

# ARTICLES

## Blind Faith and Reasonable Doubts: Investigating Beliefs in the Rule of Law

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The rule of law, whether applied to matters trivial or grand, is the central magic of the American governmental experience.

New York Times Editorial<sup>1</sup>

In the winter of 1998-99, I was in a graduate law program designed for future law teachers. I found myself thinking with new urgency about old questions: Can our legal system produce results that are at least partly independent of political and economic power? Or does the law always wind up reproducing and reinforcing the powers that be? In short, is there any such thing as the "rule of law"?

By a bizarre accident of timing, my personal inquiry into rule of law issues coincided with a new popular interest in these matters brought about by the Clinton impeachment hearings. Suddenly, there were almost daily references in the news media and on the floor of Congress to the sanctity and vulnerability of the rule of law in our democracy. I was particularly struck by the quasi-religious tone that prevailed.<sup>2</sup> It seemed paradoxical to me that this most rationalist ideal

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1. Editorial, *Fairness for Ken Starr*, N.Y. TIMES, April 5, 1998, at D14.

2. Others have remarked in the way in which the legal system in the United States sometimes seems to call forth a kind of religious commitment. See, e.g., SANFORD LEVINSON, CONSTITUTIONAL FAITH (1988); Thomas C. Grey, *The Constitution as Scripture*, 37 STAN L. REV.

should generate an aura of the sacred, and the apparent contradiction provoked me to look more closely at what we mean when we talk about believing in something.

While considering what it meant to preach the rule of law as an ungrounded article of faith, I began to wonder if there was anything about the nature of legal practice that might ground a more limited belief in law's ability to constrain power. Watching the impeachment proceedings on television, I found myself thinking about an earlier period in my life. I used to be an actress and a performance artist. It occurred to me that there were certain similarities between legal and theatrical practice.

Perhaps the formal conventions that radically limit behavior on stage and in court might be related to the decisional constraints that constitute a rule of law. That possibility, in turn, led me to ponder various kinds of limits evoked by the figure of a blind, hence limited, justice. In the end, the formalities of legal procedure seemed more central to the value of a just legal system than I had previously thought. Somehow, investigating my own tenuous—but apparently unshakeable—belief in a rule of law ideal changed the way I saw legal practice. This Article reports that investigation.

## I. TEACHING AND BELIEVING

You may disagree with us, but we believe in something.

Rep. Henry J. Hyde<sup>3</sup>

What would I say if my students asked me if I believed in the rule of law? I could try a definitional dodge (always defensible as a lesson in forensic technique): "Well," I might hedge, "that depends on what you mean by 'rule of law.'" I could stay on safe technical ground by observing that problems brought to litigation are often stated in terms of rules and that lawyers need to know how to make and defend such statements. Or, I could go straight to the heart of the matter, then out the other side, by articulating and then distancing myself from the most improbable extreme version of the rule of law ideal: "I certainly do not believe that law is a closed logical system that functions entirely through the algorithmic application of politically neutral principles by purely rational, objective decisionmakers."

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1 (1984).

3. Proceedings of the United States Senate in the Impeachment Trial of President William Jefferson Clinton [hereinafter *Impeachment Trial of President Clinton*], 106th Cong. 1416 (1999) (statement of Rep. Hyde).

But rhetorical strategies are unlikely to satisfy a student who really wants to know if I think there is or can be such a thing as the rule of law, "not of men."<sup>4</sup>

It is quite possible to study and even to practice law without forming a clear opinion about whether law is capable only of embodying and amplifying power, or if it can also restrain it, if not absolutely then to some meaningful degree. Lawyers and law students face more immediate problems about how law works. They must win the case, do the assignment, pass the test, make the motion. If theoretical or philosophical doubts and questions arise, there is nothing paralyzing about not knowing where they stand. But it is hard to imagine teaching something when you are uncertain about whether you believe in that something's capacity to do what it is ostensibly meant to do.

A syllabus says something about what the teacher thinks law is and can be. The question of what cases to include in a first-year torts class—and of how to explain the courts' decisions in those cases—quickly opens up the question whether it is likely, or even conceivable, that "our law will rule . . . us, not the wishes of powerful individuals."<sup>5</sup> A course plan may, or probably should, include materials that present beliefs contrary to the teacher's views. It is hard to envision a successful class taught so that no one has a clue as to what the teacher believes about law's institutional effects, let alone one taught by someone who does not know herself what she believes.

Maybe that is why for so long the most bitter controversies about law's potential to restrain political power were not among lawyers, statesmen, or social reformers, but among law teachers. In the 1930s, the Realists stirred up the legal academe with their attacks on law's claims to transcend political and economic pressures and the prejudices of legal decisionmakers. Though some of that skepticism undoubtedly influenced the legal system through the attitudes of Realist judges, explicit debate about the meaning and potential of the "rule of law" remained firmly rooted in academia. Decades later, in 1984, Paul Carrington, then Dean of Duke University School of Law, published a pithy attack on skeptical scholars who question law's institutional ability to transcend individual partiality and contending that those intellectual "nihilists" had a duty to leave the training of young lawyers up to true believers in the rule of law.<sup>6</sup> The battle was joined

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4. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803).

5. Margaret Jane Radin, *Reconsidering the Rule of Law*, 69 B.U. L. REV. 781 (1989).

6. Paul D. Carrington, *Of Law and the River*, 34 J. LEGAL EDUC. 222, 227-28 (1984).

by commentators of various political and scholarly stripes,<sup>7</sup> but it never made much noise outside the ivied halls of legal academe.

### A. *The Impeachment*

That changed suddenly, and with a vengeance, when the impeachment trial of President Clinton made "rule of law" a household phrase. It was tossed around and defended or dismissed by millions of readers of the morning *Times* and watchers of the nightly news. With passionate conviction and chant-like regularity, the House Managers avowed that the President had violated the rule of law and that his impeachment and conviction were required to vindicate it. In response, the President's advocates argued first that the impeachment itself was a violation of the rule of law (because its procedures fell short of due process),<sup>8</sup> then that impeachment had nothing to do with the rule of law (which could only be enforced through an indictment and judicial trial),<sup>9</sup> and finally (when it seemed certain that the President would be acquitted by a wide margin), that the Senate proceedings were a fine example of the rule of law in action.<sup>10</sup>

How strange, just as I was coming to seriously puzzle over my own position on the rule of law question, to hear the phrase repeated in a hundred disjointed contexts, like the theme music in a bad movie. In my more narcissistic moments, it occurred to me that I could have dreamed the entire impeachment trial, conjured it as a kind of wild dramaturgy of my personal intellectual dilemma: "Yes, doctor, it was really weird. There was some kind of trial going on in this big room

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7. See, e.g., Joan C. Williams, *Critical Legal Studies: The Death of Transcendence and the Rise of the New Langdells*, 62 N.Y.U. L. REV. 429 (1987); Owen M. Fiss, *The Death of Law?*, 72 CORNELL L. REV. 1 (1986); Peter Martin, "Of Law and the River," and of Nihilism and Academic Freedom, 35 J. LEGAL EDUC. 1 (1985).

