency.[51]

At a practical level, rule-of-law principles become the basis for a practice of accountability where the lawgiver is expected to fulfill a justificatory burden in claiming rule-of-law legitimacy for exercises of public power in the law's name, a burden which shows that the lawgiver is engaging the legal subject's salient moral interests. [52] This duty flows from the lawgiver's morality of role as a manager of legal order. In order to manage legal order effectively, the lawgiver must be responsive to the legal subject's actual experience of the law and pay attention to the subject's judgments as to whether law successfully facilitates his or her interests. Therefore, legal order must contain appropriate institutional channels and feedback mechanisms for legal subjects to signal these judgments to the lawgiver. These institutional channels enable the subject to participate in the project of maintaining legal order. It is no surprise, then, that formal legal order tends to contain institutional machinery that revolves around the management of rules. Hart's theory of positivism, for instance, gives us a picture of these institutions. In claiming that law consists of a union of primary and secondary rules, Hart sketches a system of rule-management which requires institutions like legislatures, courts, and law-enforcement agencies. Legislatures and courts are needed as institutional channels to enable the legal subject's participation in legal order in the creation and interpretation of laws; and law enforcement agencies are necessary to ensure that rules are obeyed. These institutions sustain the practice of accountability that is crucial to the success of legal order as a framework of rules for the guidance of conduct.

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[49] Hart recognises the element of autonomy associated with the choice to rule through rules so that he explains that legal order does not usually comprise "particularized forms of control." But because, as I argue, he is under the grip of the control model of law he does not seem to see that a recognition of a person as possessed of autonomy cannot be separated from a recognition of that person's moral agency. See Hart, *supra* n 9, at pp. 20-21.

[50] Fuller, *supra* n 6, at pp. 40-41.

[51] For an argument that a notion of liberal equality is implicit in Fuller's thought, T. R. S. Allan, *Constitutional Justice: A Liberal Theory of the Rule of Law*, Oxford University Press, Oxford, 2001. See also Dyzenhaus, *supra* n 30, at p. 21.

[52] The practice of accountability is a basis to a "public culture of justification." See David Dyzenhaus, "The Legitimacy of Legality" *University of Toronto Law Journal*, 1996, Vol. 46, p. 129; David Dyzenhaus, "Law as Justification: Etienne Mureinik's Conception of Legal Culture" *South African Journal of Human Rights*, 1998, Vol. 14, p. 11.

The idea that rule-of-law principles are a proxy for engaging the legal subject's moral agency as the basis to a practice of accountability explains why Fuller also thinks that the lawgiver's duty to explain himself within that practice will tend to pull legal order towards moral goodness.[53] This idea can be seen if we notice that institutions like legislatures and courts, in particular, are associated with ideas like democracy and checks and balances or the separation of powers. These are important notions in political morality that grow out of the basic idea that the maintenance of workable legal order requires the legal subject's participation in the creation and interpretation of laws. The project of maintaining legal order, in requiring engagement with the legal subject as a rational and moral agent creates a definite moral trajectory which orients legal order to the salient moral interests of legal subjects. As Fuller says, "[t]here is therefore, in an ordered system of law, a certain built-in respect for human dignity, and I think, it is reasonable to suppose that this respect will carry over into the substantive ends of law."[54] Thus, a mature reflection of that trajectory manifests when a legal order contains a constitutional bill of rights that affirms the salient moral interests of legal subjects, generating a discourse of constitutionalism. Through that discourse, legal subjects can argue about the constitutional legitimacy of exercises of public power when deliberating about the legitimacy of law at the level of its creation and interpretation. All this reflects the idea that unless there is serious engagement with the rational and moral agency of the legal subject as connected dimensions of human agency, legal subjects will not respect law and the enterprise of maintaining legal order as a framework of facilitation will run aground.

V. THE PATHOLOGY OF RULE BY LAW

Given the centrality of the notion of respect for law within the facilitative model of law, and the practice of accountability that attaches to that model, we can now better understand the pathological character of rule by law. When an authoritarian regime tries to exploit the legal subject's sense of respect for law, it is trading on the idea that the legal subject will accept its claims to exercise power in a manner that is legitimate from a rule-of-law perspective without questioning that claim. As Fuller puts it:

> …once you create a legal order that purports to rest on a system directing human conduct by rules, the law-giver or law-enforcer is subject to a constant temptation to cheat on the system and to exercise a ruleless power under the guise of upholding a system of rules…. The ordinary citizen has a certain deference for law; he does not like to break law. This attitude is subject to exploitation by the legislator or

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[53] "I shall have to rest on the assertion of a belief that may seem naïve, namely, that coherence and goodness have more affinity than coherence and evil. Accepting this belief, I also believe that when men are compelled to explain and justify their decisions, the effect will generally be to pull these decisions towards moral goodness, by whatever standards of moral goodness there are." See Fuller, *supra* n 7, at p. 636.

