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**Rule of Law
Series**

**COMPETING
DEFINITIONS OF
THE RULE
OF LAW
Implications for
Practitioners**

*Rachel Kleinfeld
Belton*

**Democracy and
Rule of Law Project**



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EXECUTIVE SUMMARY

Definitions of the rule of law fall into two categories: (1) those that emphasize the ends that the rule of law is intended to serve within society (such as upholding law and order, or providing predictable and efficient judgments), and (2) those that highlight the institutional attributes believed necessary to actuate the rule of law (such as comprehensive laws, well-functioning courts, and trained law enforcement agencies). For practical and historical reasons, legal scholars and philosophers have favored the first type of definition. Practitioners of rule-of-law development programs tend to use the second type of definition. This paper analyzes the challenge of effectively defining the rule of law, through an examination of both types of definitions, the historical background of each, and the implications of each for rule-of-law development efforts.

From this definitional analysis, two main points follow. First, as ends-based definitions make clear, the rule of law is not a single, unified good but is composed of five separate, socially desirable goods, or ends: (1) a government bound by law, (2) equality before the law, (3) law and order, (4) predictable and efficient rulings, and (5) human rights. These ends are distinct, likely to meet different types of support and resistance within countries undergoing reform, and often in tension with one another in practice. Second, a number of the widely acknowledged problems with current rule-of-law reform strategies spring directly from pitfalls inherent in a definition based on institutional attributes. Consciously switching to an ends-based definition would provide conceptual clarity to strengthen rule-of-law reform efforts. By considering the rule of law as a series of separate goods that must advance together, practitioners can improve their measurements of the rule of law within and between various countries, better anticipate likely supporters of and opponents to different reform efforts, and avoid various unintended side effects of reform efforts that now sometimes undermine the rule of law in countries attempting reform.

The rule of law bakes no bread, it is unable to distribute loaves or fishes (it has none), and it cannot protect itself against external assault, but it remains the most civilized and least burdensome conception of a state yet to be devised.

—Michael Oakeshott, 1983¹

It would not be very difficult to show that the phrase “the Rule of Law” has become meaningless thanks to ideological abuse and general over-use. It may well have become just another one of those self-congratulatory rhetorical devices that grace the public utterances of Anglo-American politicians. No intellectual effort need therefore be wasted on this bit of ruling-class chatter.

—Judith Shklar, 1987²

DEVELOPED COUNTRIES AND INTERNATIONAL ORGANIZATIONS have spent more than a billion dollars over the last twenty years trying to build the rule of law in countries transitioning to democracy or attempting to escape underdevelopment.³ Like a product sold on late-night television, the rule of law is touted as able to accomplish everything from improving human rights to enabling economic growth to helping to win the war on terror. The rule of law is deemed an essential component of democracy and free markets. The North Atlantic Treaty Organization (NATO) demands that all new members demonstrate their commitment to it, and the European Union (EU) requires its existence before a country can even begin negotiating for accession. Building the rule of law is a strategic objective of the U.S. Agency for International Development (USAID), a growth field for the World Bank, and a rhetorical trope for politicians worldwide.⁴ So what is this magical elixir?

Read any set of articles discussing the rule of law, and the concept emerges looking like the proverbial blind man’s elephant—a trunk to one person, a tail to another. In fact, the phrase is commonly used today to imply at least five separate meanings or end goals. One frequent usage implies a government that abides by standing laws and respects judicial rule—precisely what the International Bar Association found lacking when it chastised Zimbabwe for destroying the rule of law in that country.⁵ By this same standard, neighboring South Africa is praised for its government’s willingness to abide by the law. Yet USAID is sponsoring “rule-of-law” building activities there to counter high crime rates—under a definition of the rule of law that means “law and order.”⁶ An *Asia Times* writer uses the term to mean lack of equality before the law, stating, “If a case arises between two normal people, then the law is somewhat powerful. But if one person is a company official or from the government, then there is no power in the law.”⁷ The rule of law is also frequently used as

a synonym for enforced human rights. Amnesty International, for example, is not alone in making statements such as, “The only way to make a break from the past, a time when human rights were routinely abused, is to establish the rule of law, with the protection of human rights at its center.”⁸ Meanwhile, under the aegis of rule-of-law building, the World Bank is providing computers to courts, printing laws, and establishing magistrates’ schools to create its technocratic vision of the rule of law as efficient and predictable justice.⁹

Is the rule of law any of these bundles of goods, a set of goods lumped together, or a set of goods that must be related to one another in a particular way? Is it, in other words, a tail or a trunk, a bundle of elephant parts, or the whole elephant? Among those who define the rule of law by its ends—and thus argue about which ends deserve inclusion—this argument has raged since the ancient Greeks. The debate continues today, mainly among legal scholars.¹⁰ Yet among others—particularly within the practitioner, political, and journalistic communities—the very question seems to have gone unnoticed. The five ends are jumbled together willy-nilly, any end may be implied when the phrase *rule of law* is invoked, and differences between ends are often ignored.

This conceptual confusion may have arisen because practitioners working to build the rule of law abroad have developed an entirely different way of looking at the concept, based not on end goals but on institutions to be reformed.¹¹ Few modern rule-of-law reform practitioners sat down and enjoyed a disquisition on classical rule-of-law conceptions before taking up their jobs; their efforts were developed in the heat of battle, as authoritarianism was pushed back, Communism fell, and countries had immediate needs for functioning economies, governments, and societies. In response to these unprecedented demands, aid agencies and their hastily employed lawyers tried to get a handle on the massive new undertaking by breaking the concept down into the concrete institutions that needed reforming. In Latin America, that meant a focus on “judicial reform,” gradually expanding to law and then police reform. In Eastern Europe, legal change alone was thought sufficient in early years; when this approach failed to bear fruit, efforts expanded to reform other rule-of-law institutions. When the U.S. Government Accounting Office (GAO) was asked to evaluate U.S. rule-of-law assistance, for instance, they defined the scope of their work as many practitioners would:

Throughout this report, we use the phrase “rule of law” to refer to U.S. assistance efforts to support legal, judicial, and law enforcement reform efforts undertaken by foreign governments. This term encompasses assistance to help reform legal systems (criminal, civil, administrative, and commercial laws and regulations) as well as judicial and law enforcement institutions (ministries of justice, courts, and police, including their organizations, procedures, and personnel).¹²

In other words, a parallel conversation has emerged in which the rule of law is defined not by the end purposes it is to serve in society but by what I will call its “institutional attributes.” Creating the proper institutional attributes—the “necessary” laws, a “well-functioning” judiciary, and a “good” law enforcement apparatus—has become, for many practitioners, the goal of rule-of-law reform efforts.

Thus, there are two very different ways of defining the rule of law that are being discussed in parallel conversations.¹³ The first style of definition enumerates the goods that the rule of law brings to society. A society with the rule of law is a society that instantiates these goods or ends, such as law and order, a government bound by the law, and human rights. The ends are the reason why we value the rule of law and are what most people mentally measure when determining the degree to which a country has the rule of law. Another type of definition describes the institutions

a society must have to be considered to possess the rule of law. Such a society would have certain institutional attributes, such as an efficient and trained judiciary, a noncorrupt police force, and published, publicly known laws.

These two different ways of defining the concept are often conflated and confused. Current definitions of the rule of law used by organizations working to create it abroad tend toward ad hoc laundry lists of institutions to reform, mixed with high-flying rhetoric about the ends that the rule of law is expected to accomplish.¹⁴ It is easy to accuse attempts at closer definition as pedantic, academic exercises. After all, even if current practitioners have not precisely defined their terms, they will know what they want when they see it.

If institutional reform led directly to improvements in rule-of-law ends, that would be true enough. Yet, because achieving such ends requires reform *across* institutions while institutional reforms are generally carried out *within* single institutions, institutional reform can be undertaken with no significant effect on rule-of-law ends. At the same time, definitions based on institutional attributes lead practitioners to measure the wrong things to determine success. Worse, poorly devised reforms of rule-of-law institutions can undermine rule-of-law ends. Therefore, the slant toward definitions based on institutional attributes or which amalgamate ends and institutions has serious repercussions for the success (or lack thereof) of rule-of-law building strategies. Improving our definitions is crucial to advancing our understanding of what it is we are trying to build and our ability to implement reforms. Before we can improve definitions, however, we must first consider each definition in turn.

ENDS-BASED DEFINITIONS

Already, in discussing the “ends” of the rule of law, I have gotten ahead of the general use of the phrase. In ringing policy pronouncements and membership criteria for exclusive “clubs” such as NATO and the EU, the rule of law itself is the desired end—singular. States can have more or less rule of law, and more is always better. Yet as the elephant metaphor indicates, by the time the field of rule-of-law building had gained steam, the concept was being used to imply at least five different goals: making the state abide by law, ensuring equality before the law, supplying law and order, providing efficient and impartial justice, and upholding human rights.

Because these ends were never clarified or separated, practitioner organizations did not fully appreciate their distinctiveness. In their written definitions, practitioner organizations tend to mention some ends and forget others—often with little consistency in which they include and which they leave out from definition to definition. For instance, in the various USAID definitions cited in this paper, predictability appears in only one, while another leaves out law and order and touts a market-based economy as inherent to the concept.¹⁵

Clarity on the five end goals is important, however, because they are not the same: One cannot be reduced to another. On a theoretical level, some of these end goals have become generally accepted in Western legal and political philosophy over the last few thousand years. Others remain hotly disputed. Reining in the state by forcing it to govern through a known set of laws has been accepted as a goal of the rule of law since the ancient Greeks.¹⁶ Meanwhile, whether human rights is an end of the rule of law—or whether the phrase merely implies technocratic procedures and institutions—has

been contested from Aristotle to the present day. For modern practitioners, these disputes still affect the success of reforms but are often unrecognized: For instance, the kleptocrats in a transitioning country might happily accept limiting the power of a previously autocratic state (thereby enhancing their own economically based power), but they may balk at equality before the law.

In other words, clarity on the five ends we are now seeking from the pursuit of the rule of law is also important because each end goal touches on different cultural and political issues. Each is thus likely to meet different pockets of resistance from different portions of society in countries being reformed. Aid practitioners often talk about the importance of finding “political will” for rule-of-law reforms and overcoming resistance. Clarifying the actual ends being sought from various rule-of-law reforms highlights the fact that different elements of society are likely to have “will” for different sorts of reforms and that those resistant to one reform may be supportive of another.

Because rule-of-law ends are so contested and historically determined, they cannot simply be stated as given. They must be understood as varying greatly by context, culture, and era. Simply describing the ways in which the term is currently used lacks depth and provides no heft to argue against certain ways of using the term that are erroneous or unhelpful. Thinking about rule-of-law ends requires realizing that they are historically and culturally determined concepts. New ends can be discovered by reinterpretation or reemphasis of old ideas, but creating a new end is a lengthy and intellectually weighty proposition, not something that can simply be declared by practitioners.

I will therefore look at each of the current ends in turn, first describing their historical precedent and the societal goals they are expected to uphold. I will then consider which of the primary rule-of-law institutions (laws, courts, and law enforcement)—as well as which nonorganizational cultural and political structures—would need to be reformed to accomplish the end. Finally, for each goal I will discuss the power centers it affects, and the possible resistance for reform. By doing so, I hope to demonstrate why it is useful for practitioners to consider their reforms end by end, rather than institution by institution, so that they can accurately gauge the likelihood of their success.