8. See, e.g., Rep. J.C. Watt, House of Representatives, *Judiciary Committee Hearing on the Articles of President Clinton*, 105th Cong. 1998 WL 854485 (statement of Rep. Jerrold Nadler).

[T]he rule of law says if you charge somebody with perjury, you are obligated to tell them what the perjurious statements are . . . We have received sanctimonious lectures from the other side of the aisle about the rule of law, but the law does not permit perjury to be proved by the uncorroborated testimony of one witness nor does the law recognizes [sic] corroboration, the fact that the witness made the same statement to several different people.

*Id.* As a matter of federal law, Rep. Nadler is simply wrong.

9. See *Impeachment Trial of President Clinton*, *supra* note 3, at 1271 (statement of Gregory B. Craig, Office of the White House Counsel) (arguing that impeachment was meant to protect the country from abuse of official power and the "criminal justice system was to vindicate the rule of law.").

10. "The fact that we are having this trial in this chamber, the fact that we had an impeachment proceeding in the House, is itself part of our rule of law. The president is immersed in the application of the rule of law at this very moment." *Impeachment Trial of President Clinton*, *supra* note 3, at 1448 (statement of Charles F.C. Ruff, Counsel to the President).

with velvet curtains and all this dark wood paneling. And the judge had these gold stripes on his robe, like a costume from some community theater production of Gilbert & Sullivan.<sup>11</sup> Anyway, the prosecutor gets up and says, 'he takes an oath to tell the truth, the whole truth, nothing but the truth and lies, and then lies, and lies, and lies. What kind of lesson is that for our kids and our grandkids? What does it do to the rule of law?'<sup>12</sup> The defense attorney was in a wheelchair. What do you suppose that means? He rolls up to the mike and says, 'The fact that we are having this trial in this chamber . . . is itself part of our rule of law. The President is immersed in the application of the rule of law.'<sup>13</sup> Yes, 'immersed,' that's interesting isn't it? As though law was a kind of solvent that could produce . . . what? Some sort of transformation, I suppose."

### B. Rule of Law Theories and Problems

You might think that the Clinton impeachment was not a likely setting for a serious debate about the rule of law ideal. Perhaps the rhetoric that accompanied that tawdry political spectacle should not be compared to a principled theoretical discussion. But it strikes me that the figures in my real-life dream sequence articulated two different notions of the rule of law that correspond quite closely to divergent theoretical versions of the concept as it is identified in the scholarly commentary.<sup>14</sup>

The prosecutor, Henry Hyde, took what Margaret Radin calls a "substantive" view of the rule of law,<sup>15</sup> treating it as the institutional embodiment of a moral system centered on fairness. The tricky thing about this view is that it sometimes seems to confuse violating the law with violating the rule of law. If President Clinton lied under oath, he broke the law against perjury. But "rule of law" usually means more than lawbreaking. Laws, after all, are made to be broken, and when they are, the rule of law remains intact, as long as the legal violations themselves are dealt with according to the law rather than decided by the whims of whatever legal decisionmakers happen to be charged

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11. American judges at all levels of the federal and state judiciary generally wear plain black robes. A few years ago, however, Chief Justice Rehnquist had four gold chevrons sewn onto the sleeves of his robe, apparently in imitation of a costume he had seen in a Gilbert and Sullivan operetta. RICHARD A. POSNER, *AN AFFAIR OF STATE: THE INVESTIGATION, IMPEACHMENT AND TRIAL OF PRESIDENT CLINTON* 168 (1999).

12. *Impeachment Trial of President Clinton*, *supra* note 3, at 1437 (statement of Rep. Hyde).

13. *Impeachment Trial of President Clinton*, *supra* note 3, at 1448 (statement of Charles F.C. Ruff, Counsel to the President).

14. See Radin, *supra* note 5, at 783-84.

15. *Id.* at 787-88.

with resolving the case. The most basic requirement in the "rule of law not of man" is what Lon Fuller called "congruence between official action and the law,"<sup>16</sup> i.e., resolving legal violations according to the factors dictated by law rather than according to the political power of the violator. Thus, a simple violation of the law does not a rule of law issue make.

But hold on. President Clinton is not only a government official but the chief official of law enforcement. If he breaks the law, isn't that in and of itself a rule-of-law issue because it is so incongruous with his official role? Certainly this theme was at the heart of the prosecutor's presentation in the Clinton case, a feeling that the problem of how officials would respond to the violation of law in question was doubled by the fact that the violation itself was committed by a government official in charge of enforcing the law.<sup>17</sup> His rhetoric reflected a moral intuition at the core of a substantive rule of law—officials are supposed to follow the law.

If the Clinton administration was going to prosecute citizens for perjury in civil suits, perjury by the head of that administration was already a violation of the rule of law requirement of congruence between law and official action. Moreover, the particular kind of violation charged—lying in a judicial proceeding—raised yet another substantive rule of law problem because perjury itself potentially undermines fairness in a legal system based on testimony. From this point of view, letting the President off the impeachment hook would be a triple blow to the substantive rule of law. Three times unfair.

The President's counsel, of course, had an interest in promoting a view that the rule of law could escape unscathed by the President's conduct and did not need to be redeemed by a conviction, so long as it was preserved in the impeachment process. Unsurprisingly, then, his remarks stressed what Radin calls an "instrumental" rule of law.<sup>18</sup> This version of the rule of law ideal is at once less and more ambitious than a substantive approach. On the one hand, it makes no claim that the rule of law necessarily produces a more moral outcome than would otherwise result. On the other, it expresses a strong belief that the law

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16. LON L. FULLER, *THE MORALITY OF LAW* 81 (2d ed. 1977).

17. Indeed, the impeachment process reflects this aspect of the problem by making removal from office the punishment for official misbehavior, leaving open the possibility of civil and criminal liability with additional penalties if the conduct at issue was illegal.

18. Radin, *supra* note 5, at 784. It is, of course, highly questionable whether the President's counsel would have been content to focus on the process rather than the result of the impeachment if it had not appeared certain that the Senate would refuse to convict the President.

itself—regardless of the character or motives of its practitioners—can have a powerful positive effect on society.<sup>19</sup>

Ruff's metaphor of "immersion" evokes this second strong aspect of the instrumental rule of law concept. It likens the impeachment trial to an alien environment, different from our normal planetary atmosphere. This is a world apart, where the ordinary political and social pressures dissipate the way gravity lets go when you dive into a pool. Presumably this separate legal medium would produce outcomes not possible in the everyday world. And here the two views begin to converge.