[54] See Lon L. Fuller, "A Reply to Professors Cohen and Dworkin", *Villanova Law Review*, 1965, Vol. 10, Issue 4, pp. 666.

[55] *Ibid*. at p. 657.

> policeman, who, acting in the name of law (that is, in the name of an impersonal regime of general rules) may exercise a power that does not respect those conditions essential for the achievement of a regime of general rules.[55]

Empirical studies exploring judicial politics in authoritarian regimes show that attempts to cheat on the system are not frictionless in the sense that they result in a breakdown in rule-of-law principles.[56] Since independent courts are seen as an institution that are emblematic of a commitment to the rule of law, authoritarian regimes have reason to tolerate the operation of such courts to "make up for their questionable legitimacy."[57] The difficulty for these regimes that wish to project rule-of-law legitimacy while carrying out authoritarian agendas, however, is that independent courts may potentially limit the regime's power thus curbing the regime's ability to protect its own interests. Therefore, an authoritarian regime must find ways to limit judicial power – the power of courts to render authoritative determinations about what the law requires within a legal order – without formally eviscerating judicial autonomy since such formal evisceration compromises the regime's desire to project rule-of-law legitimacy or legal legitimacy for its actions. Therefore, courts operating in an authoritarian context are likely to be embroiled in a "dialectic of empowerment – as regimes seek the benefits judicial empowerment can provide – and constraint, as regimes seek to minimize the associated costs of judicial autonomy."[58] In seeking to constrain the courts, authoritarian regimes may adopt formal strategies of manipulation of the law to exercise control over courts. This may manifest as changes in the law that curtail the legal subject's right of access to justice, repealing laws that affirm the salient moral interests of legal subjects or the creation of alternative courts that apply more relaxed procedural norms and that are staffed by judges friendlier to the regime's core interests. However, in addition to formal strategies of manipulation and control, authoritarian regimes are also likely to engage in informal strategies of manipulation aimed at trying to condition judicial attitudes so that judges will interpret the law in a way that will uphold the regime's interests, not the interests of legal subjects. These strategies may include weakening judicial protections from removal, controlling judicial appointments, and determining judicial salaries by reference to whether judges defer to the regime's interests. The point of such strategies is to send a clear signal to judges that they should not interpret the law by reference to the interests of legal subjects and should interpret the law by reference to the regime's interests instead. The combination of formal and informal strategies produces strains upon rule-of-law principles including clarity, stability, and non-contradiction. Importantly, such tensions also undermine the principle requiring congruence between official action and declared rule by preventing legal subjects from seeking the enforcement of laws that serve their salient moral interests or from having those laws enforced by impartial courts. The damage to these principles

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[56] See Ginsburg & Moustafa, *supra* n 3. A notable fact about all of the case studies set out in the book is that without exception, each case study shows that when a ruling regime strives to control an independent judiciary in an effort to avoid accounting to legal subjects in courts for its actions, there is a strain on rule-of-law principles.

[57] *Ibid*. at p. 4.

[58] *Ibid*. at p. 21.

has the effect of eroding the rule-like character of legal order as it becomes less and less clear that legal rules are mediating exercises of state power whenever the state claims to act in accordance with the law.[59]

The problem of domination helps to explain the breakdown in rule-of-law principles and an erosion of the rule-like character of legal order. Recall that the problem of domination is fundamentally about the absence of accountability so that A has the capacity to interfere with B's salient moral interests without accounting to B for such interference. In this regard, A's domination of B involves a violation of B's dignity and moral agency. Since the principles of the rule of law are a proxy for engaging the moral agency of legal subjects by sustaining a practice of accountability, in seeking to avoid accounting to legal subjects, a ruling regime is likely to take steps to protect its interests that invariably put pressure on these principles.