Government Bound by Law

When the idea of the rule of law was first conceived, the original end was to make the state subordinate to law in order to prevent arbitrariness. Aristotle considered whether it was better for kings to rule with discretion or according to law, and determined that in a state governed by law “God and reason alone rule,” whereas “passion perverts the minds of rulers, even if they are the best of men.”¹⁷ Solon provided Athens with laws so that they would have “the certainty of being governed legally in accordance with known rules.”¹⁸ The idea, naturally enough, fell out of favor during centuries of monarchical absolute rule, particularly in Europe. The Magna Carta introduced the concept in England, and the celebrated English Petition of Grievances of 1610 emphasized the basic notion of a government subordinate to law when it claimed that the most prized traditional right of English subjects was

to be guided and governed by the certain rule of law, which giveth to the head and the members that which of right belongeth to them, and not be any uncertain and arbitrary form of government...[and that people should not be subject to any punishment] other than such as are ordained by the common laws of this land or the statutes made by their common consent in parliament.¹⁹

The idea that the monarch needed to act through parliament to suspend or create laws was enshrined in the English Bill of Rights of 1689.²⁰

A government bound by law must act through pre-written laws in executing its decisions and change laws through established legislative means. Absolute governments, from Caligula to modern-day Myanmar, have taken the property of subjects without recompense, killed citizens at will, and destroyed economies on vanity projects and silly ideas. Governments bound by law must, at the very least, follow pre-written laws or pass general laws through separate legislative organs before undertaking such destructive activities. Under this end alone, however, governments would still be able to abrogate individual rights as long as they followed correct legal procedures: Upholding rights is a separate end and requires additional means to accomplish.²¹

Binding the government to rule *by* law is the sine qua non of the rule *of* law. Some would even argue that this end alone is enough to constitute the rule of law—although most scholars, lawyers, and rule-of-law practitioners hold a more expansive definition.²² Regardless, this concept can hardly be described as technical; after all, restricting the powers of an otherwise absolute government is a highly political activity. In countries where the rule of law is being reformed, strong or absolute executives have usually held sway quite recently, either in communist or authoritarian systems. So real powers are being taken away from powerful individuals when judiciaries are strengthened and procedural laws that bind the executive are passed. Reformers would be naïve not to expect recalcitrance and evasion of reforms meant to achieve this end from those who stand to lose power. However, these reforms also strengthen other power centers—particularly the judiciary, which is often weak and subservient, commanding little respect under absolute regimes. For reforms that bind the government to rule by law, the judiciary is often a reform ally. Such a face-off does not necessarily make the judiciary more “reformist” than the government across the board; it simply means that on this dimension of the rule of law, the judiciary tends to benefit from supporting reform.

Often, binding a government to rule by law is treated as an issue of judicial independence and is therefore considered an issue of court reform. Obviously, as stated above, power plays a far greater role than mere court organization in limiting the government, although well-organized courts with self-confidence can play a strong role in curtailing government power. Laws must also codify the concept. Law enforcement is generally ignored in achieving this end, yet in any absolute government or captured state, one of the mainstays of extralegal power is having law enforcement bodies that answer to the government, not the people. In fact, the transfer of military and police allegiance from the regime to the citizens is often the first essential step in moving autocratic governments toward becoming governments bound by law.

Equality before the Law

Equality before the law also harkens back to disputes among the Greeks. Plato insisted on a hierarchical society buttressed by an original myth, but Solon gave Athens, “equal laws for the noble and the base.” Again, centuries of hierarchical monarchy halted further development of the concept, which revived during the Enlightenment and the French Revolution. When A.V. Dicey crafted his seminal modern definition of the rule of law, one of his three “kindred conceptions” was the idea that all people are equal before the law, and that all, particularly government officials and clergymen, must be tried under the same laws and in the same courts as ordinary men.²³

Equality before the law ensures that all citizens—no matter how well-connected, rich, or powerful—are judged for their actions by the same laws, equally applied. Equality before the law is one of the core ways in which citizens can ensure that government officials, the rich, the powerful, and the well-connected do not become a caste apart. It is also essential for upholding the rights of marginalized groups, such as women and racial and religious minorities, who must also be treated as equal before the law. In transitional and developing countries, the lack of equality before the law—the feeling that there are not “equal laws for the noble and the base”—is a prime complaint and is often believed so strongly that ordinary people do not even attempt to test the principle with a time-consuming and expensive court case.

As with reining in the government, creating equality before the law changes the balance of power in a society, giving far more power to ordinary people at the expense of the rich and powerful. It is therefore likely to meet with political resistance when it becomes successful enough to really threaten power holders. Nor is such resistance entirely self-serving: Those in politics are often most likely to be accused of misdeeds by political rivals; if equality before the law is not enforced by courts that are truly independent, politicians can face punishment for wrongs they may not have committed. Equality before the law can also meet cultural resistance. In many Islamic societies, giving women equality before the law is opposed by most interpretations of *Sharia*, the Islamic code. In other cases, equality before the law is *de jure*, but different justice prevails *de facto*. For example, even though India has formal equality before the law, caste concepts in villages remain strong; the idea that a low-caste person should be treated as the equal of a high-caste person is “unjust” in such contexts, as well as irreligious. The idea of equality would be seen as nearly inhuman in less individualistic societies. For example, the notion that a policeman should treat his mother caught in a crime as he would a stranger would be seen in the West as personally difficult but nonetheless a just ideal, whereas elsewhere it would be seen as manifestly unjust.²⁴

Real equality before the law requires courts that are strong and independent enough to enforce it. It also depends particularly on a lack of corruption within the judiciary, because the rich can use bribes to escape equal justice. It is highly dependent on cultural factors that reinforce the notion and on a government strongly committed to upholding minority rights in this area. In other words, promoting equality before the law requires change across laws, courts, and even law enforcement, as well as alterations in the cultural and political fabric. Not only does it require a good system, but it also requires citizens who are willing to test the principle. Bringing a case to court is time consuming and expensive (just in opportunity costs alone); in many countries, the poor or marginalized will not risk bringing misdeeds of their “betters” before a court if they believe the courts will simply uphold the power structure of society. Thus, access to justice programs has proliferated as a means of helping to create *de facto* equality before the law.

Law and Order

Law and order did not form a major portion of the political thought of ancient Greek philosophers. Enlightenment thinkers, however, were influenced by the brutality of the English civil war and entranced by the idea of the newly explored “savage” America.²⁵ They began considering the origins of the state by contrasting it with the brutality of the state of nature. Hobbes stated that escaping the anarchy of a “nasty, brutish, and short” life subject to the crimes and whims of one’s fellow human beings was the main reason people joined the state. In perhaps one of their few points of agreement,

Locke assents: Why would people give up absolute liberty and be subject to a government? Because although they have the natural rights of freedom, property, and so on, “Enjoyment of it is very uncertain, and constantly exposed to the Invasion of others... the enjoyment of the property [they have] in this [state of nature] is very unsafe, very unsecure.” People join society for the “mutual *Preservation* of their Lives, Liberties, and Estates, which I call by the general Name, *Property*.”²⁶ Protection from one’s fellow citizens—or law and order, as we would say today—thus became one of the ends that government was supposed to provide.²⁷ Law and order is central to the popular understanding of the rule of law. Most citizens within weak states see law and order as perhaps the main good of the rule of law. Law and order is essential to protecting the lives and property of citizens—in fact, it is a prime way of protecting the human rights of the poor and marginalized, who often face the greatest threat from a lack of security.²⁸ In this end goal, the rule of law is often contrasted with either anarchy or with a form of self-justice in which citizens do not trust in the state to punish wrongdoers and to right wrongs but instead take justice into their own hands and use violence to enforce the social order.

Law and order, however, came to the concept of the rule of law through the back door. As described above, it was never part of the philosophical basis of the rule of law but emerged from the way in which Enlightenment thinkers groped toward their political ideals. Although it pervades the common use of the term, it elided with the rule of law rather than finding a comfortable situation within Western jurisprudential definitions. Dicey, for example, left it out of his first modern attempt to pin down the meaning of the rule of law.

This “poor-cousin” historical status has had direct effects on the place of law and order in modern rule-of-law building efforts. Despite its importance to the popular conception of the rule of law, and its essential role in attracting foreign investment, ensuring the well-being of the poor, and promoting global security, law and order tends to be outside mainstream rule-of-law building projects. Ironically, although U.S. and EU rule-of-law assistance disproportionately flows to police reform and equipment (reflecting the fact that such aid serves donor countries’ own security interests ranging from combating drug trafficking to countering terror), these programs tend to be separate from legal and judicial reform programs in the minds of scholars and practitioners; they are also administered by different agencies and farmed out to different contractors.²⁹ Police reform efforts are often oriented more toward border security or solving law-and-order problems that spill over and affect other states, such as smuggling and human trafficking, than they are geared toward promoting domestic law and order per se. Insofar as rule-of-law programs do consider the police, their focus tends to be human rights training, not law and order.

In the United States, part of the isolation of law and order from the mainstream rule-of-law building agenda can be attributed to U.S. law: Congress banned foreign development aid from being used for police training after U.S.-trained police in Latin America were found to be committing human rights abuses in the 1960s. Although the rules have been relaxed and many loopholes admitted, the stigma still remains. Professional balkanization likely plays a part as well: Lawyers, who make up the bulk of rule-of-law practitioners, tend to be different types of people and move in different circles from the security officials who focus on reforms more directly related to law and order.

As with the other ends discussed earlier, law and order requires more than institutional change; it also has political and cultural components and can meet resistance from any of these areas. States

want the police strong enough to do their bidding and fend off threats to their power, but they do not want the police (who are often paramilitary in developing countries) to *become* threats to their power. Unless power backs a strong, professional police force, such a force is unlikely to emerge without a fight. Although law and order might appear to be a universal good, it also depends heavily on citizens' acceptance of laws and on the government's legitimacy to make laws that bind them.³⁰ Customs such as blood feud traditions can also undermine the imposition of a state-based law and order.

The split between law and order and other rule-of-law ends is pernicious for two reasons. First, because this end conflates easily with an institution, law and order is often viewed solely as police reform efforts. But as with the other ends, improving law and order requires cooperation across all rule-of-law institutions. Police reform alone can do nothing to quell crime if police capture criminals and then corrupt judges release them, if prisons allow prisoners to enlarge their criminal empires while behind bars, or if laws do not exist to keep them in jail for significant periods of time.³¹

Second, high degrees of crime tend to undermine other rule-of-law reforms. Crime is often better remunerated than magistracy in many developing countries, and criminals try to bribe judges to evade imprisonment. In many countries with law-and-order problems, judges are afraid to dispense equal justice to members of the military, organized criminals, or gangs for fear of reprisal or that they will not survive the sentencing.³² At its worst, criminals buy politicians to gain security for their enterprises or buy political seats to gain immunity to distort the system. Moreover, organized criminals and drug gangs can abuse human rights on just as wide a scale as any government. Thus, high crime rates not only harm law and order, but can also corrupt or overwhelm all rule-of-law institutions and undermine all other rule-of-law ends. By treating law and order as an institutional reform of the police and leaving it to the police and security reformers, those working on other rule-of-law goals practically ensure that they will not achieve their own ends.³³

Predictable, Efficient Justice

The idea of efficiency had been implicit since the Magna Carta, which first hinted that justice would neither be denied nor delayed.³⁴ In 1693, William Penn wrote, "Our law says well, 'To delay justice, is injustice.'"³⁵ By the time the famous aphorism "justice delayed is justice denied," was (mis)attributed to Gladstone and the first legal case cited it as precedent, the idea that the rule of law required some form of efficiency in decision making was fairly settled.³⁶ In part, efficient justice was seen as a way to uphold other rule-of-law ends, such as discouraging the tried-and-tested method of delaying cases to extort bribes from those who most wanted a decision. Delay could also be used to subvert justice, such as when delays intrinsically favored one party and therefore acted as a penalty to the other party before a judgment was even announced.³⁷

Hayek, meanwhile, did the most to revive the notion of predictability, hinted at by the earliest Greek thinkers, as a stand-alone element of the rule of law. Although Hayek's writings stress that the rule of law is about binding the government to rule through legislated laws, his underlying interest is in how the rule of law buttresses the market economy. One of the primary by-products of the rule of law, in Hayek's mind, is that it provides predictability—it allows one to "plan one's individual affairs."³⁸ But Hayek's antipathy to judicial discretion meant that predictability gained a prominent place in his argument.³⁹ Hayek's followers cemented the idea. What had been part of the outcome of the rule of law, in Hayek's definition, had become an element of the rule of law by the time Ronald

Cass defined the concept in 2001 as: (1) fidelity to rules, (2) *of principled predictability*, (3) embodied in valid authority, (4) that is external to government decision makers.⁴⁰ (emphasis added)

A predictable, efficient legal system allows businesses to plan, enables law-abiding citizens and businesses to stay on the correct side of the law, and provides some level of deterrence against criminal acts. It enables a free market by providing for efficient adjudication of contract disputes. Efficiency is relative and differs widely in countries that see themselves as having the rule of law. What is important in both cases is that the majority of people see the judicial system as a viable means for solving disputes so that they are not forced to use extrajudicial means—ranging from only doing business with trusted family members to hiring contract killers—to attain the same ends. Predictability and efficiency are thus closely linked with law and order and with equality before the law. A lack of either law and order or equality can harm predictability and efficiency, while a lack of predictability and efficiency can undermine law and order by forcing citizens to bypass courts and take justice into their own hands.