The prosecutor's substantive version of rule of law as fairness depends to some extent on the idea that legal process is uniquely capable of achieving fair results, otherwise it is an image of government not by laws but by—extremely fairminded—men. At this point of commonality, what are, for me, the central rule of law questions return: Is there any reason to think that law has such an effect? Is there any theory that explains why we might reasonably expect that "immersion" in the impeachment trial, or for that matter, in any legal proceeding, allows legal decisionmakers to escape—or even to ease—the ordinary political, economic and personal pressures that shape the rest of our behavior?

I agree with Robin West that what seems to be missing from most liberal (and conservative) dreams of a legal system capable of restraining political, economic, and charismatic power is some reason to believe those dreams might come true.<sup>20</sup> Calling for a "naturalistic" theory that can support liberal intuitions about the viability of a rule of law, West offers as an example Sigmund Freud's theory that law is rooted in a primeval Oedipal murder and the murderers' subsequent remorse. According to Freud, the rule of law begins when the patricidal horde makes a collective decision to renounce aggression and subject themselves to the authority of law as the totemic incarnation of the murdered father. As West points out, Freud's explanation of law's power to restrain human behavior has been widely discredited in historical, psychological, and anthropological terms.<sup>21</sup> Nevertheless, Freud's approach remains in one sense more promising than the philosophical defenses most contemporary legal scholars advance for the

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19. Notice that in the claim for positive effect, the instrumental view merges with the substantive view of rule of law, just as the substantive view's emphasis on fair procedure is itself dependent on an idea of instrumental good.

20. Robin West, *Law, Rights, and Other Totemic Illusions: Legal Liberalism and Freud's Theory of the Rule of Law*, 134 U. PA. L. REV. 817 (1986).

21. *Id.* at 880-81.

rule of law, because his argument is founded in a theory of "human nature" with a factual basis.<sup>22</sup>

In the absence of a theory of how a rule of law might actually work, plentiful examples of the legal system's failure to transcend politics leave us necessarily suspicious about law's potential for shaping human behavior. Given that we can generally explain legal outcomes as the result of extralegal causes, what justifies anyone's faith in the rule of law? West is right that what distinguishes Freud's theory is its attempt to answer that question in arguable terms. Freud offers a description of human tendencies and limitations that explains how a rule of law ideal might be realized. Still, for most of us, that particular description has been conclusively falsified. Is there another view that can fill its place?

Like West, I find it deeply unsatisfying to be told that an autonomous rule of law can somehow disempower ordinary social and personal prejudices without being given any explanation of how such transcendence is achieved. Nor is it particularly compelling to hear that the rule of law must be a social reality because it is a social necessity. As Jerome Frank remarked when his critics protested that society could not do without the legal certainty he debunked, it would also be useful to be in two places at once, "[b]ut although practical needs prompt his desire for instantaneous transportation across the globe, it can scarcely be said that, if Jones insists upon procuring a wishing-rug, his demand is therefore practical in nature."<sup>23</sup> The fact that a particular attribute is desirable in a legal system does not mean that it is present, or even that it is theoretically possible.

Still, many law teachers seem satisfied to profess belief in the rule of law as a kind of vocational prerequisite. When I showed a draft of this Article to colleagues, some found my presentation of the problem disingenuous. Surely I *must* believe in the rule of law, one of them wrote, "figures in the law have no choice but to believe in a rule of law; it is the fundamental source of all predictability, and the law rests on predictability." For this man, the rule of law seems to be an axiom whose objective reality is relatively insignificant because assuming its existence allows for so many more interesting doctrinal inquiries, in the same way the Euclidean assumption that parallel lines cannot intersect opens up all the possibilities of triangulation. Questioning such axioms is generally viewed as tedious and sophomoric, a gambit by the uninitiated to be dismissed as quickly as possible in order to move on to more sophisticated issues.

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22. *Id.* at 819-20.

23. JEROME FRANK, *LAW AND THE MODERN MIND* 11-12, n.† (1930).



At a law school panel discussion I attended during the impeachment hearings, the faculty presenters opined that the President's alleged conduct did not constitute impeachable offenses, even if he had committed perjury and obstructed justice. A student raised her hand. "What about the rule of law?" she asked. "If the President can lie under oath and obstruct justice, what about everybody else?" "He can be indicted and convicted just like anybody else," shot back one of the panelists. Like ships that pass in the night.

The student's question, it seems to me, came from a substantive view of the rule of law, like that expressed by Representative Hyde. It focused on fairness and the inherent incongruity of the chief law enforcement officer breaking the law and retaining his office. Whether intentionally or obtusely, the professor parried, rather than answered, the question by responding with an instrumental view that went even further than Charles Ruff's avowed faith in the impeachment process. In this view, the fact that the President was not legally immune to prosecution at some later date was enough to satisfy the criterion of congruence between official action and the law.<sup>24</sup> But even from a highly instrumental perspective, it seems questionable whether that would really resolve the rule of law issue.

After all, impeachment is the process (legally) mandated by the Constitution to address the wrongdoing of government officials. At the very least, if the impeachment outcome was a totally foregone political conclusion, we would have to acknowledge that the rule of law had failed in that case—instrumentally as well as substantively. The student's question was about how to square the notion of the rule of law with a chief law enforcement officer who breaks the law. There we were, sitting around a university talking every day about the legal system as if it might produce better results than what we would get if government officials did whatever they wanted. She was asking how we could keep doing that if we were willing to write off the prescribed constitutional sanction for official misconduct as having nothing to say about the President's lies in a legal proceeding. That may not be a very sophisticated rule of law question, but it is a profound one. Not that I have an answer.

I imagine the student turning to me. "Do you believe in the rule of law?" she asks. I imagine that I open my mouth and start to talk, but no sound comes out. My mouth opens and closes, fishlike, and I

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24. Though just about everyone agreed that Clinton could be prosecuted after leaving office, it is not clear whether a sitting President is subject to indictment. Moreover, as Judge Richard Posner has pointed out, it may well be that a President has the power to issue himself a prospective pardon, rendering him *de facto* immune to criminal punishment, if not to conviction. POSNER, *AN AFFAIR OF STATE* *supra* note 11, at 105-08.

move my hands in a pantomime of conviction as the look of curiosity on the student's face turns to aversion. Silently, desperately, I repeat the question over and over to myself, looking for a way in, a hook for my fish mouth to grab at. The first thing that attracts me is the verb.

## II. BELIEF MEANS DOUBT

If worse comes to worst, a doubter, even though by talking he were to bring down all possible misfortune upon the world, is much to be preferred to these miserable sweet-tooths who taste a little of everything, and who would heal doubt without being acquainted with it, and who are therefore usually the proximate cause of it when doubt breaks out wildly, and with ungovernable rage.