We can see the interplay of both formal and informal strategies adopted by ruling regimes to prevent legal subjects from bringing them to account effectively for their actions in court as part of an overarching program of domination. Formal strategies of manipulation are designed to enable the regime to interfere with the salient moral interests of legal subjects without accounting for such interference. A problem here, however, is that when the regime claims allegiance to the rule of law and seeks to project a claim of legal legitimacy for its actions, this signals to legal subjects that the regime wishes to engage their rational agency as legal subjects. But because, from the subject's perspective, that agency cannot be severed from the subject's sense of moral agency there is a likelihood that subjects are likely to contest the regime's claim. They will interpret the regime's claims through the lens of the facilitative model of law, and are likely to try to bring the regime to account by going to courts as institutional spaces designed for precisely that purpose. In doing so, legal subjects call for the regime to fulfill its duty to account as a manager of legal order. And here, they are going to rely on the expectation that courts, in virtue of their role morality as fair and impartial institutions that speak to the lawgiver's duty to self-correct in failing to engage the moral agency of legal subjects, will protect these interests by interpreting the law in a way that accords with a facilitative view of law. This will push the regime to engage in informal strategies of manipulation that put direct pressure on judges to defer to the regime. These strategies are necessary in order to corrupt judicial role morality by compelling judges to refrain from acting out of a facilitative understanding of legal order and to privilege the regime's interest in control and domination. This predicament reflects that the regime and its legal subjects operate under competing conceptions of legal order, the former under the control model of legal order, the latter under the facilitative model of legal order. Since the logic of both models is at odds as the control model privileges the perspective of the lawgiver while the facilitative model privileges the perspective of the legal subject, the result is competing pressures that ultimately strain rule-of-law principles as the backbone to the practice of accountability.

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[59] Hence, Robert Barros notes that there tends to be a rise of discretional forms of authority and a shift away from rule-governed authority in authoritarian regimes. See Robert Barros, "Courts in Context: Authoritarian Sources of Judicial Failure in Chile (1793-1990) and Argentina (1976 – 1983)" in Moustafa & Ginsburg, *supra* n 3, Chapter 6 at p. 168.

The basic problem that produces friction which damages rule-of-law principles, therefore, is that the desire to control and dominate legal subjects (which strives to crimp the moral agency of legal subjects) is inconsistent with the duty to adhere to rule-of-law principles as a proxy for engaging the legal subject's moral agency.

In the light of this basic problem, we can more clearly see why domination strains the rule-like character of legal rules. Legal rules are fundamental to the idea of accountability because the choice to rule through rules means that legal rules mediate the relationship between legal subjects and the state in a way that allows legal subjects to see themselves as bearers of self-respect, dignity, and freedom as the legal subject can see him or herself as subject to the rule of rules rather than the rule of a ruling power. The legal rules mediate the relationship between ruler and subject by enabling the latter to point out that the appropriate interpretation of law, as constituted by legal rules, is predicated upon the lawgiver's role morality to engage the moral agency of legal subjects, thus bringing the lawgiver to account for its decisions by reference to the rules so understood. On this view, legal subjects can use the rules to "look the authorities in the eye."

In being subject to law, they are not subservient to the whim or caprice of the ruling power. Rather, legal rules create a public base of knowledge among legal subjects as well as those who wield political power so that legal rules set out the basic framework within which to assess all claims of legal legitimacy.[60] The rules become an impartial standpoint from which to engage in such assessments since the right answer to questions about whether this or that exercise of state power is legitimate must be resolved by an interpretation of the rules, not through the fiat of a ruling power. With the existence of this public base of knowledge, it becomes harder for a ruling power to dominate legal subjects precisely because of the mediating role of legal rules. Throughout, rule-of-law principles are fundamental to the maintenance of that public base of knowledge since these principles affirm the rule-like character of legal order. When the law expresses the features of these principles, in being public, general, clear, coherent, and so on, the public base of knowledge remains intact so that the full mediating power of legal rules as a backstop against arbitrary power can be realised. Thus, it is not surprising that authoritarianism tends to be marked by opacity as an authoritarian regime will have to damage the rule-like character of legal order in order to privilege the use of discretional forms of authority which are more amenable to its desire to control and dominate legal subjects. The rule-like character of legal order is inimical to the desire to control and dominate precisely because that character constitutes a public base of knowledge about

[60] Thus, Pettit argues that the choice to rule through rules as the appropriate legal form is a "principled" approach to political rule because it avoids particularistic modes of rule. Here, rule-of-law principles speak directly to the principled nature of the choice to rule through rules. The reason for this is that the choice to rule through rules creates the basis for a common base of knowledge as between ruler and subject about where each stands. In his words, "[i]f the law does not satisfy such constraints [rule-of-law principles], then those who make, execute or enforce the law may easily be given arbitrary power over others." As I argue in the text, the point is that fulfillment of rule-of-law principles creates a public basis for assessing the legitimate uses of state power, and because that basis is publicly known, one's sense of self as free is enhanced as the danger of domination is reduced. Pettit, *supra* n 40, at p. 174.

what can pass as legally legitimate, knowledge that the legal subject can utilise to contest the regime's claims to rule-of-law legitimacy.[61] An authoritarian regime will not find this public base of knowledge favourable to its desire to exercise arbitrary power and to avoid accounting to legal subjects.