Predictability and efficiency are typically seen by practitioners as attributes of the judiciary alone. However, laws and law enforcement are also needed to support the end goal. If laws are not relatively known and settled, it is difficult for courts to rule with predictability. Overzealous legal reform, such as occurred in Romanian commercial laws, can wreak havoc on predictable decisions—not only because the laws are changing, but because it is difficult for overtaxed and understaffed judges to keep up to date on these legal changes. Moreover, judges are not the only possible source of legal delay; clerks can “lose” files, and law enforcement agencies can delay investigations for bribes just as easily. In Moscow during the roaring 1990s, for example, the going rate for stalling a criminal investigation was claimed to be \$50,000.⁴¹

Current rule-of-law building organizations such as the World Bank, with a vested interest in making the concept as technocratic and apolitical as possible, have further elevated the ideas of predictability and efficiency as central pillars of the rule of law.⁴² When the World Bank pushes the rule of law for development, for instance, they couch their thinking in Hayek and label their internal think-tank Legal Institutions for the Market Economy. Many of their legal development specialists fail to consider whether, for instance, rampant law-and-order problems might be dampening foreign investment in Africa or Russia more than a weak system of commercial law.⁴³ Development technocrats push for predictability and efficiency as their primary—and often only—rule-of-law goal, hoping that the more political issues such as limiting government or the more cultural issues such as human rights will come in on the same tide. Yet these are separate ends, and although there are relationships among them, as discussed above, there is no reason to assume that pushing one will help all of the others.

In fact, predictability and efficiency are often used by local power brokers as code words to achieve their own goals, which can undermine other rule-of-law ends. Ministries of justice can advance predictability, for instance, by holding anticorruption drives that let them purge courts of independent judges, or they can promote efficiency by delivering computers to those justices who promise them allegiance. Although real reform would reduce the executive’s control over the judiciary, a reform that only half accomplishes its goals will often increase executive control—hence the support many ministries of justice give to these programs and the waffling that can occur later. Judiciaries tend to balk at these reforms because, when successful, they reduce chances for corruption, patronage, and the less pernicious but often equally Byzantine immemorial customs

that judiciaries the world over uphold. Determining exactly who is balking at what reform can be difficult in such circumstances. For example, a Romanian minister of justice who appeared to this author and to many Romanian liberals as genuinely committed to helping the judiciary reduce its case backlog, improve its skills, become less corrupt, and promote younger, more honest and liberal judges, used means that were nearly the same as those used by his successor—an ex-Communist who was, by all accounts except her own, attempting to regain executive control over the judiciary and reduce its independence.⁴⁴ Predictability and efficiency are important and accepted rule-of-law ends. But they, in particular, show the hazard of not recognizing the tension between ends, and their irreducibility.

Lack of State Violation of Human Rights

The Enlightenment revival of the rule of law expanded the idea of individual rights nascent in the previously cited English Petition of Grievances. Locke asked the question: Why should rulers not have absolute power over their subjects—why should rulers not be arbitrary? Because all humans have natural rights that preceded his rule, he answered. People join the state voluntarily to protect those rights, and thus it makes no sense for the state to be able to abrogate them. Making a ruler bow to law thus became intertwined with the end goal of individual rights, including the right to preserve “lives, liberties, and estates.”⁴⁵ By positing natural rights, Enlightenment thinkers added substantive content to the procedural ideals of the rule of law. The importance of individual rights was upheld in Dicey’s first modern conception of the term, which lauds the common law as a way of ensuring that individual rights are not only established but also enforced.⁴⁶ Because the modern rule-of-law building field grew in large part out of a desire to improve human rights in Latin America in the 1980s and to create liberal democracy in Eastern Europe in the 1990s, getting states to recognize and not violate human rights was from the beginning a core reason for undertaking rule-of-law reforms.⁴⁷

Yet human rights are the most contested end of the rule of law. A debate has raged for centuries between substantivists, who believe the rule of law must contain some content and some limits on what the government can *ever* legally do, and formalists, who claim that the rule of law is simply about procedure, not content. Formalists such as U.S. Supreme Court Justice Antonin Scalia have argued that there “are times when even a bad rule is better than no rule at all.”⁴⁸ Experience in countries where the government is above the law, where anarchy has taken hold, or where laws change so frequently that businesses cannot plan and individuals cannot even know what justice would be gives this view weight. For formalists, the rule of law is useful because it provides the four goods mentioned above. Insofar as it provides justice, it does so procedurally, through efficiency and equality before the law. The rule of law cannot be expected to provide just outcomes such as human rights. Human rights may be a laudable goal, but they are seen as separate from the rule of law.⁴⁹

Substantivists believe the formalist definition amounts to rule *by* law, which strengthens the government, not a rule of law meant to bind it to certain acceptable ways of treating citizens.⁵⁰ Aristotle was the first substantivist, stating that his *Politics* showed nothing more than that “laws, *when good*, should be supreme” (emphasis added), raising the question of what a “good” law entailed.⁵¹ Locke’s definition of rule-of-law institutions quoted above concludes with the statement, “all this is to be directed to no other *end* but the *Peace, Safety*, and publick good of the People.”⁵² This definition suggested that the rule of law was intended to have content that would protect the citizens of a state; therefore, states such as Nazi Germany or apartheid South Africa (which were run by law

but used that law as an instrument to deprive some citizens of peace and safety) were not governed by the rule of law at all.

Those rule-of-law practitioners who include human rights in their goals are thus taking a side in this debate—they are not promoting a technocratic ideal, but a cultural idea with substantive, values-driven content. The problem with human rights as an end, of course, is that different cultures—and different countries, even within the developed world—differ on what they see as human rights. Even when general concepts can be universalizable, particulars, such as the death penalty, social and economic rights, or even the practice of female genital mutilation, are disputed. Some in the United States see a Scandinavian-style system of social and economic rights as undermining property rights through excessive taxation. Europeans see the U.S. death penalty as a human rights violation. In Romania, the EU pushed very hard for the legislature to repeal laws criminalizing homosexuality—a human rights issue essential to the rule of law to the European Commission, but a moral issue that had nothing to do with the rule of law to the indignant Romanians.

As with all the other ends, human rights require reforming many rule-of-law institutions, as well as establishing new cultural norms. Laws can and must be established to promote these rights, but laws are among the weakest instruments for protecting human rights. It was precisely because laws alone are such poor defenders of human rights, particularly when they get ahead of social and government intuition, that Dicey championed the common law—which by definition enforced rights at the time they are proclaimed. Police must be trained to uphold human rights and watched to ensure that they do so. Unfortunately, they are often among the worst abusers of human rights. The judiciary has traditionally been a bastion for the protection of individual liberties and minority rights against encroachment from the government and the uncaring majority, but in developing countries, the judiciary can only serve this function to the extent that its members uphold liberalism over traditional or majoritarian values.⁵³ Culture generally matters a great deal in proclaiming and promoting human rights. Governments can get ahead of their citizenry, as occurred in the American south with *Brown v. Board of Education*, but they rarely go too far outside culturally set boundaries, and when they do, these rights tend to be de jure alone.

A Note on Ends-Based Definitions

As shown above, defining the rule of law based on the ends it is intended to achieve within a society provides more clarity and focuses practitioners more on their end goals than defining it by institutional attributes, which are just means to these ends. Moreover, achieving any end requires reform across multiple rule-of-law institutions. Reforming a single institution or even reforming laws and courts but not law enforcement will rarely be able to further rule-of-law ends.

Considering rule of law by its ends also illuminates one of the major difficulties with rule-of-law reform: All good things do not go together. These ends are not part of a unified concept that emerged whole; rather they grew piecemeal in response to different historical needs over a period of millennia. They represent distinct societal goals, and work toward one goal will not necessarily lead to success in the others. Moreover, these ends are often in tension: Improving one can often make success in another more difficult—a point to which I will return when discussing implications.

THE INSTITUTIONAL APPROACH

Although most legal scholars define the rule of law by its ends, most programs to build the rule of law implicitly define the rule of law by its institutional attributes. Although they cite the rule of law as their ultimate goal, practitioners almost immediately turn to institutions not as means, but as intermediate or measurable ends. Internally, most practitioner organizations rarely use the words *rule of law reform* and instead discuss legal reform, judicial reform, and police (or law enforcement) reform.

Institutional definitions of the rule of law are not new. Their heritage stretches back to ancient Greek discussions of the need for standing laws, impartial courts, and enforcement mechanisms (although the latter were often religious, political, or cultural strictures, not modern law-enforcement bodies). The three primary institutions that modern-day rule-of-law programs focus on were first enumerated by John Locke, who stated that legitimate governments were:

bound to govern by establish'd *standing Laws*, promulgated and known to the People, and not by Extemporary Decrees, by *indifferent* and upright *Judges*, who are to decide Controversies by those Laws; and to employ the force of the community at home *only in the execution of such Laws*.⁵⁴

Modern rule-of-law practitioners still define the rule of law as a state that contains these three primary institutions:

- **Laws** themselves, which are publicly known and relatively settled;
- A **judiciary** schooled in legal reasoning, knowledgeable about the law, reasonably efficient, and independent of political manipulation and corruption.
- A **force able to enforce laws**, execute judgments, and maintain public peace and safety: usually police, bailiffs, and other law enforcement bodies.

As practitioners have tried to reform these primary institutions, however, they have found that they rely on the proper functioning of a large and ever-growing array of essential supporting institutions. Laws are supported by institutions ranging from legislatures to land cadastres and notary publics. The judiciary is reliant on magistrates' schools, law schools, bar associations, clerks and administrative workers, and other supporting groups. Police require prisons, intelligence services, bail systems, and cooperative agreements with border guards and other law enforcement bodies, among other institutions. As new supporting institutions are discovered and deemed to be essential, they are added to the list of areas in need of reform.