Soren Kierkegaard<sup>25</sup>

My imaginary interlocutor and the antagonists in the impeachment case are not the only ones who have put the rule of law question in terms of belief. Commentators across the political spectrum speak of "belief in" the rule of law. Conservative Supreme Court Justice Anthony Kennedy exhorted the American Bar Association: "If the rule of law is to be preserved, we must restore and revive our belief in its most simple, fundamental, principles."<sup>26</sup> Liberal legal philosopher Jeremy Waldron contends, "[t]hose who believe in the rule of law need not believe that society and community are primarily legal structures."<sup>27</sup> And in her critical article, Robin West explains, "I will refer to the belief in law's necessary morality and autonomy from politics as a belief in the 'Rule of Law,' or a commitment to 'Rule-of-Law virtues.'"<sup>28</sup>

In some instances, of course, belief is simply used as a synonym for knowledge, another way of expressing a proposition of fact about some aspect of the world.<sup>29</sup> It can also signal a purely normative statement, meaning that one thinks something would be a good idea, such as when someone says he believes in tax breaks for corporations, peace on earth, or early toilet training.<sup>30</sup> Often, though, "belief" carries

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25. SOREN KIERKEGAARD, *FEAR AND TREMBLING* 120 (Walter Lowrie trans., 1969).

26. Anthony M. Kennedy, *Law and Belief*, 34 TRIAL, July 1998, at 22, 23.

27. Jeremy Waldron, *The Rule of Law in Contemporary Liberal Theory*, 2 RATIO JURIS. 79, 90 (1989).

28. West, *supra* note 20, at 818.

29. "Logic, then, is about beliefs and about when they are consistent with each other." WILFRED HODGES, LOGIC 17 (1981).

30. But note that such statements generally imply the existence, or at least the possibility, of the policies they advocate.

another meaning, especially when we speak of believing *in* something. That phrase suggests that something more is at stake than a cool propositional position, something about the way the believer believes.

My friend Lucy's daughter, then seven years old, came home from school one day and asked her mother whether she believed in Jesus. Not wanting to squelch a newly awakened interest in spirituality but trying to avoid endorsing Christian orthodoxy, Lucy said that she believed that a person named Jesus had once lived and done some extraordinary things, but did not believe that he was the son of God. "Yes, yes," said the frustrated first-grader, "but do you believe *in* him?" As seven-year-olds apparently understand, belief in this sense implies a kind of commitment. This sort of belief is a matter of faith and generally entails a stronger connection between the believer and the object of belief than is present in ordinary statements about what one knows or thinks.

Notice, though, that if belief can imply this stronger tie between the believer and what she believes, it may also suggest a more tenuous connection. If I say that something is true and you say, "Are you sure?" I might acknowledge doubt by responding, "Well, I believe so."<sup>31</sup>

Paradoxically, in matters of faith, both of these senses of belief seem to be present at the same time. The pull between doubt and certainty at the center of belief awakens anxiety and a sense of drama. Discussing her novel *Tar Baby*, Toni Morrison explains that the book's opening sentence,

"He believed he was safe," is the second version of itself. The first, "He thought he was safe," was discarded because "thought" did not contain the doubt I wanted to plant in the reader's mind about whether or not he really was—safe. . . . to use "thought" seemed to undercut the faith of the character and the distrust I wanted to suggest to the reader. . . . He believed; was convinced. And although the word suggests his conviction, it does not reassure the reader.<sup>32</sup>

Thinking about the rule of law in terms of one's belief in it invokes the duality that Morrison consciously employed to heighten the tension of her story. The move from thought to belief conjures up both faith and doubt.

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31. Cf. Wittgenstein's suggestion, "Suppose it were forbidden to say 'I know' and only allowed to say 'I believe I know'?" (Wie wenn es verboten wäre zu sagen 'Ich weiss' und erlaubt nur zu sagen 'Ich glaube zu wissen?') LUDWIG WITTGENSTEIN, *ON CERTAINTY* § 366 at 47 (G.E.M. Anscombe & G.H. von Wright eds., 1972).

32. Toni Morrison, *Unspeakable Things Unspoken: The Afro-American Presence in American Literature*, MICH. Q. REV., Winter 1989, at 29-30.

Where there is belief, there is doubt or incomprehension—at least from the perspective of anyone other than the believer, and presumably for a believer disposed to reflect on his own beliefs. This kind of belief can never be justified—nor can doubt be removed—by rational argument, for, as Søren Kierkegaard observes, “faith begins precisely there where thinking leaves off.”<sup>33</sup> Nor can faith, at least in Kierkegaard’s implacable terms, be anchored to universal moral values. As an act of faith, Abraham’s murder of Isaac would not have been justified by any greater good. That sort of ethical justification belongs not to faith but to tragic heroism, such as when Agamemnon sacrificed Iphigenia to free the Greek ships for war on Troy.<sup>34</sup> Faith has none of the comfort of moral justification available to heroes. Because heroic acts appeal to universal principles, they are comprehensible to others. But acts of faith are private, unjustified, and untranslatable.

Sometimes, those who speak in terms of faith in the rule of law suggest that to act on that belief is heroic. Those appeals ring false because real belief is its own justification and is thus necessarily unjustifiable in external terms. As Kierkegaard says, “Humanly speaking,” the person who acts on faith “is crazy and cannot make himself intelligible to anyone.”<sup>35</sup> In his plea to law teachers to keep faith with the rule of law, Dean Carrington first used the language of belief: “The law . . . is a mere hope that people who apply the lash of power will seek to obey the law’s command. Let us not be modest: it is an act of considerable courage to maintain belief in such a hope.”<sup>36</sup> Ultimately, though, he fell back on the idea of professional service as a greater good to justify the faith he espoused and transform it into a moral duty for all law professors:

[W]e love law not because reason requires it, but because our commitment to our discipline serves the needs of the public to whom, and for whom, we are responsible.<sup>37</sup>

The reference to an external standard—professional duty—seems meant to quell the doubt that would necessarily come with a true call

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33. KIERKEGAARD, *supra* note 25, at 64. See also Wittgenstein, *supra* note 31, § 550, at 72, stating “If someone believes something, we needn’t always be able to answer the question ‘why he believes it;’ but if he knows something then the question ‘how does he know?’ Must be capable of being answered.” (Wenn Einer etwas glaubt, so muss man nicht immer die Frage beantworten können, ‘warum er es glaubt;’ weiss er aber etwas, so muss die Frage ‘Wie weiss er es’ beantwortet werden können.”)

34. KIERKEGAARD, *supra* note 25, at 67-71.

35. *Id.* at 86.

36. Carrington, *supra* note 6, at 226.

37. *Id.* at 228.

to act on faith. The implication is that by eschewing “nihilistic” criticism and teaching rule of law doctrine, law professors will produce more righteous and confident professionals who will, in turn, serve the public as legal practitioners. But the value of that service depends on the same belief in the rule of law that it supposedly justifies. We come circling back to unfounded faith.