A serious difficulty follows from the demise of the rule-like character of legal order. Pettit's analysis of the problem of domination suggests that that we should not overlook the fact that people are highly sensitive to the problem of domination such that the fact that there is this problem is likely to be commonly known amongst those who are dominated.[62] Even if legal subjects are unsure in their judgments about whether a particular law is morally troubling in the light of their sense of respect for legal authority and its influence on their sense of moral right and wrong, it is likely that they will know they are being dominated under rule by law.[63] The perception that one is being dominated can be gleaned from the actions of the regime which show that if legal subjects try to challenge the ruling power, they may suffer an interference with their salient moral interests and that there is nothing they can do to prevent such interference by the regime. [64] This message is equally crystal clear when a ruling power is actively trying to constrain courts in an effort to resist attempts by legal subjects to engage in such challenges.

For instance, when the regime engages in formal strategies of manipulation that seek to reconfigure the legal landscape by cutting off procedural and substantive measures that allow the legal subject to go to court to argue for the legal protection of their salient moral interests, this will evidence the regime's unwillingness to account for its actions. Therefore, the attempt by a ruling power to "cheat" on the system is unlikely to go unnoticed as involving a problem of domination. It is likely to be clear to legal subjects that the regime is seeking to control and dominate legal subjects with a view of disabling legal subjects of the option to bring the regime to account. Here, the point will also be driven home to legal subjects when the regime relies on informal strategies of manipulation, which strives to put pressure on judges to ensure that courts will defer to the regime's interests. Such strategies are likely to raise questions amongst legal subjects about the impartiality of the judiciary. This too will convey to legal subjects that the attempt to cheat on the

[61] My account speaks directly to the thought that the rule of law and democracy are united in emphasising the right of legal subjects to participate in the making of political decisions affecting their salient moral interests. For a normative argument detailing the linkages between the rule of law and non-domination in justifying a democratic framework of governance, see Richard Bellamy, *Political Constitutionalism: A Republican Defence of the Constitutionality of Democracy*, Cambridge University Press, Cambridge, 2007.

[62] Pettit, *supra* n 40, at pp. 58-61.

[63] To see how it is possible to know that one is dominated without having to first exercise moral judgment, think of the distinction between resentment and indignation, where only the latter requires a moral sensitivity to the plight of others: where we feel resentment on our own behalf, we feel indignation on behalf of another. The problem of domination is akin to the notion of resentment. We easily recognise (though not infallibly) when we are dominated but it takes a certain empathy with others in general, and a capacity to universalise, to make a moral judgment that there is cause for indignation. I am grateful to Phillip Pettit for clarifying this point.

[64] See Pettit, *supra* n 40, at pp. 59-60.

system is part of an overall attempt to dominate them and to stop legal subjects from seeking the legal protection of their salient moral interests.[65]

Given that the problem of domination is likely to be obvious and known by legal subjects, there arises a threat to the basic idea that the law is operating as a guide to conduct. When it becomes apparent to subjects that legal rules do not mediate the relationship between ruler and legal subject, this adversely impacts the legal subject's perception that legal rules can be considered as a sufficiently stable normative framework with which he or she may plan and act in orienting his or her behavior to be in accordance with these rules. Note that even if the law seems to operate to guide conduct in other spheres of life, the fact that it does not adequately protect the legal subject's salient moral interests means that the subject is nevertheless the victim of domination because the law's failure to affirm the salient moral interests of legal subjects is likely to have a pervasive effect on the way legal subjects understand the legitimacy of legal order as a whole. It becomes difficult to perceive the law in its entirety as a framework of norms that strives to guide conduct because one never knows when a ruling power may interfere with the subject's salient moral interests. As Pettit argues, this inability to count on the law as a secure basis for affirming the salient moral interests of legal subjects produces a heightened sense of uncertainty and insecurity.[66] Legal subjects will have to orient their conduct by reference to the whim or caprice of a ruling power given that that power has the capacity to interfere with their salient moral interests without accounting for that interference.[67]