From Institutions as Means to Institutions as Ends-in-Themselves

When ancient Greeks or Enlightenment philosophers discussed the rule of law, these material rule-of-law institutions were considered means to overarching societal ends, such as order, rights, and justice. Aristotle, for instance, discussed various forms of political arrangements, as well as the institutions of the magistrates and juries, and cultural and personal values, as enforcement mechanisms—all of which were judged on how they would affect the end goals that the rule of law was supposed to accomplish.⁵⁵

Similarly, when the rule of law first came into the development field through the work of Douglass North and his fellow new institutional economists, they meant to underline the

importance of both means and ends. The new institutionalists used the term *institution* in a broad and new way to mean “the humanly devised constraints that shape human interaction.”⁵⁶ Recognizing the importance of institutions so construed was not meant to imply that aid workers focus on the *material* organization of such legal institutions, such as laws and judiciaries, but that they recognize the importance of political, social, and cultural structures—such as a set of social patterns and interactions that serve to limit the acceptable areas of government control.

Yet when practitioners turned these ideas into practice, they inevitably had to simplify such nuanced theoretical concepts. Because programs to build the rule of law are most easily oriented around reforming concrete problems within material things such as laws or organizations, it was all too easy for means to become conflated with ends and eventually made into ends in themselves. Rather than considering from scratch, each time one enters a new country, how organizations, cultural interactions, and government agencies can be made to function in a system that supports human rights, for example, it is simply easier to write human rights laws, train police in human rights norms, and establish legal clinics that enable the poor to enforce their rights. Such a move is an inevitable part of rule-of-law reform.

This move would not be problematic if it were true that when organizations are made to function properly, or laws are better written, the means become the end. But, in fact, it is the ends to which they will be put that determines what it means for these institutions (as the word is commonly used) to function well. Even an impartial, efficient judiciary, for instance, is not of value in and of itself; if a society never had a dispute to solve, such a judiciary would simply be a ceremonial cost. It is of value because we believe that such a judiciary will enable disputes to be resolved efficiently and without recourse to violence, will create predictability, and will provide like judgments for like cases.⁵⁷ It is these ends, among others, that compose the intrinsic goods that the rule of law brings. Moreover, as shown above, even if reformers can make a single institution function well, they will not necessarily achieve any rule-of-law ends because each requires reform across *multiple* institutions.

The problem, therefore, is seeing the creation of such laws, training programs, and clinics as ends in themselves. Yet that step is an easy one to take. In many states, the problems with these institutional attributes are broad and deep. After the fall of the communist regime in Albania, for instance, laws were not published or distributed. Judges without high school degrees had been appointed from the hometown clan of the prime minister; their inability to reason through judicial precedent, their lack of knowledge of the laws, and their frequent corruption rendered fair justice impossible. Moreover, the sudden downfall of the government had been followed by widespread looting, and government arms caches had thus been redistributed to most men in the country. Poorly equipped bailiffs and police were scared to enter heavily armed villages, making the enforcement of civil claims or criminal justice nearly impossible. In rural areas, old forms of tribal justice—made more brutal and arbitrary from their reintroduction by drug and human traffickers with goals other than the rule of law in mind—had taken over in the face of government inability to enforce the laws. Similar problems are repeated in countries worldwide.

The solution, to any well-meaning and time-pressed reformer, seems obvious. Laws should be published and disseminated, judges should be trained, police should be armed and citizens disarmed, court procedures should be made efficient and corruption reduced—the list may be enormous, but it is, at least, self-evident. Improving flawed primary and secondary institutions appears to be a fairly straightforward process of skill building and technical reform.⁵⁸ The question then becomes one of sequencing: Where does one start?

The tendency to move directly into institutional reform, without considering the overarching end goals of such reforms, is exacerbated by the practical problems of expertise. Breaking down the rule of law by the institutions that must be improved in order to build it makes practical sense, given how expertise is allocated. Consultants on police reform tend to be retired police officers, police commissioners, and scholars of criminology. Lawyers alone have the expertise for legal reform, and judges, magistrates, and lawyers tend to be involved in most judicial reform projects. Meanwhile, a person who can advise on police reform will probably have little to say about the judiciary and vice versa. Other than political theorists and legal scholars, few presume to be expert in the rule of law, and their ability to transform this theoretical knowledge into pragmatic procedures for addressing the practicalities of institutional reform in developing countries is limited, to say the least. For such mundane reasons, the rule-of-law field tends to be subdivided into different areas of expertise, and bringing these fields together to consider how they can work toward joint ends based on a unified definition and understanding of overarching goals is difficult.⁵⁹ It is easy to take the next step and simply focus on making each field function “properly” as an end in itself.

It is quite understandable why practitioners have made this simple move in their need to accomplish a particular goal. Most have ended up betwixt and between: Their formal definitions mix ends and institutions, the distinction is never clarified, and in practice, they tend to focus on institutions as ends in themselves. The reasons are understandable, but explanation is not exculpation. Organizations working to build the rule of law abroad could insist that institutional reform always occurs under a distinct and clear understanding of the end it is intended to serve. Reformers could measure ends, rather than institutional reforms, in judging their success. They rarely do. Instead, reform of institutional attributes is treated as the end goal of rule-of-law reform—a definition that has real, negative impact on the success of rule-of-law reform efforts.

Problems with Institution-Based Definitions

When the rule of law is implicitly defined by its institutions, rather than its ends, the latter tend to be assumed. Rather than considering the desired goals we are trying to achieve through the rule of law, and then determining what institutional, political, and cultural changes best achieve these ends, practitioners are tempted to move directly toward building institutions that look like those reformers know. Practitioners engaged in such institution modeling tend to compare institutions in the country that need to be reformed with their counterparts in developed countries and then provide the resources, skills, and professional socialization to help each local institution approach Western models.⁶⁰ However, judiciaries can be impartial, trained, efficient, and able to dispense honest justice whether they are working within an Anglo-Saxon adversarial system, a Continental prosecutorial system, or even are constituted as a group of tribal elders working with known customary law within a village Panchayat in India. A government can be reined in by a constitution, but sometimes, as Montesquieu made clear, custom or a type of “English constitution” works just as well, if not better, than paper laws that are not obeyed. Not only are innumerable institutions to be reformed not necessarily essential to rule-of-law reform, but they can even impede it, by insisting on a model that is either unnecessary or unsuited to the political and cultural landscape.

Defining the rule of law by its institutions also slants practitioners toward overly technocratic models of reform. As discussed in the section on ends, the rule of law is as much a cultural and political model as a technocratic or even legal institution. The Greeks recognized that the rule

of law rested on more than correctly constituted legal institutions, and their enforcement ideas tended to emerge out of religious strictures far more than human institutions.⁶¹ For this reason, Aristotle claimed that “customary laws have more weight... than written laws.”⁶² And, as Isaiah Berlin observed, “What makes [Great Britain] comparatively free, therefore, is the fact that this theoretically omnipotent entity is restrained by custom and opinion from acting as such. It is clear that what matters is not the form of these restraining powers—whether they are legal, or moral, or constitutional—but their effectiveness.”⁶³ Even the *Economist*, in a recent article on crime in Argentina, discusses the need not only for improved institutions but also for cultural change among the citizenry to curb crime and corruption.⁶⁴ Many modern practitioners recognize the cultural dimensions of the rule of law in theory, but their definition of the concept and means of attacking it impede this realization from seriously impacting reform efforts.

An institutional attributes type of definition also fails to ask why institutions are so bad—and whose interests are served through weak rule-of-law institutions. Often, there are quite rational political reasons for appointing ill-trained judges who, as a result, lack independence or for keeping police underequipped with arbitrary career paths so that they are not tempted or able to form a power center separate from their government benefactors. Practitioners are often following an idealized blueprint of their home system that ignores its own difficulties and flaws, such as the intense political involvement in the picking of the U.S. judiciary or the corruption residing in some European judiciaries. Therefore, many reformers ignore the issues of power and politics inherent in all developed rule-of-law systems. The very question “how should this institution be reformed?” ignores larger political changes that may be far more important than institutional tweaking in achieving rule-of-law ends. As in the establishment of the court in the *Eumenides* or the historical case of the Magna Carta, politics and power matter a great deal in establishing the rule of law.⁶⁵ Michael Oakeshott correctly noted that the rule of law cannot protect itself against external assault. It must have powerful defenders or interests who gain from supporting it. Reform programs that focus on providing computers to improve court efficiency in the midst of a political autocracy, for example, seem rather like treating heartburn in a patient suffering from cancer.

Another problem that arises from such institutional modeling is that reformers tend to waste time and scarce legal resources within developing countries in efforts to make laws and institutions look like those in their own system. Delegates from the EU speak constantly of bringing the legal systems of Balkan countries “up to European standards” and suggest that they adopt the entirety of European law, regardless of their ability to enforce it, as a first step. Lawyers from the United States hold mock trials to teach adversarial litigation techniques to law students in countries with prosecutorial legal systems. There is a theoretical basis to some of these efforts: The Balkans may eventually need European law, and the adversarial, oral litigation system, for instance, is argued to be more transparent and less confusing, particularly for illiterates, than prosecutorial, written procedures. Even so, fights often break out between reformers from different nations who argue over whether to use German bankruptcy laws or American, or whether the constitution should uphold case law versus code law, when in reality either would be sufficient for achieving the ends that these reforms are supposed to serve. Reform can then become a process of substituting one workable law with another, perhaps slightly “better,” that emanates from a different legal system.

Part of the reason for such arguments is that many supposed rule-of-law reforms stretch the concept to encompass not only the minimal ends of the rule of law but also values and institutions that are cutting-edge or not even agreed upon within countries with a developed rule of law. The

poor, for instance, did not get free legal counsel in criminal cases before the 1960s in America, but such counsel is considered essential to declare that a developing country has the rule of law. Human rights laws that far exceed those of Singapore, or even of the United States, are considered essential for legal reform in Europe. These reforms may well be very good things, but they are not necessarily essential for the rule of law, and by stretching the point they can cast doubt on the more core attributes of the concept.

In fact, by claiming that institutional reform is an attempt to bring institutions in line with those in developed countries, reformers open themselves to charges of hypocrisy. Judicial and criminal legal reform in Russia is engaged in overturning a system that is *de rigueur* in Japan, which has a 99 percent conviction rate and allows citizens to be held without reason for 23 days.⁶⁶ The highly political process of judicial choice in the United States would never be permitted by reformers elsewhere. Neither would an institutional arrangement such as that in Great Britain that leaves the police answering to three different masters, none of them the public. In fact, since Hayek, there has even been an active debate about whether the United States and Great Britain, by allowing too much administrative discretion or by using the law to advance social goals, are moving away from the impartial rule of law.⁶⁷ Many legal professionals in the developing world know that the rule of law is a goal toward which even Western institutions are still evolving. Using Western systems rather than universally accepted ends as models leaves the reforms themselves open to question when flaws in the “model countries”—corruption, the death penalty, prison abuse—come to light.⁶⁸

Most pernicious, depending on how they are implemented, institutional reforms carried out under the banner of rule-of-law reform can actually undermine rule-of-law ends. For instance, in Romania, businessmen have pleaded for an end to legal reform: They can live with bad laws, but the constant “improvement” of key property laws by various bilateral and multilateral aid agencies creates an unpredictable legal environment. An end good of the rule of law—a stable, predictable legal system—has been undermined by the so-called reform process. If legal reforms are forced on other countries through conditionality, as they often are, executives may be forced to pass laws by decree rather than through the legislative process.⁶⁹ In many Latin American and Eastern European countries, for instance, strong World Bank and International Monetary Fund conditionality for various commercial legal reforms forced the growing use of executive ordinance in the face of a recalcitrant parliament. The growing habit of the executive to bypass parliament and rule through decree was noted with alarm in the EU progress reports on Romania’s rule of law.⁷⁰ These apparent reforms threatened the very idea of a government bound to pass laws through a standing legal process, a particularly worrisome occurrence in a new democracy emerging from overly strong executive rule.