In the Clinton impeachment trial, Congressman Hyde blended the language of faith with the rhetoric of public sacrifice:

The families of executed dissidents know that this is about the rule of law, the great alternative to the lethal abuse of power by the state.

Those yearning for freedom know this is about the rule of law . . . . If they know this, can we not know it?

If across the river in Arlington Cemetery, there are American heroes who died in defense of the rule of law, can we give less than the full measure of our devotion to that great cause?<sup>38</sup>

In fact, both sides in the impeachment trial managed to invoke America’s war dead. Opening for the defense, the President’s counsel, Charles Ruff, first declared that he was at a loss to respond to Representative Hyde’s evocation of two centuries of patriot martyrs, then moved seamlessly into recalling his own father’s landing on Omaha Beach. Even in their shared hyperbolic exploitation of military heroism, however, Hyde and Ruff managed to stick to their respective substantive and procedural views of the rule of law. Whereas Hyde exhorted a vote for impeachment, Ruff declined to argue that only the specific legal outcome he was seeking would serve the same goals as the sacrifices of wars past. Instead, he staked out a procedural high ground: “as long as each of us—manager, president’s counsel, senator—does his or her constitutional duty, those who fought for their country will be proud.”<sup>39</sup>

Proselytizing belief in the rule of law, Carrington, Hyde, and Ruff all edge up to the precipice of faith, then pull back. Though they speak in terms of acting on faith, they smuggle in moral justifications for their demands: public service, democracy and freedom, honoring the dead. But they do not really offer any moral reasons for the actions they advocate. There is no reason to think the rule of law, or acts based on it, would serve any of the values held out as justifications

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38. *Impeachment Trial of President Clinton*, *supra* note 3, at 1193 (statement of Rep. Hyde).

39. *Impeachment Trial of President Clinton*, *supra* note 3, at 1224 (statement of Charles F.C. Ruff, Counsel to President Clinton).

for it—unless of course, you believe in the rule of law. Nor does the invocation of moral values in any way explain how a rule of law might overcome the existing social obstacles that prevent the full realization of the values espoused.

### III. FREE AGENCY AND STRUCTURAL DETERMINISM

The rallying cry of the faithful to judicial independence was that independence from other men is the best guarantor of total and scrupulous servitude to the law.

Robert Cover<sup>40</sup>

The question of belief in the rule of law is, in a sense, a variation of a larger question that these days haunts nearly every inquiry into the social world and every argument for social change. In some ways, *the* question at the turn of the millennium is the extent to which our understanding of the world and our actions in it are determined by structural forces outside our individual control—and even outside our consciousness—and to what extent we make independent choices. In practice, any concept of a rule of law must entail a rather complicated, perhaps conflicting, combination of institutional determination and individual agency.

The central rule of law notion is that law as an institution is capable of determining answers to legal questions that are somehow different from the decisions individual legal actors would come to if left to their own devices. At the same time, the rule of law ultimately depends on the willingness and capacity of independent legal actors who interpret and apply law to resist the pressures and constraints of other social institutions. In this sense, then, the rule of law is the rule of man; it is the rule—or the dream—of the individual somehow temporarily released from other institutionalized habits of mind that would typically direct his judgment, free to submit, free to follow the law—while ignoring all other social rules. It seems the most rigorous rule of law requires the most unruly social actors.

When I mentioned this paradoxical situation to a lawyer friend, he was nonplused. "Well, it's because of rationality, isn't it," he suggested gently, looking at me as though he wondered how I had managed to pass a single course in law school. Of course he is right as far as it goes.

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40. ROBERT M. COVER, JUSTICE ACCUSED: ANTI-SLAVERY AND THE JUDICIAL PROCESS 146 (1975).

As Pierre Schlag puts it, in the traditional view, "[i]t is the possibility of a publicly accessible and recognizable reason that enables legal actors to claim that power, interest, prejudice, and personal proclivities are constrained and controlled by an overarching frame known as the rule of law."<sup>41</sup> The rule of law is supposed to be rational, and rationality is about principled choice. So, if the law is rational, then you have a whole legal system of independent individuals who can and will reason out what the correct legal result is and follow it. But there are some problems with this formula.

For one thing, as Schlag points out, the invocation of reason reiterates rather than answers the question of whether, and why, one believes in a rule of law. Critics and philosophers inside and outside the field of law have long questioned the possibility of the objective reason to which law aspires. The critique of rationality is certainly the most devastating line of attack on the whole rule of law ethos—especially in the form of skepticism about whether there is any such thing as a rule that is logically prior to social practices. But this is an issue that I will basically ignore for the rest of this Article. I think there is another question that needs answering before we reach the lofty realm of the possibility of some kind of objective or public reason.

Assuming for a moment that there was such a thing as "publicly accessible and recognizable reason"<sup>42</sup> expressed, however imperfectly, in the form of legal rules, it is not at all clear how such a store of reason would constrain irrational prejudice, an aspect of human behavior not generally known for its susceptibility to logic. To allow for the possibility of a rule of law, then, do we not first need a theory of how legal practice might at least help practitioners constrain the "interest, prejudice, and personal proclivities"<sup>43</sup> that would otherwise prevent legal decisionmakers from applying reason's dictates?

To me, the traditional rule of law formulation—logical rules constrain human decisions—is cart before horse. It seems clear that, behaviorally, anyway, constraint makes reason possible, rather than vice versa.<sup>44</sup> If that is so, belief in the rule of law—in any sense other

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41. PIERRE SCHLAG, *THE ENCHANTMENT OF REASON* 20 (1998).

42. *Id.*

43. *Id.*

44. Margaret Radin acknowledges this problem early on in her article on rule of law, saying that "[i]mplicit in the understanding of law as rules, and of the Rule of Law as a guide to the efficacy of those rules," is the problem of "the individual as rule-follower." Radin, *supra* note 5, at 787. Thus, implicit in rule of law ideals is the notion that the people to whom the rules are addressed must be responsive to them. She seems to be speaking primarily of the question of law abidingness in general, but legal decisionmakers must also follow rules. Radin acknowledges that "problems of choice and motivation" are therefore inherent in a concept of rule of law, but she chooses instead to focus on the other major philosophical problem—the rationality critique—

than as a good but utterly unachievable idea—requires some notion of how legal practice disposes legal decisionmakers to separate themselves from other institutional and personal pressures and thus makes it possible for them to follow the guidance of legal reasoning, assuming there is such a thing.

In other words, as I see it, there are really two parts to the rule of law idea: (1) restraint of ordinary individual decisionmaking, and (2) direction toward an at least partially determined result. The usual understanding of the rule of law is that the second part takes care of the first; that somehow the rules themselves create the constraints. In the traditional rule of law formulation, constraint is not seen as a separate attribute, but rather as the product of the reasoning process that guides the substantive legal result. But why should that be so? I'm suggesting that, behaviorally, constraint has to come first to enable legal decisionmakers to follow reason's directions, to the extent rationality is possible. Is there any feature of the legal system that seems a likely facilitator of such constraint?