It is through this idea that we can start to make sense of Hart's claim, for example, that when there is widespread immorality in the law the system threatens to sink to the status of "meaningless taboos." At one level, this sinking takes place because it is much harder for legal subjects to interpret the law if it cannot be understood to reflect a commitment to the legal subject as possessed of salient moral interests.[68] At a more basic level, the sinking takes place because law will be unable to deliver certainty sufficient for legal subjects to rely on legal rules in determining how to act. If there is always the chance that a ruling power may interfere with their salient moral interests, then any judgments they make about how best to behave are not going to be the result of an understanding of what the law requires. It is irrational to see the law as a guide to conduct. Rather, it

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[65] See my account of how the practice of rule by law has undermined public confidence in the independence of the Malaysian judiciary in "Has Rule by Law Killed the Rule of Law in Malaysia?", *supra* n 3.

[66] "To suffer the reality or expectation of arbitrary interference is to suffer an extra malaise over and beyond that of having your choices intentionally curtailed. It is to have to endure a high level of uncertainty, since the arbitrary basis on which the interference occurs means that there is no predicting when it will strike. Such uncertainty makes planning much more difficult than it would be under a corresponding prospect of non-arbitrary interference. And, of course, it is likely to produce a high level of anxiety." Pettit, *supra* n 40, at p. 85.

[67] This has been a central aspect of the ongoing "Kramer-Simmonds" debate. See Matthew H. Kramer, "On the Moral Status of the Rule of Law", *Cambridge Law Journal*, 2004, Vol. 63, p. 65 and Nigel E. Simmonds, "Straightforwardly False: The Collapse of Kramer's Positivism", *Cambridge Law Journal*, 2004, Vol. 63, p. 98.

[68] Ronald Dworkin makes the point that morally obnoxious laws are harder to interpret because one cannot "supplement its language with auxiliary principles of fairness and justice." See Ronald Dworkin, "Philosophy, Morality and Law – Observations Prompted by Professor Fuller's Novel Claim", *University of Pennsylvania Law Review*, 1964-1965, Vol. 113 p. 672.

becomes rational to base judgments of right conduct on an understanding of the ruling power's expectations and preferences. When legal subjects must try to orient their conduct by reference to the whim or caprice of a ruling power, not legal rules, there is a falling away of law and an undermining of legal order because the rules are no longer guiding conduct. Thus, rule by law is pathological of legal order because it ultimately undermines the capacity of law to guide conduct by disengaging the law from the moral agency of the legal subject which in turn makes it irrational for the legal subject to see law as a source of binding obligation.

It is important to note that this problem of lawlessness need not manifest simply in cases where we are talking about authoritarian regimes that consistently and directly undermine the salient moral interests of legal subjects. The problem of lawlessness may issue even in cases where a ruling regime shows a reasonable degree of sensitivity to the salient moral interests of legal subjects. Indeed, the regime may show a sufficiently high level of sensitivity so as to gain the respect and allegiance of a majority of legal subjects.[69] None of this detracts from the fact that there remains a problem of lawlessness any time there is knowledge that the ruling power can interfere with the salient moral interests of legal subjects without accounting for that interference. Here, there is a difference between legal subjects having a sense of respect for a ruling power and their having respect for the rule of law. Keep in mind that the contrast between the rule of law and arbitrary power is, in part, about the role of legality as an antidote to authoritarianism and dictatorship. But the need to guard against arbitrary power also means that legal subjects should be rescued from a situation where the protection of their salient moral interests is ultimately left to the good-will of a ruling power. So even in a situation where a ruling power seems to have a good record in protecting the salient moral interests of legal subjects, it does not follow that the rule of law is in a good state of health if that power has the capacity to interfere with these interests without accounting to legal subjects.[70]

The danger of rule by law, therefore, is one that can transpire in any political context. In this regard, even constitutional liberal democracies are not immune from the problem of lawlessness that rule by law engenders. Thus, in a post 9/11 context, some constitutional liberal democracies have undermined the human rights of non-citizens in prosecuting the so-called War on Terror through, for example, the use of laws that allow for detention without trial. In doing so, there is a danger that in attempting to resist challenges to the