These criticisms of an institutional attributes style of definition may appear strong on paper, but in the field, it is easy to shrug off these thoughts as pedantic. When institutions are extremely flawed, fixing some of the problems seems like a move in the right direction, regardless of whether rule-of-law ends have been thought out. Yet the effects of such breezy thinking should be seriously considered. Real, negative outcomes, such as pushing institutional reforms in ways that actually undermine rule-of-law ends, demonstrate the serious repercussions of too-easy thinking.

IMPLICATIONS OF COMPETING DEFINITIONS

This paper has sought to make two core points: first, that the rule of law is more usefully defined for the international development community by its ends, not by its institutional attributes; and second, that these ends are manifold, separable, often in tension, and affect different segments of the society to be reformed. Taking these two conceptual steps has many repercussions for the rule-of-law reform community, including the following:

1. For any rule-of-law end, all institutions must be reformed.

Fulfilling any rule-of-law end requires work across the three primary rule-of-law institutions. Even the most frequently undertaken reform, achieving predictable and efficient justice, which may appear to involve judicial reform alone, in fact necessitates legal reform to ban activities such as judicial corruption, bribery, and threatening public officials, as well as police reform to ensure that appropriate evidence is collected for use in cases, to avoid investigation delays, and to protect judges from threats that could affect their decisions.

Not only does each of the major rule-of-law ends require reform of and coordination among laws, the judiciary, and the police, it also requires reforms across the spectrum of supporting institutions for all three, such as prison reform (to keep prisoners in jail and prevent them from perpetrating crimes from inside), notary public reform (to reduce corruption and forgery of legal documents used in court), and law school reform (to ensure that lawyers are a professional class trained to argue cases based on law, rather than “fixers” who win by connections and bribes).

On the ground, coordination between some types of legal reform and judicial reform occurs regularly, but coordination between these two reforms and police reform almost never takes place. Moreover, coordination of any of these three areas with the reform of supporting institutions is ad hoc, at best. When reform of any one institution gets too far ahead of the other, achieving rule-of-law ends becomes less likely, because of the interdependence among rule-of-law institutions. For instance, in Panama, a decade-long reform effort moved the police from being one of the least trusted and most corrupt institutions in the country, to being among the most highly regarded. Police reform in Panama was successful, and now people turn to the police for help. However, law and order there has barely improved; the corrupt judiciary tends to release prisoners, particularly drug traffickers and organized criminals. And although the state may abuse the human rights of the citizenry somewhat less (never a huge problem before), individual criminals now do so more.

Obviously, country-specific empirical research is necessary to address the practical implications of this point, such as which areas should be prioritized, or where scarce resources should be allocated. The overarching point, however, should be heeded: Organizations such as USAID that are leaning ever further toward sector-specific reform, where one contractor focuses solely on the judiciary and another on the police, should reconsider their model.

2. Achieving rule-of-law ends requires political and cultural, not only institutional, change.

Reform must occur across all primary institutions to achieve any rule-of-law end, but even such widespread institutional reform will rarely be enough to ensure real change. As alluded to throughout

this paper, many rule-of-law ends are upheld even when institutional arrangements are far from supportive, if countries have social and political cultures that place a premium on the rule of law. The converse is also true: Recalcitrant cultures or balking politicians can undermine even well-organized rule-of-law institutions. Institutional reform can be a lever of change that pushes culture and politics in the right direction, but this outcome is neither assured nor particularly likely to occur unless reformers have their eye on using institutions to leverage wider change in this way.

Alexis de Tocqueville probably saw this issue most clearly. Visiting England just after a trip to Switzerland and following his famous travels in America, he wrote:

Whoever travels in the United States is involuntarily and instinctively so impressed with the fact that the spirit of liberty and the taste for it have pervaded all the habits of the American people. But if violence were to destroy the Republican institutions in most Swiss Cantons, it would be by no means certain that after a rather short state of transition the people would not grow accustomed to the loss of liberty. In the United States and in England there seems to be more liberty in the customs than in the laws of the people. In Switzerland there seems to be more liberty in the laws than in the customs of the country.⁷¹

In other words, while customs without material institutions can manage to uphold some rule-of-law ends (here described as the “spirit of liberty”), institutions without customs are weak and easily circumvented by raw power.

Well-planned institutional reforms can certainly affect political culture and change societal expectations. And most practitioners realize the importance of culture, power, and politics. But the institutional attributes style of defining the rule of law minimizes the importance of these levers of change and obstructs clear thinking about how to address them.

As already discussed, looking at distinct ends one by one illuminates the political and cultural cleavages that will affect reform success. By adopting this nuanced view of rule-of-law ends as distinct goals, reformers could better anticipate obstruction and could begin to take power and politics into account on the practical, planning level. Moreover, a clear consideration of ends would remove the ability of some practitioners to deny the fact that their work is inherently about changing the cultural and political values of other countries. The self-deception endemic in the field regarding this issue raised obstacles in project after project.⁷²

3. Not all work to reform legal institutions is rule-of-law reform.

Rule-of-law reformers believe, by definition, that they are trying to create the rule of law. Yet the field of rule-of-law reform grew not out of a desire to create the rule of law abroad but out of a need to find solutions to myriad international needs and problems. The United States and Europe hit on the rule of law as one solution to many needs: creating liberal democracies in Latin America and Eastern Europe, providing global security against drug cartels and organized criminals, and helping poor countries develop. Piecing together preexisting programs and creating new ones, the field of rule-of-law reform was born. Yet the field of rule-of-law reform did not replace these primary policy motives—it was a means to these larger ends. When strict rule-of-law procedures would impede the passage of laws or the construction of agencies desired for development, security, and so on, they tended to be ignored. Thus, these public policy goals that motivated the creation of the field sometimes also motivate action outside of it—as is shown by the acceptance of using executive decrees to achieve supposed rule-of-law goals.

One of the key problems with defining the rule of law by institutional reform rather than end goals is that it makes such conceptual conflation easier. Any work to reform laws, any change to police policy, is considered rule-of-law reform. This is not true. For instance, goals such as improving global security through police reform and antiterrorist laws are accomplished by reforming rule-of-law institutions—but they are targeted not at improving the rule of law *within* a particular state, but at achieving security for *other* states. When the EU pushes acceding countries to adopt the entire legal *acquis communautaire*, it is not building the rule of law through all these legal changes; it is simply helping them create a legal system that can mesh with its own, which is often tilted in ways that benefit current members. In the past, such activity was known as “gunboat diplomacy.” Simply because it is now undertaken by aid agencies and lawyers instead of generals does not elevate it to a dimension of the rule of law.

Conflating all institutional reform with rule-of-law reform leads to two problems. First, the rule of law winds up being defined so broadly that it takes in all sorts of reforms pursued for other reasons, including the self-interest of the aiding state. Second, reformers can believe that they are working toward the rule of law, when in fact their goals require reforms that are other than, and at times opposed to, the rule of law.

A common example of the first mistake is conflating the desire to build the rule of law to enable a market economy—which is certainly helped by forwarding these five rule-of-law ends—with building a particular type of laissez faire economy, a separate goal from building the rule of law. Law reforms to enable large-scale privatization activity, reduce business regulations, float prices on basic goods, and create certain types of bankruptcy and credit procedures are encouraged, often in the name of legal reform for the rule of law.⁷³ Because this work is done by those agencies engaged in other rule-of-law reform projects, and because they are using the instruments of rule-of-law reform to press their case, practitioners frequently confuse “building the rule of law” with enacting a particular vision of economic life.⁷⁴ These reforms may all be economically useful, but even Hayek (under whose name such reforms are frequently conflated with the rule of law) distinguished between reforms that improved economic efficiency, and the far narrower range of economic activities that the state had to be restricted from to maintain the rule of law. Germany and the United States, for instance, are both viewed as rule-of-law societies, despite the fact that bankruptcy is a more difficult procedure in the former than the latter. Scandinavia can be more socialist, and France can favor greater agricultural tariffs, without either having less rule of law than more open, laissez faire economies.⁷⁵ Mis-defining the rule of law in this way breeds cynicism and resistance in states to be reformed. Politicians in states that are being reformed can end up believing, rightly or wrongly, that rule-of-law reform is used as a guise for developed countries to tie the developing state more closely to their own legal and economic system.⁷⁶

Equally important, rule-of-law reformers may not actually want the rule of law, a point obscured by institutionally based definitions that count all reform of rule-of-law institutions as rule-of-law reform. Reformers engaged in the rule-of-law field primarily to improve global security may support some rule-of-law ends but be less excited about others, such as human rights or due process that would bind the executive to act through law. Other reformers may want some of the ends some of the time but not all of the time. Frank Upham describes an early case in the United States in which judges use some tricky legal footwork to abrogate one individual’s property rights to allow for large-scale development that would create growth and jobs for many more.⁷⁷ The case could easily mirror the development desires that the World Bank, USAID, or EU holds for many countries today.

These development goals lead these organizations, which theoretically favor rule-of-law ends such as binding the executive, to push executives to use unlawful decrees to pass desired reform legislation, rather than upholding rule-of-law procedures as their primary end.

In other words, the rule of law is often desired by rule-of-law reformers not as an end in itself but as a means to other ends. In such cases, the rule of law, the means they are using to try to achieve their other goals, is under some definitions in opposition to them and certainly likely to slow them down. In fact, it is arguable that reformers often do not want the rule of law at all—or at least not the technocratic, proceduralist version they proclaim.⁷⁸ The lack of hard evidence that the rule of law, in and of itself, procedures and all, actually does bring improved economic growth in the long run or better international security contributes to the ambivalence over actual end goals within the rule-of-law building field.⁷⁹

4. Rule-of-law ends are in tension—particularly in poor societies or societies with a weak rule of law. Improvements in one end goal can decrease success in others.

If we are going to pursue an ends-based definition, we must acknowledge that it is not easy. A key point that must first be understood is that all good things do not go together: Rule-of-law ends are in tension, particularly in the development stages.

The rule of law is about both limiting the power of the state and empowering it to protect the rights of the citizens against lawbreakers and rebels. Fostering the judicial independence required to bind the government can work against rooting out corruption within the judiciary. A country with scrupulous human rights norms may have difficulty maintaining law and order in the face of a heavily armed citizenry and organized gangs without similar scruples. Conversely, citizens wanting social order may demand the weakening of regulations protecting civil and political rights. In working rule-of-law systems, the five elements of the rule of law support one another. In nascent or poorly functioning systems, the five elements can and do undermine one another. While the ends of rule of law are not opposed in theory, in practice, they often come into conflict.

Poverty is one exacerbating factor. Countries are better able to enforce law and order while respecting human rights if the police are well paid, well trained, and properly equipped, and prisons are well built and undercrowded. When judges are underpaid and underrespected, corruption can take hold, forcing difficult choices between increasing judicial independence and achieving predictable, equitable justice. Poor countries are more at risk for civil wars and rebel movements and therefore are more likely to need to invoke overwhelming executive powers and martial law to create law and order.⁸⁰

In fact, in countries where the rule of law is not well developed, vicious cycles can emerge where the lack of one good leads to the lack of another: Human rights abuse, for instance, breeds a rebel movement that causes the government to attempt to reassert public order by acting further outside the law and further harming human rights. In countries where multiple elements of the rule of law are lacking or out of sync, rebuilding them often requires choices between valuable goods. For example, forcing the government to abide by law may allow the rebel movement to get out of hand, which itself creates law-and-order problems—and can lead those victimized to take the law into their own hands.