Perhaps oddly, my pre-law-school experience as an actress and performance artist suggests a possibility. It seems to me that the structured public performance of trial and appellate practice and the communal reasoning "out loud" prescribed for juries and, to a lesser extent, for appellate panels may function to move legal actors out of their characteristic ways of thinking. In other settings, notably theatrical ones, people adopt formally structured processes that, by changing and limiting their ordinary ways of looking, speaking, and acting, lead them to feel and think in uncharacteristic ways.

In the theater, enforcing certain limitations on speech and action is a common strategy for opening a performer's mind and broadening his range of habitual behavior. Performers know that by adopting rigid patterns of speech and action they can temporarily disrupt their own habitual ways of thinking and behaving. Thus, actors might choose, for example, to play a scene using only a few set phrases and/or a limited series of prescribed movements. For that matter, a play script is a complex example of such a set of limitations. One goal of such imposed external constraints on behavior is to ultimately release internal, often unconscious, mental and behavioral inhibitions and patterns that would otherwise prevent performers from fully realizing different characters. Performing in groups and in public tends to increase the effect of such exercises, probably because one's fellow performers and the audience respond to one's uncharacteristic presen-



tation of self in ways that reflect the behavioral changes, reinforcing their authenticity.

It may be that the enacted commitment to perform the dry public rituals of the legal system has a similar capacity to interrupt the habitual thought patterns of legal actors. Rather than a conscious individual obedience to substantive legal rules, then, it may be their effort to put themselves to the public and communal forms of legal process that can ground our expectation that legal actors will transcend their usual subjective biases.

It seems important that much adjudicative action is not undertaken alone, but rather is performed in groups and often in public settings. The quintessential example is the public trial. Unlike scientists, trial judges only rarely reason alone in their rooms. Legal cases begin in public with the filing of public documents, and may proceed to the performance of advocacy before a public audience. Trial judges make many of their most important decisions in public court, often on the spot and in full view of parties and spectators, and through public dialogue with the parties' legal representatives. In particular, nearly all of the evidentiary decisions that get such great deference on appeal are made in the midst of the trial process. When solitary study and reasoning are a significant part of a legal decision, it eventually leads back to a public explication of that reasoning process.

Appellate judges do at least some of their reasoning and decision-making in groups. Panels of three or four are typical of intermediate appellate courts, and courts of final decision such as the United States Supreme Court have even more members. The Supreme Court does not decide cases through the reasoning process of a single herculean judge attempting to follow the rules, but through a communal public process that includes formal argument and conferencing with all nine justices.<sup>45</sup> Though a single judge is usually assigned to write an appellate opinion, traditionally, at least, this takes place after a conference is held in which the panel determines the majority's view of the correct outcome. Again, traditionally, all appellate decisions are published, along with explanatory reasoning, though this practice is changing.

Trial fact finding is done by juries of six to twelve. Their deliberative process is private in the sense that it is protected from the view of the general public. But, if it is not a public performance, it is certainly a collective ritual. Typical jury instructions warn jurors not to

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45. Thus, Ronald Dworkin's imaginary judge, Hercules, who has "superhuman intellectual power and patience" is distinguished from real legal decisionmakers not only by his extraordinary individual capacities but also by his solitude. RONALD DWORKIN, *LAW'S EMPIRE* 239 (1986).

draw solitary conclusions about the case, not to talk with anyone outside the jury, and not to talk with other jurors until the case has been presented to them for the start of formal deliberations. These instructions conflict with the usual tendency of people engaged in a common project to speculate about the possible conclusions on their own and to discuss them informally with family and friends and most of all with the other people who are making the decision with them. Against what seem to be both normal and rational ways of coming to a decision, the court's instructions impose a limiting communal form on the jury's reasoning process.

It is not at all clear how such formal communal practices advance the rationality of legal decisions. In fact, it seems rather certain that they do not do so directly. Perhaps, then, the performative forms of adjudication are nothing but irrational formalism, "survivals" of a less scientific age of jurisprudence that hang on through sheer inertia and the legal system's conservative tendencies. But procedural formalism may also have salutary potential. The enactment of restrictive trial procedures may provide a behavioral constraint that—perhaps partly through simple distraction—helps deprive legal decisionmakers of their habitual ways of perceiving the world, leaving them open to a different kind of reasoning process. To see things from a distinctively "legal" point of view, decisionmakers first have to give up their usual perspectives. The adoption of restrictive procedures for a trial's truth finding function may facilitate that first step toward a uniquely legal resolution of the issues being adjudicated, a result that begins by further constricting the ordinary subjective approach of the individuals who serve as legal decisionmakers in the case.

#### IV. TRANSCENDENT DISABILITY

She is blindfolded, for nothing but pure reason, not the often misleading evidence of the senses, should be used in making judgments.

Cesare Ripa<sup>46</sup>

Law is the projection of an imagined future upon reality.

Robert Cover<sup>47</sup>

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46. BAROQUE AND ROCOCO PICTORIAL IMAGERY 120 (a sixteenth century encyclopedia of iconography) (E. Maser ed., 1971) *quoted in* Dennis E. Curtis & Judith Resnik, *Images of Justice*, 96 YALE L.J. 1727, 1748 (1987).

47. Robert M. Cover, *Violence and the Word*, 95 YALE L.J. 1601, 1604 (1986).

The familiar image of blind Justice may provide a clue to the primacy of constraint in our legal system. Justice's blindfold is generally interpreted as symbolizing the notion that the law's application of objective reason produces results untainted by subjective sympathies, fears, likes, and dislikes. What strikes me, though, about the blindfolded figure is its suggestion that the ideal of objective rationality can only be achieved through a loss—through a limit that incapacitates as it empowers. Rather than a celebration of the power of human reason to overcome the limitations of individual perception and understanding, the image presented is of justice achieved by disabling the untrustworthy human agent. A blindfolded Justice seems to undermine the concept that independent reason itself can generate rule of law constraints, that a legal decisionmaker freely chooses to follow the law instead of some other path.

In the first place, the blindfold calls attention to the real problem of constraint in any legal system. Real judges (and juries) are not blindfolded, but depend very much on their perception to determine the facts upon which "blind" Justice will operate.<sup>48</sup> Even if, in theory, the law is insensible to individual differences, in practice, the rule of law depends on the administration of sighted, sensing individuals vulnerable to prejudice and error. Even taken on traditional terms, then, the blindfolded figure stirs an uncomfortable doubt about the possibility of achieving the depicted goal. The contrast between the iconographic ideal and real human practice could not be more stark.<sup>49</sup>

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48. One commentator notes that "[h]istorically, sight was viewed as critical to the jury function of evaluating evidence and credibility." Nancy Lawler Dickhute, *Jury Duty for the Blind in the Time of Reasonable Accommodation: The ADA's Interface with a Litigant's Right to a Fair Trial*, 32 CREIGHTON L. REV. 849, 866 (1999). Under the ADA, blind persons should probably not be routinely dismissed from jury duty, but challenges for cause and peremptory strikes are possible. There are several sitting blind judges, including David S. Tatel on the U.S. Court of Appeals for the District of Columbia and Richard Casey on the Southern District of New York. When Judge Casey was nominated to the trial bench, he faced serious questions about his ability to do the job.