[69] I am grateful to Victor Ramraj for pushing me to specify the normative difference between a benevolent dictatorship and the aspiration of the rule of law to engage the salient moral interests of legal subjects. The difference, again, lies in the idea of accountability and the absence thereof in the former case. Indeed, one can characterise the ruling regime in Singapore as practicing "stick and carrot" rule by law. Here, control and domination manifests through a combination of rewarding legal subjects for supporting the regime, thus creating incentives for subjects to refrain from challenging it, while resorting to coercion to punish those who choose to resist. This combination of reward and force, conditions the behaviour of legal subjects in a way that speaks to a problem of domination and vulnerability. The aim of "stick and carrot" rule by law is to dominate since it aspires to condition people to think it better to pursue material comfort and wealth rather than to exercise moral agency through political activism. It tries to convince them to give up their autonomy. See generally Cherian George, *Singapore: The Air Conditioned Nation Essays on the Politics of Comfort and Control, 1990-2000,* Landmark Books, Singapore, 2000.

[70] "A mere respect for constituted authority must not be confused with fidelity to law." See Fuller, *supra* n 3 at p. 41.

legal legitimacy of such actions, these democracies may weaken the moral resources of their laws in order to try to legitimise this undermining. This weakening may entail formal changes to the law akin to the changes one might see in an authoritarian context.[71] However, even in the absence of such changes, the weakening may also manifest in the acceptance by both government and the populace that it is permissible that the law should draw arbitrary distinctions between persons equally possessed of moral agency in the way that the law protects the salient moral interests of all legal subjects. This is dangerous to the integrity of liberal democracy as an attractive conception of political rule for that society because it mark a change in the legal culture by now weakening the basis of that culture in the idea of moral equality, a notion that is a cornerstone of liberal democratic thought.[72] At a practical level, if this change takes hold, a society risks losing juridical barriers that embody this commitment to equality if it countenances the idea that the law can draw arbitrary distinctions of principle between persons. Nothing is to assure that such distinctions cannot be drawn even between citizens if a ruling power deems that this is necessary to protect some greater good. Then, at an expressive level, should this view of law take hold, there will be a loss in the moral character of the law that is also likely to go hand in hand with a lowering of the law's moral authority in the estimation of legal subjects. When there is a loss of respect for law, this opens the door to precisely the problem of lawlessness that can afflict authoritarian regimes as legal subjects may cease to treat the law as a stable framework of norms that purports to guide their conduct by systematically engaging their moral agency. While they may not live in a conscious state of fear that the state may arbitrarily interfere with their salient moral interests without accounting for such interference, the fact remains that a weakening in the moral integrity of their law introduces an element of uncertainty about the prospects of such interference. It is far from evident that a society can easily repair the damage to the moral integrity of the *corpus juris* once such damage has taken place.[73]

VI. CONCLUSION

My aim in this paper has been to sharpen the popularly perceived association between rule by law and worries about arbitrary power. I have argued that the use of law as a cloak for arbitrary power or rule by law is pathological to the rule-of-law because it undermines law's capacity to facilitate or guide conduct. My analysis of rule by law

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71 Ratna Rueban Balasubramaniam, "Indefinite Detention: Rule of Law or Rule by Law?" in Victor Ramraj ed., *supra* n 37, Chapter 5.

72 See generally John Rawls, *Political Liberalism*, Columbia University Press, New York, 1993.

73 This is an important aspect of Jeremy Waldron's arguments challenging the legal legitimacy of attempts by the Bush administration to loosen the absolute legal prohibition against torture both at international law and under American constitutional law. Waldron thinks that the prospects of damage to the *corpus juris* outweigh any possible benefit that may accrue if the law were to compromise its stance on the absolute legal prohibition against torture. See Jeremy Waldron, "Torture and Positive Law: Jurisprudence for the White House", *Yale Law Journal*, 2005, Vol. 105:6, p. 1681.

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pivots on the argument that the rule of law is an ideal of workable legal order understood as a framework of norms for facilitating the interests of legal subjects. The rule of law is therefore a moral idea to the extent that the attempt to construct and maintain such an order requires engaging the legal subject as a rational moral agent possessed of vital interests. Since rule by law involves the attempt to use the law in a way that does not involve the systematic engagement of the legal subject so conceived but which nevertheless tries to project rule-of-law legitimacy by trading on the rule of law, rule by law strains the rule of law and corrupts the workability of legal order as a framework for facilitating the salient moral interests of legal subjects thus by damaging the rational and moral foundations of legal order. It is therefore apt to conceive of rule by law as a form of juridical pathology.