Sequencing of reforms is yet another difficulty. Attempts to reform aspects of the rule of law that focus on one end can be undermined by reform efforts concerned with another. For instance, efforts to increase predictability and efficiency in the judiciary through anticorruption drives, skills testing, and other measures can be used by local ministries of justice to increase the grip of the executive over the judiciary. Precisely this fight played out in Albanian reform efforts. Reformers from the World Bank, working with the ministry of justice, wished to institute a skills test for judges to weed out those who had been appointed with no training. They were opposed by reformers from the Council of Europe, who believed that a skills test instituted by the Ministry of Justice set a bad precedent for executive interference in the judiciary. In Albania, a smart solution was found: The test was held but was closely monitored by international reformers, watered down considerably, and few judges were expelled. This outcome both reduced the precedent of executive interference and ended up improving judicial skill levels to some extent, because international reformers spent the weeks before the test providing judges with copies of the laws and helping them study.⁸¹

Most of the time, states and international organizations working to build the rule of law avoid the implications of this tension, instead taking the approach that “all good things go together” and that a little bit more rule of law is better than none at all.⁸² Yet because these goods are often interrelated in tension, progress on one front without progress on the others will lead not to partial progress (all other goods being held equal while one improves) but to an entirely different animal (where the improvement in one good pushes some of the others up and others down).

Far from the current belief among aid practitioners that some reform is better than none, reform may occasionally create worse, less liberal outcomes.⁸³ For example, improved human rights laws and norms in a society suffering from law-and-order problems can erode cultural support for human rights, if they are seen as getting in the way of the rights of “ordinary” citizens to live free from crime.⁸⁴ Greater efficiency without improved laws can lead not to a liberal rule of law but to an autocratic rule *through* law that is not founded on liberal norms, as exemplified by regimes such as the Third Reich. The U.S. Institute of Peace report on the rule of law in Afghanistan, in discussing the lopsided work in law enforcement versus human rights and judicial reform, notes,

at best, such a [law enforcement] force will be able to provide some public order; at worst, the international community will have enhanced the ability of power-holders to control and abuse the population without creating mechanisms to protect the rights of Afghans. A substantial investment in one area of rule of law will not have a meaningful pay-off in terms of real democratic governance and stability unless other pieces of the puzzle are put in place as well.⁸⁵

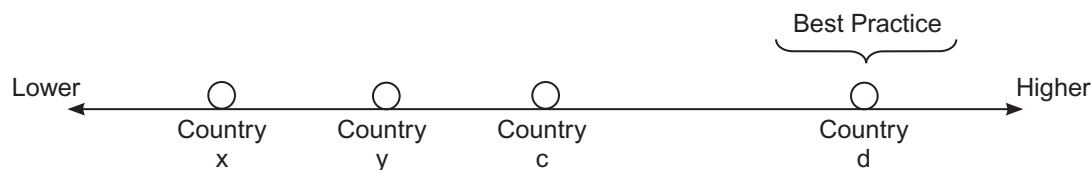
One reform effort can also undermine another. For instance, a subsector of many rule-of-law reform programs is making justice more accessible. Those working for predictable, efficient justice tend to see this end largely in terms of making justice more accessible so that the market economy might function more efficiently.⁸⁶ They therefore tend to create small claims courts, which both serve the ends of making justice more affordable and efficient for those with small stakes to settle and move those cases that would have been brought out of the regular courts. Yet other accessibility reforms can undermine this end. Accessibility programs championed to help the poor ensure their human rights or gain real equality before the law often use the regular court system, and if the programs are successful, they can overwhelm courts at all levels with suits that would not have been brought previously, reducing court efficiency.

5. *We should measure the ends of the rule of law, not the institutions. Given the tension between goods, we will gain clarity if instead of measuring the rule of law, we measure achievement in each end of the rule of law.*

As discussed above, end goals of the rule of law can be achieved even when institutions vary widely. Moreover, whether institutions are properly aligned or not cannot be measured by considering the state of the institution itself; the measurement only makes sense against the end the institution is intended to serve. Any anxious tourist to an exotic locale knows that if one is worried about law and order, it is more telling to measure crime statistics, not to count how many police have graduated from the academy. An investor does not read the constitution of an emerging market economy but asks other businesspeople whether contracts are enforced fairly and predictably. Having the aforementioned institutional attributes may be necessary to these outcomes, but they are not the way in which we determine whether the rule of law is present.

When the United States, the EU, or the World Bank try to measure success in building the rule of law, or the Millennium Challenge Account attempts to measure a country's "the rule of law" as one of its criteria for aid, it tends to be one of a number of goods they are measuring. They generally divide the dimensions of the manifold goods they are looking at along different lines, where the rule of law is a unified good, and is placed under the umbrella of "governance," which includes other measures such as regulatory quality and control of corruption.⁸⁷ Their rule-of-law measurement thus looks unitary, like this:

Figure 1. Rule of Law Measurement

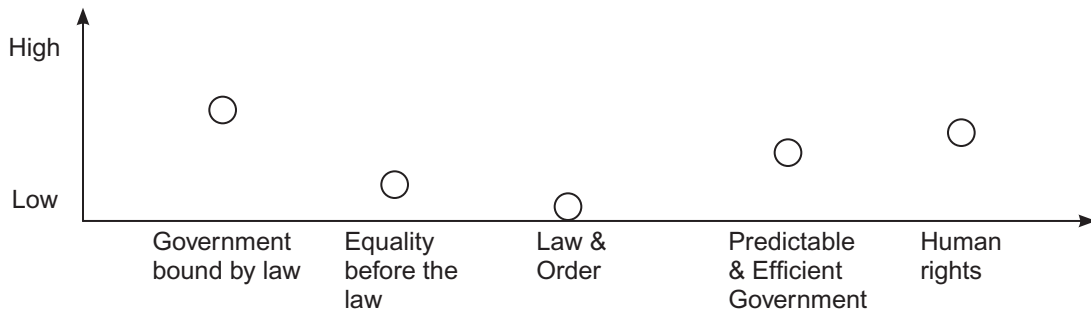


Yet the fact that the rule of law has five distinct ends means that it is not a unitary whole, but a set of five distinct goods that can advance at different rates. If we agree that the five ends described above should be the measurement of rule-of-law achievement, we must then determine how to weigh them against one another. Does improving one end create more rule of law? Or must all five be advanced together, or be related in a particular way? Many U.S. and EU interventions to build the rule of law do not work at pushing all five ends but are geared toward improving some institutional attribute aimed primarily at one of these ends, though often affecting a few of them simultaneously. This interdependence, along with the fact that the five ends are complementary but often in tension, means that progress in one area alone rarely occurs with all other goods being held constant. If one goes up, the others may rise with it, but they may also fall as a result.

For instance, Russia under Putin has had more predictable and efficient justice than it did under Yeltsin (see figures 2 and 3). The reduction in corruption has helped to ensure that the central government can rule, regular businesses can operate, and local government officials do not have impunity before the law. However, Putin accomplished this feat by amassing more power at

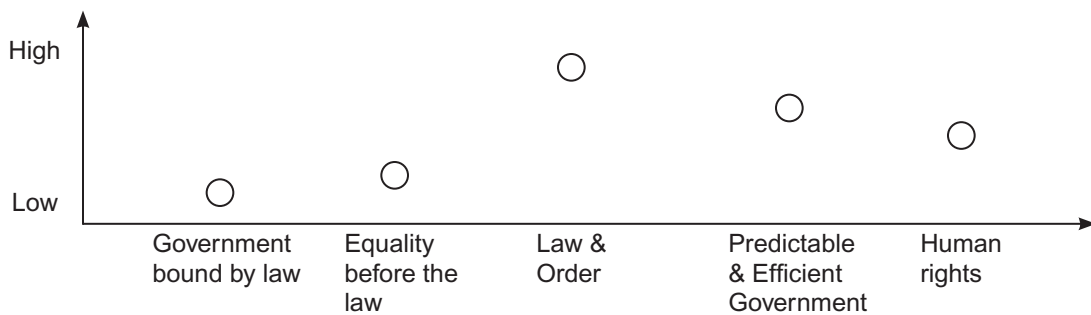
the central level, reestablishing executive control over the Duma and much of the judiciary and reinstating elements of state power such as the reformed KGB.⁸⁸ Is this more rule of law, or less? The question, actually, is incoherent, because the rule of law is not a unified good. Instead, it makes more sense to see these five aspects of the rule of law as independent elements—like five dimmer switches that control different lights.

Figure 2. Rule of Law in Russia under Yeltsin



Under Putin, law and order has improved, as has the predictability and stability of legal institutions (figure 3). Yet the executive is less bound to law. Meanwhile, human rights are now more threatened by the state, but less by anarchy, leaving that measure fairly steady.

Figure 3. Rule of Law in Russia under Putin



These five goods can be added together, of course, to get a single rule-of-law “score” for a country; a higher score would mean a greater level of rule of law, but the additive number would be fairly meaningless. If one country has serious law-and-order difficulties and another has an authoritarian government, but their final scores even out, do they have the same rule of law? The answer is not worth giving: They have different types of rule of law, and different societies have different levels of tolerance for different rule of law problems.⁸⁹

Finding the proxies to measure these end goals is a huge undertaking and outside the scope of this paper. Here, it is enough to suggest that we need to be looking for proxies to measure the right things: The ends—not the institutions or an amalgamation of the two—are the proper goals to measure. The actual measurement proxies within efforts such as the World Bank Governance

Indicators are a good first step, but by amalgamating ends and institutions and by making the rule of law unitary, these indicators hardly serve any clarifying purpose.

CONCLUSION

When Dicey described the rule of law a hundred years ago, he wrote that “whenever we talk of Englishmen as loving the government of law, or of the supremacy of law as being a characteristic of the English constitution, [we] are using words which, though they possess a real significance, are nevertheless to most persons who employ them full of vagueness and ambiguity.”⁹⁰ This pleasant fog had not improved significantly at the time that the field of rule-of-law reform was born.

The new field of rule-of-law reform did not emerge slowly after years of academic discourse. It grew from action—action needed right away—as states tried to keep regions from falling into poverty and anarchy, organizations jockeyed with one another for primacy in a new and growing field, reformers tried to create new polities out of crumbling states, and the United States and Europe fought for influence over the newly unallied states of Eastern Europe through legal systems, as well as through NATO and the EU. Few, except perhaps practitioners on the ground, noticed that they were working for different goals under the rubric of rule-of-law reform—and that they were too busy acting to comment.

After twenty years of such fevered activity toward ambiguous ends, however, it is time to take a step back and reflect.⁹¹ Rule-of-law reformers have been working to improve an ever-growing number of rule-of-law institutions. But the ends these institutions are intended to serve in society have become obscured. Rule-of-law reformers are trying to build a system that is better seen not as a set of institutions but as a set of distinct but interrelated end goals. When the system is properly balanced, these ends are mutually supportive. But when the system is in its infancy or when these goods are improperly aligned, they can undermine each other.

By treating the rule of law as a set of institutions, reformers handicap themselves in bringing about the end goals of the rule of law—all of which require reform across institutions, as well as cultural and political changes that lie outside the concrete institutional realm. By treating the rule of law as a single good rather than as a system of goods in tension, reformers can inadvertently work to bring about a malformed rule of law, such as one in which laws that overly empower the executive are applied and enforced more efficiently.⁹²

The difficulties of turning a definition of the rule of law based on ends into a practical method of tackling rule-of-law reforms are real. Acknowledging the need to do so and developing a measurement system that orients reformers toward this realization are first steps.