49. It also has to be said that a more literal interpretation of the image is far more nihilistic. Why is that woman going around blindfolded with a sword in her hand? She'll put somebody's eye out with that thing! And why a woman, after all? I suppose the conventional wisdom is that because at the time the symbol was chosen women rarely occupied public positions of power, the use of the female form conveyed an image of ideal justice, a spirit or idea, rather than any actual person or role in the legal system. But, taking the image at face value, you would be tempted to see the selection of a woman as an indication of the irrationality of the legal system. After all, women's absence from public life was attributed to their lack of reason. Curtis and Resnik, *supra* note 46, at 1756, point out that blindfolds do not always signify the objective distance of the wearer; in fact, numerous medieval and renaissance images employ blindfolds to symbolize foolishness, confusion, and inadequacy. In this light, what could be more dangerously misguided than a blindfolded woman with a sword?

It is not just at the practical level that the familiar blindfolded figure of Justice challenges the rule of law. The image suggests that even in ideal form, justice is not a matter of a free agent choosing consciously between alternatives to find the just result. The restriction imposed does not appear to allow an informed selection limited through reason. If that were the message, we might see Justice with her eyes open and her hands tied or perhaps controlled, like a puppet, by some other clearly omniscient figure.<sup>50</sup> On the contrary, the standard image of Justice portrays her as unable to discern any choices at all. If Justice required a sharper view of reality, she might wear glasses. Instead, it looks like what Lon Fuller calls "the enterprise of subjecting human conduct to the governance of rules"<sup>51</sup> depends on relinquishing one's ordinary view of the conduct being judged. Far from a rational comparison of conduct with rules, the act of applying the rules seems to entail losing sight of the conduct. A blindfolded Justice hardly celebrates the power of legal reasoning to sharpen one's independent view of the world. Instead, it suggests a need to give up that view altogether.

Iconographically, then, justice does not leave one's view of reality intact; it changes, limits, even obliterates the way we would otherwise view the world we judge. This is what anthropologist Mary Douglas calls "institutional thinking" at its strongest.<sup>52</sup> Douglas argues that all social institutions develop in part by limiting the way people see reality. Institutional "practices establish selective principles that highlight some kinds of events and obscure others."<sup>53</sup> In the image of blindfolded Justice, the sacrifice of ordinary, individual vision appears. Doing justice is apparently disorienting, requiring a loss of one's usual means of finding one's way in the world and acceptance of severe

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50. In fact, the last image does exist in a famous medieval depiction of Justice. Ambrogio Lorenzetti's fresco in the Palazzo Pubblico in Siena, known as the Allegory of Good Government, features an open-eyed image of Justice, who, instead of holding scales, appears to be connected through the top of her head to the center point of a giant balance held above her by the figure of wisdom. The huge scales hang down on either side of Justice, and she holds a thumb on each of the pans in which an angel sits. The angel to her right is cutting off one man's head and bestowing a crown on another. In the left balance pan, the angel is offering a strongbox, spear and staff to two gentlemen. Though Justice's eyes are open and unobstructed, they are turned upward toward the controlling figure of Wisdom, who appears to be ultimately in charge of the actions of the angels in the balance and the cord that emanates from the scales and is passed by another allegorical figure, Concord, into the hands of a group of citizens. As one commentator remarks, in this picture, Justice truly appears as "an emanation of divine wisdom." CHIARA FRUGONI, PIETRO AND AMBROGIO LORENZETTI 70 (Lisa Pelletti trans., 1988). But this is not the image of Justice that has become our modern icon.

51. FULLER, *supra* note 16, at 96 (1977).

52. MARY DOUGLAS, HOW INSTITUTIONS THINK 124 (1986).

53. *Id.* at 70.

limits on ordinary perception. This may be, as Douglas argues, a common feature of all social institutions, but it seems rare, if not unique, for an institution to flaunt that aspect of its function in a personification that lacks a crucial perceptual faculty.

Still, there is a way to see this impaired figure as somehow enhanced by her limitations and ultimately transcendent. The character driven to overcome ordinary human limits through the imposition of an extraordinary handicap is a familiar cultural hero. Repeatedly we hear of people who suffer some kind of incapacitating physical injury or emotional blow that somehow forces them to go beyond what would otherwise have been possible. In classical mythology, blindness is associated with another extraordinary form of sight—second sight—the ability to foresee, and, like Tiresias and Cassandra, to foretell the future.

Blind seers have lost a central human attribute but gained a superhuman power: they are transcendent truth-tellers.<sup>54</sup> The idea may be that by taking away the natural human ability you also take away the human limit. The blind figure of Justice identifies law with these other mythological figures for whom the loss of ordinary sight leads to extraordinary powers of vision and prophecy, “the projection of an imagined future upon reality.”<sup>55</sup>

I find the notion of power acquired through disability deeply attractive. I am fascinated by the image of Justice putting on her blindfold in a bid for transcendence, disabling herself in one way in order to gain another sort of power, a power that exceeds ordinary human limits—extraordinary capacity achieved through deliberate limitation. Or was it deliberate?

The figure of blind Justice makes me think of another situation in which disabilities are transformed into extraordinary powers. The anthropologist Victor Turner writes about the “rituals of affliction” among the African Ndembu.<sup>56</sup> These ceremonies aim at freeing sufferers of various forms of misfortune—for instance bad luck in hunting or reproductive problems—from the spirits causing their disorders.<sup>57</sup> In the Ndembu system, the person cured of her handicap becomes exceptionally gifted in the previously afflicted area. Moreover, according to Turner, when an afflicted person has undergone a successful ritual cure, she is entitled to become a minor ritual healer

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54. Tiresias appears, for example, in Aeschylus' *Oedipus at Colonus*, where he informs Oedipus that Oedipus himself is the killer he is seeking. Cassandra foresaw the sack of Troy.

55. Cover, *supra* note 47, at 1604.

56. VICTOR WITTER TURNER, *THE FOREST OF SYMBOLS: ASPECTS OF NDEMBU RITUAL* 9 (1967).

57. *Id.* at 9-12.

herself, and may even progress to taking on the role of a principal healer.<sup>58</sup> Thus, the way toward acquiring the power to heal affliction begins by being afflicted.