NOTES

- ¹ Oakeshott, “Rule of Law,” 119 at 164.
- ² Shklar, “Political Theory,” 1.
- ³ See Carothers, “Rule of Law Revival.”
- ⁴ USAID defines a strategic objective as “the most ambitious result that a U.S. Agency for International Development operating unit, such as a country mission, can materially affect, and for which it is willing to be held accountable.” See GAO, “Former Soviet Union,” 3. For examples of rhetoric, see Tamanaha, “Rule of Law for Everyone?”
- ⁵ International Bar Association, “Report on Zimbabwe.”
- ⁶ Remarks by Bakken, “Remarks at the Judicial Symposium Banquet.”
- ⁷ Gorni, “China: Rule of Law, Sometimes.” In addition to citing inequality before the law, the article describes all five senses of the rule of law in turn.
- ⁸ Amnesty International, “Afghanistan,” 1.
- ⁹ In a single extended article, the *Economist* manages to use the rule of law to demonstrate each of these meanings. It begins by stating that in Argentina, “the rule of law has been repeatedly trumped by executive power.” It then repeats the need for the rule of law in its claim that “Argentines are demanding something new from their government: law and order.” The article goes on to quote the deputy foreign minister, who says, “Argentine society is convinced that the impunity of the army’s crimes facilitated corruption and lack of respect for the rule of law,” referring both to the lack of equality under the law and the army’s impunity for human rights abuses. Then the article quotes Roberto Sava of the Association for Civil Rights as saying, “a politician who wants public support has to adhere to an agenda of the rule of law, fighting corruption, and promoting open government and human rights.” *Economist*, “Becoming a Serious Country” and “Crimes Past, Crimes Present.”
- ¹⁰ For a survey of how the term has been used in Germany, France, the United Kingdom, and the United States, see Grote, “Rule of Law, Rechtsstaat and Etat de Droit,” 271. Friedrich Hayek traces the history of the phrase in his book *The Constitution of Liberty*. A. V. Dicey attempts the first modern definition in his book *Introduction to the Study of the Law*. Also see Stephenson, “Rule of Law as a Goal.” Grote concludes that the idea “belongs to the category of open-ended concepts which are subject to permanent debate.”
- ¹¹ *Institution* is a term packed with meaning for international relations scholars and those familiar with the new institutional economics, from whence much rule-of-law building activity sprang. Because this paper is dealing with precisely the misuse of the term by rule-of-law practitioners, this paper uses the terms *institutions* and *institutional attributes* to refer to concrete, material organizations and sets of concretized interactions, such as laws. I will discuss the new institutional economics and its intended use of this terminology, which refers more generally to customs and patterns of interaction, in the section on definitions based on institutional attributes.
- ¹² GAO, “Rule of Law Funding Worldwide.”
- ¹³ There are, of course, dozens of ways to classify definitions of the rule of law, depending on the purpose the definition is meant to serve, or what divisions it is intended to clarify. Brian Tamanaha divides the concept between preliberal and liberal ends (see Tamanaha, “Rule of Law for Everyone?”) Others divide it between formalist and substantivist definitions, or proceduralist and substantivist modes. I have chosen the following means of definition because it best illuminates the dilemmas faced by the rule-of-law building project.
- ¹⁴ The World Bank’s Comprehensive Development Framework states, for example, that
 Without the protection of human and property rights, and a comprehensive framework of laws, no equitable development is possible. A government must ensure that it has an effective system of property, contract, labor, bankruptcy, commercial codes, personal rights laws and other elements of a comprehensive legal system that is effectively, impartially and cleanly administered by a well-functioning, impartial and honest judicial and legal system. (Wolfensohn, Proposal for a Comprehensive Development Framework.)
 USAID, when asked by the GAO for a definition of the rule of law, responded that
 The rule of law embodies the basic principles of equal treatment of all people before the law, fairness, and both constitutional and actual guarantees of basic human rights; it is founded on a predictable, transparent legal system with fair and effective judicial institutions to protect citizens against the arbitrary use of state authority and lawless acts of both organizations and individuals. (GAO, “Rule of Law Funding Worldwide,” 13.)
 The European Union, in its 1998 Commission Communications to the Council and the European Parliament, makes the greatest attempt to delineate between ends and institutions but suggests that the latter are implied by the former—a

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misunderstanding that I will discuss later. They declare that

The primacy of law is a fundamental principle of any democratic system seeking to foster and promote rights, whether civil and political, or economic, social, and cultural. This entails means of recourse enabling individuals to defend their rights... The principle of placing limitations on the power of the State is best served by a representative government drawing its authority from the sovereignty of the people. The principle must shape the structure of the State and the prerogatives of the various powers. It implies, for example:

- a legislature respecting and giving full effect to human rights and fundamental freedoms;
- an independent judiciary;
- effective and accessible means of legal recourse;
- a legal system guaranteeing equality before the law;
- a prison system respecting the human person;
- a police force at the service of the law;
- an effective executive enforcing the law and capable of establishing the social and economic conditions necessary for life in society.

(See European Initiative for Democracy and Human Rights, “Presentation on the Rule of Law”).

- ¹⁵ Compare the USAID definition in note 14 above to the definition used in its *Handbook of Democracy and Government Program Indicators*:

The Rule of Law ensures that individuals are subject to, and treated equally according to the law, and that no one is subject to arbitrary treatment by the state. A rule of law that contributes to the building of sustainable democracy is one that protects basic human rights... It is one in which market based economic activity is enabled, and freely operates. It is one in which the processes and institutions of justice are available to all individuals... A democratic Rule of Law is also one in which the processes and institutions of justice work efficiently and effectively to establish justice and resolve disputes. (USAID, *Handbook of Democracy*.)

- ¹⁶ Tamanaha, “Rule of Law for Everyone?” 11.

- ¹⁷ Aristotle, *Politics*, III, 15, 1286a-16, 1287a.

- ¹⁸ Quoted in Hayek, *Constitution of Liberty*, 164–5.

- ¹⁹ Quoted in Hayek, *Constitution of Liberty*, 168.

- ²⁰ See the English Bill of Rights, 1689.

- ²¹ Brian Tamanaha separates these senses and suggests (1) that a government bound by law must follow the law or change it, and, more robustly, (2) that there are certain actions that even the government cannot make “legal.” I separate these concepts into the end of human rights and the end of a government limited by law, in order to draw the distinction, discussed later, between those who advocate for the “formal” rule of law in which rights are not included, and those who take a substantivist position in which both procedure and content matter. This debate is discussed later in the section on human rights.

- ²² Some strict formalists and certain strands of Rechtstaat theory would posit rule by law as the rule of law—although this substance-less definition is rebutted by substantivists and often by the underlying assumptions of formalists themselves. More on this debate is found when the end goal of human rights is discussed later.

- ²³ Dicey, *Introduction to the Study of Law*.

- ²⁴ Cultural values, in other words, permeate most of the ends we desire out of the rule of law—and not just human rights issues. Montesquieu discusses this idea in depth and saw little hope for success in legislating what were properly cultural and social matters. This realization is important to understanding why legal reform, as pursued under the institutional attributes definition discussed later, has failed to live up to its promise. See Montesquieu, *Spirit of the Laws*.

- ²⁵ See, for example, Hobbes, *Leviathan*, ch. XIII; and Locke, *Two Treatises of Government*, Treatise II, 46–9, for references to the United States, and commentaries for the effects of the English civil war on Hobbes’ thinking, in particular.

- ²⁶ Locke, Treatise II, 123.

- ²⁷ Locke, Treatise II, 131, 353.

- ²⁸ See Narayan, with Patel, Schafft, Rademacher, and Koch-Schulte, *Voices of the Poor*, 183–7, which features thousands of interviews with poor individuals in developing countries; see particularly the case study on the police.

- ²⁹ For U.S. figures, see GAO, “Rule of Law Funding Worldwide,” 8, 11. Although numbers are for Latin America alone, the author’s research into other areas and into EU funding demonstrates similar funding levels. See also GAO, “Foreign Aid.”

- ³⁰ Most laws are followed not out of fear of force but out of general acceptance. Where large law-and-order problems prevail, either a society has reached a tipping point where social strictures no longer serve this self-policing function, or large portions of the citizenry do not accept the government's legitimacy in governing them. The former frequently occurs in impoverished areas; the latter in separatist or tribal regions with a strong sense of customary law.
- ³¹ In Panama, for instance, a decade-long effort at police reform has been quite successful in creating a trained, respected corps of police officers, but lagging judicial reform means that criminals simply bribe judges and evade imprisonment.
- ³² In Russia, judges were regularly bribed, and at least one judge was beaten, see Black, Kraakman, and Tarassova, "Russian Privatization," 1755–6. Even in Italy, the famous "clean hands" judges who tried to go after the mafia and connected politicians found their ranks decimated by murders that went unsolved.
- ³³ Black, Kraakman, and Tarassova, "Russian Privatization," 1757.
- ³⁴ Magna Carta, 1215, c1. 40. "To no one will We sell, to no one will We deny or delay, right or justice."
- ³⁵ Penn, *Some Fruits of Solitude*.
- ³⁶ *Bartlett's Familiar Quotations* attributes the quote to Gladstone, but it does not seem to be found in his writings. The first case to cite the idea is *Gohman v. City of St. Bernard*, 111 Ohio St. 726, 737 (1924).
- ³⁷ Obviously, civil settlements that are delayed earn the winner less money, given inflation and the opportunity cost of investment. A better example might be the recent contestation of a local election in the Philippines where the court eventually overturned the results and gave the seat to the plaintiff—on the last day of his term (*Economist*, "Democracy as Showbiz").
- ³⁸ Hayek, *Road to Serfdom*, 80.
- ³⁹ Hayek is participating in a fight between proceduralists and substantivists that is described later in note 78.
- ⁴⁰ Cass, *Rule of Law in America*.
- ⁴¹ Wolosky, "Putin's Plutocrat Problem," *supra* note 39, at 27.
- ⁴² The World Bank has a vested interest in making the rule of law appear technocratic because the organization is caught in a quandary. Their research arm shows that the rule of law and other highly political issues they now term *governance* are crucial to successful development, but their mission precludes them from taking a stand on political systems. Thus, they are trying to approach these sticky governance issues as technocratic problems so that they can address them without overstepping their legal bounds.
- ⁴³ Even though the World Bank has a new and cutting-edge program to consider the problems of insecurity on development, the Legal Department that advises on most rule-of-law reforms is not connected to this line of thinking within the Bank. For the problems that law and order, not efficiency and predictability, have on foreign investment, see Black, Kraakman, and Tarassova, "Russian Privatization," 1758–60.
- ⁴⁴ The story, based on field research and interviews, is contained in the author's unpublished master's thesis, Kleinfeld, "Diplomacy and Development." Parts can also be gleaned from successive European Commission *Progress Reports on Romania, 1999–2002*.
- ⁴⁵ Locke, *Treatise II*, 131.
- ⁴⁶ Dicey, *Introduction to the Study of the Law*, 107–22. Dicey upholds human rights by stressing that the common law is the preeminent means of creating the rule of law, because rights are less easily abrogated when they emerge through precedent, and because rights proclamation comes simultaneously with a means to enforce them. Many commentators confuse this third of his "kindred conceptions," believing that it is about the necessity of the common law, and miss the focus on individual rights. Yet Dicey specifically cites the United States as having the rule of law, despite proclaiming rights constitutionally and in the Bill of Rights rather than solely having them evolve from precedent, because the American system had numerous methods to ensure that rights were realized and enforced. Dicey's point in stressing the common law is that he believes the rule of law requires individual rights to be enforced, not simply proclaimed. He fears that when rights are declared by constitution rather than emerging from precedent, it is more likely that they will become empty statements rather than enforced liberties.
- ⁴⁷ Not any human rights reform would necessarily count as a rule-of-law issue. The idea is not simply the growth of human rights, but the notion that the state should be reined in by the law and that law should have content to it—that is, the state cannot violate intrinsic human rights of individuals. Thus, the rule of law is historically about negative rights, not positive rights or so-called economic and social rights. There is also a strong connotation of physical or property violence to human rights as a rule-of-law issue. A state violates the rule of law when it abducts and extrajudicially executes citizens or appropriates citizens' property; it is not as intuitive that a state violates the rule of law when it places curbs on free speech.

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- ⁴⁸ Scalia, “Rule of Law as a Law of Rules,” 1179.
- ⁴⁹ Raz, “Rule of Law and Its Virtue,” 195. This paper will later argue that even the apparently value-neutral institutional attributes actually carry a liberal Western value set, but this is not generally recognized by the field and not part of the debate between formalists and substantivists.
- ⁵⁰ Empirical work on growing authoritarian tendencies in Russia shows the danger to rule-of-law reformers of not using a substantivist definition of the term that includes a full range of human rights. See Sachs and Pistor, *Rule of Law and Economic Reform*.
- ⁵¹ Aristotle, *Politics*, III, 11, 1282b-III, 12, 1283a and IV, 8, 1294a.
- ⁵² Locke, *Treatise II*, 131, 353.
- ⁵³ A recent news account, for instance, describes how marriage-through-kidnap-and-rape, a traditional practice in Ethiopia, was banned by law but was not enforced because most people were unwilling to protest through the courts, and judges did not believe in the right enough to uphold it. See Wax, “Ethiopian Rape Victim.”
- ⁵⁴ Locke, *Treatise II*, 131.
- ⁵⁵ Aristotle, *Nicomachean Ethics* V. 6, 1134a-b; see also Aristotle, *Politics*, III, 11, 1282b.
- ⁵⁶ North, *Structure and Change in Economic History*, 344.
- ⁵⁷ USAID and the EU both imply the distinction in their definitions. USAID declares that the rule of law “embodies” some things and “is founded on” others, whereas the EU notes that the rule of law is “a fundamental principle” and then describes institutions that it “implies.” Amnesty International actually captures the distinction best, stating in its report on Afghanistan that, “the institutions essential to implement the rule of law and to protect human rights are weak. The reconstruction of a professional police force, as an important enforcement mechanism for the rule of law across the country, needs urgent attention.”
- ⁵⁸ Carothers, “Rule of Law Revival.”
- ⁵⁹ A similar problem can be seen in economic development, a field in which identifying the connections among education, infrastructure, governance, environmental health, and economic policy, to name just a few, has been notoriously difficult.
- ⁶⁰ Thomas Carothers coined the term *institution modeling* to describe this process; see Carothers, “Democracy Assistance,” 116.
- ⁶¹ Aristotle, *Nicomachean Ethics* V. 6, 1134a-b; see also Aristotle, *Politics*, III, 11, 1282b. Of course, Plato’s entire idea of enforcement of social hierarchy through the noble lie is such an example. Brian Tamanaha describes numerous cultural and social strictures that upheld parts of the rule of law during the medieval era, even when rule-of-law institutions did not exist, see Tamanaha, “Rule of Law for Everyone?” 15.
- ⁶² Aristotle, *Politics*, III, 16 1287b.
- ⁶³ Berlin, *Four Essays on Liberty*, 166.
- ⁶⁴ *Economist*, “Crimes Past.”
- ⁶⁵ In *The Eumenides*, the third play in Aeschylus’ *Oresteia*, Athena creates a court to rule on the case of patricide, taking the right of such decisions away from the ancient Furies, who she then placates in a most political way with a host of other nonlegal powers. The Magna Carta was famously forced on the English King by the growing power of the aristocratic landowners. See Aeschylus, *Eumenides*; and Pollock and Maitland, *History of English Law*.
- ⁶⁶ *Economist*, “The People Come to Court.”
- ⁶⁷ Hayek, *Constitution of Liberty*, 172; this problem was also mentioned by Dicey.
- ⁶⁸ Frequent references to the U.S. Supreme Court’s “independence” after their intervention in the *Bush v. Gore* electoral battle, comments on the highly political judge-picking strategies in the United States, evidence of police use of torture in New York, and notorious corruption cases in Italy, France, and the United States are often mentioned as asides by legal professionals in developing countries, as if to say, with a wink and a nod, that we all know no state can really practice the rule of law. We would have more credibility if we acknowledged that all of our systems are evolving attempts toward ideals.
- ⁶⁹ All governments now use executive decrees to some extent, and they are quite common in the United States. At issue is the use of executive decrees to evade the parliamentary legislative process for laws that would be unlikely to pass otherwise, or the use of such decrees to unlawfully amass extra powers to the executive.

- ⁷⁰ See European Commission, “Regular Reports on Romania for 2000, 2001, and 2002.” The overuse of executive decrees to meet conditionality has been recognized by many observers of other countries as well. See Gupta, Kleinfeld, and Salinas, “Legal and Judicial Reform.”
- ⁷¹ de Tocqueville, *Complete Works*, viii, 455–7, quoted in Dicey, *Introduction to the Study of Law*, 109.
- ⁷² Admittedly, much of this self-deception is forced on practitioners by the obvious political difficulty of admitting that they are meddling with the politics and cultures of other countries (for bilateral aid agencies) or by a mission that proscribes such work (for multilateral groups). Nevertheless, it impedes clear thinking.
- ⁷³ Sometimes, regulations are reduced in an effort to reduce corruption; where there are no rules, there are no rule-breakers, and every regulation is an opportunity for corruption. What I am criticizing is not such reasoned efforts, but the ideology that sometimes leads to blind activity without reasoned thought to guide it—an ideology criticized by Joseph Stiglitz in *Globalization and Its Discontents*.
- ⁷⁴ The World Bank is particularly guilty of ascribing to this fallacy. Its Comprehensive Development Framework, for instance, states that “Without the protection of human and property rights, and a comprehensive framework of laws, no equitable development is possible.” Fair enough, so far. It then states, “A government must ensure that it has an effective system of property, contract, labor, bankruptcy, commercial codes, personal rights laws and other elements of a comprehensive legal system that is effectively, impartially and cleanly administered by a well-functioning, impartial and honest judicial and legal system.” In practice, this rarely means simply that a country must have rules of the game for commercial life and property, as well as the institutional attributes already agreed upon; instead, it means that a country must have the particular rules preferred by the World Bank and International Monetary Fund.
- ⁷⁵ In part, the confusion between the rule of law and a particular system of law has arisen, particularly in the United States, because Americans misread Dicey, fail to read Hayek, and thus view the rule of law as a particularly Anglo-Saxon concept.
- ⁷⁶ It may be easy to dismiss these beliefs as conspiracy theory—but they affect our success in convincing local elites to support reform. Moreover, they are not wholly off the mark. Many rule-of-law programs are sold on a domestic political level through claims that improving the rule of law abroad will lead to greater market opportunities for the country ponying up money for the reform.
- ⁷⁷ Upham, “Mythmaking.”
- ⁷⁸ In fact, by actually preferring various public policy outcomes over rule-of-law procedures, rule-of-law reformers may unwittingly be stepping into the center of one of the bitterest debates over the rule of law. A current argument is raging over how much discretion judges have to decide cases on public policy grounds. Substantivists such as Dworkin and Tremblay see a large role for judicial discretion: When laws are not “good,” the spirit of justice, they argue, not the written word, should be supreme. Proceduralists, such as Hayek and even Aristotle (see his *Rhetoric* 1354ab), believe that such judicial discretion overturns the rule of law by allowing judges to make, as well as decide upon, law. They believe this situation undermines both equality before the law (because such decisions would require the state to determine how particular individuals should be situated) and the notion that the state must be reined in by law. In their rhetoric, rule-of-law practitioners echo the beliefs of proceduralists, who believe that to uphold the rule of law, the elected legislature must make the rules, and the judges must decide upon them narrowly. If the outcome of a case appears “unjust,” it is a sign for the legislature to rewrite the laws in a general, impartial way, and the judge is not allowed to amend judgment on public policy grounds that would make laws specific to individual circumstances. In practice, however, rule-of-law practitioners are generally happy with having the executive bypass the legislature or judges overstep the limits of the laws, if these abrogations of the rule of law help them achieve their public policy desires.
- ⁷⁹ Although numerous economists have tried to demonstrate these correlations, the facts are still unclear. See Carothers, “Promoting the Rule of Law Abroad.”
- ⁸⁰ See Collier and Hoeffler, “Greed and Grievance in Civil War.” Their findings on the links between poverty and rebellion are upheld by many scholars in this burgeoning field.
- ⁸¹ Kleinfeld, *Diplomacy and Development*.
- ⁸² Carothers cites the “all good things go together” mentality in his book, *Aiding Democracy Abroad*, 56.
- ⁸³ Domingo, “Judicial Independence,” 164; Trubek and Galanter, “Scholars in Self-Estrangement,” 1075–6; and Burg, “Law and Development,” 518.
- ⁸⁴ Some of the backlash against human rights norms in Eastern Europe and the former Soviet Union can be attributed to this problem of pacing: Cultural norms widely accepted before they were implemented have fallen into disfavor as international groups preach human rights and ordinary people feel preyed upon by increased criminality.
- ⁸⁵ Miller and Perito, “Establishing the Rule of Law in Afghanistan.”

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- ⁸⁶ Their line of thinking is generally inspired by Hernando de Soto, whose ground-breaking book, *The Other Path*, demonstrated how a lack of legal title, overregulation, and inaccessible justice kept small businesses from growing and the poor from gaining credit. See de Soto, *The Other Path*.
- ⁸⁷ See the indicators used for the Millennium Challenge Account, or those now advanced by the World Bank in Kaufman, Kraay, and Mastruzzi, *Governance Matters III*. The World Bank indicators actually do measure a number of the dimensions of the rule of law that I am talking about, but they obscure the fact by placing them under different subheadings of governance, all of which are made to sound technocratic. Human rights indicators slip in under political stability and voice and accountability. The predictability of law is sandwiched into regulatory quality. Law and order is placed under the rule of law criteria but also emerges under political stability and lack of violence. Thus, the requisite points are measured, but not as elements of the rule of law, in such a way that obscures all of the gains to be made from recognizing the different types of desired ends and the tensions between them.
- ⁸⁸ For an appraisal of Russia's standing on a variety of rule-of-law measures and appraisals of judicial corruption, see Pistor, Raiser, and Gelfer, "Law and Finance"; and Hertzfeld, "Russian Corporate Governance," 6–7.
- ⁸⁹ For more on how liberal societies hold opposing or equally valued goods in tension, see Berlin, *Four Essays on Liberty*.
- ⁹⁰ Dicey, *Introduction to the Study of Law*, 110.
- ⁹¹ There is no easy start date for rule-of-law reform activities. Developed countries have affected reforms of weaker states since the era of Rome, or even ancient Greece. The law and development movement of the 1960s heralded some of the first modern efforts at rule-of-law reform in countries that were not colonized or occupied. Rule-of-law reform started incrementally in Latin America with various legal reform programs in the 1980s and then grew rapidly with the end of the Soviet Union and the need to move states from communism to market-oriented democracies in the 1990s.
- ⁹² Jeffrey Sachs and Katharina Pistor make the important distinction between the rule *of* law and rule *through* law, in which law functions as an administrative device, not as a set of rules binding on state officials. The rule through law can entrench autocracy in law. See Sachs and Pistor, *Rule of Law and Economic Reform*, 24. Because reformers tend to favor technocratic reforms that improve efficiency and judicial functioning, this is precisely the problem many "successful" reforms risk. See Domingo, "Judicial Independence," 164.

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