In the iconography of justice, the blindfold may be at once a symbol of the problem to be solved—justice hampered by prejudice, by partiality, by received wisdom—and a symbol of the power to cure that very defect. Is it too farfetched to see contemporary trials on some level as rituals of affliction—ceremonies performed to cure the handicap of subjectivity? From this perspective, in law as in the Ndembu tradition, both the cure and the power to cure begin with an amplification of the problem. Extraordinary success at hunting begins with exceptionally bad luck in the field. In law, the transcendence of an individual's subjective point of view begins by narrowing the available perspectives through the formalities of rigid legal procedures.

Of course, the idea of breaking through existing limits by imposing additional ones is not confined to classical mythology, law, and tribal religion. I have already said that performers sometimes use self-limiting techniques to go beyond habitual behavioral patterns and expand their artistic range. Related concepts are certainly present in Western visual art. Some abstract painting, for instance, relies on a kind of deliberately assumed disability. The painter says, "Since my ability to represent reality betrays me, let me give it up. Instead of trying to paint the world, I will paint paintings. Instead of trying to overcome the limits of the human ability to translate nature into paint, I will restrict myself to two-dimensional forms or gestures with paint and see what results."

The Cubists foreswore their painterly power to create a unity of aspect through naturalistic perspective. This was a sacrifice of a technique previously thought to be the greatest achievement of Western art. Instead of trying to advance that achievement, the Cubists gave it up and set themselves to reproducing the fractured, partial aspects of three-dimensional objects translated to a single flat surface. It is at least arguable that the limitations of the Cubist process freed Picasso to produce the greatest paintings of his career.<sup>59</sup>

I am thinking also of Jackson Pollock, whose famous poured and dripped paintings may appear anarchic but were actually produced

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58. *Id.* at 10.

59. The art critic John Berger points out that Picasso's *Les Femmes d'Alger*, generally considered to be the first Cubist painting, "unlike any previous painting by Picasso, offers no evidence of skill." JOHN BERGER, *THE SUCCESS AND FAILURE OF PICASSO* 73 (1989). Yet, somehow, the loss of his previous painterly power led to a new freedom: "It is as though with the disappearance of his prodigious skill Picasso was no longer isolated, no longer bound to his past, but open to the free interchange of ideas." *Id.* at 74.

through rigorous self-limitation. Confining himself to throwing, dripping, and spattering paint, Pollock consciously abandoned the skills he had developed in decades of work. Limiting the exercise of his expressive powers led him to break through the previous limits of painterly expression. He produced some of the most important art works of the twentieth century. Notwithstanding their rebellious image, Pollock and the "process artists" who followed his example are perhaps the most rigorous rule followers, the most legalistic of innovators for whom formal procedure is the key to pushing past the limits of individual creative efforts.

Just as performers and abstract painters engage in limiting practices to expand their creative range and develop characters and visual effects they would otherwise find unimaginable, it may be that the adoption of restrictive, highly-structured public modes of argument and decisionmaking intervenes in legal actors' normal perceptual and intellectual habits. Like artists, legal decision-makers employ self-limitation to achieve unexpected and unpredictable results, i.e., results that are not entirely dictated by their ordinary individual outlooks.<sup>60</sup>

The blindfolded figure of Justice stirs a nagging doubt about the very transcendence it seems to embody: perhaps a handicap that enables one to exceed ordinary limits is still a handicap. A remarkable early image of Justice acquiring her blindfold makes explicit this unavoidable dark side of the image. Apparently, Justice was not always blindfolded.<sup>61</sup> A few modern incarnations of a sighted Justice remain, and up until the late fifteenth century, she seems to have gazed clear-eyed onto the world she judged. A 1494 woodcut by Sebastian Brant depicts the transformation. In it, Justice is seated, her scales drooping toward the floor, while a fool in a horned cap binds her eyes from behind.<sup>62</sup> One commentator suggests that this image, which was reproduced throughout Europe, may have been the source of the eventually ubiquitous figure of blindfolded Justice.<sup>63</sup> That seems difficult

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60. I am not the first to see Justice's blindfold as a metaphor of the procedural constraint necessary for, and imposed by, our legal system. For Robert Cover, "Procedure is the blindfold of Justice." Curtis & Resnik, *supra* note 46, at 1728. Instead of the formality of procedure, Cover saw in the blindfold the "indirectness" inherent in a procedural system of justice, the "purposeful interposition of a makeshift screen between reality and decision, an interposition which obstructs direct knowledge." *Id.* Cover also noticed that the blindfolded figure of Justice preserves a sense of loss. He suggested that legal decisionmakers "of quality" would feel the urge to peek out from under the blindfold, not in order to cheat, but to satisfy the worthy desire to "overcome the elusiveness of indirection." *Id.*

61. MARTIN JAY, *Must Justice Be Blind?*, in LAW AND THE IMAGE 19 (Costas Douzinas & Lynda Nead eds., 1999).

62. *Id.* at 19 and Fig. 1.3.

63. *Id.* at 19-20. Other possible explanations for the development of the blindfolded icon include the Renaissance recovery of the writings of Plutarch, which recorded a depiction of the

to prove, and I am skeptical of attributing so widespread a change to a single image. The more important point for me is that the image reveals the defective aspect of a blindfolded Justice. It is difficult to see a fool covering Justice's eyes as an unqualified improvement of normal sensibilities. Justice in this picture has a real problem; she is being tricked or deceived or is acquiescing to a foolish way of going about things. Here, the transcendent figure whose handicap is the symbol or source of her greatest strength appears a misguided dupe who has lost or given up the perceptual faculty necessary for independent, willful judgment. This Justice will have to be led and may be led by a fool. A handicap that leads to some kind of transcendence begins as a real handicap and remains one, at least for certain purposes.

Whatever new perspectives the performed formalities of legal procedure may enable will come at the cost of the perceptual capacities we usually rely on for moral and practical judgments. All the talk during the impeachment trial about faith in the rule of law missed this point.

It might be "morally permissible," as Representative Hyde suggested, "when, with the gravest matters of national interest at stake, a President could shade the truth in order to serve the common good."<sup>64</sup> But it certainly would be no less a violation of the rule of law than perjury to cover up an extramarital affair. Moreover, it is easy to say someone should be punished for breaking the rules when following them would have made things hard for him, as in Clinton's case. The hard rule of law question is whether we are prepared to support someone following the rules when they seem—to those of us who are not blindfolded—to lead to a moral horror show. Back when we had slavery in this country, avowed rule of law believers enforced it, and it was not a change in law that eventually ended the 'peculiar institu-

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blind chief judge of Thebes, or a developing rationalist distrust of images and the faculty through which images are perceived. Curtis & Resnick, *supra* note 46, at 1756; Jay, *supra* note 61, at 20-21. Then again, the sightless icon may serve to distinguish justice from rationalist modes of thought. Michel Foucault has argued that at the turn of the sixteenth century, a general shift occurred from a model of knowledge that stressed logical deduction from first principles and textual interpretation to an outward-turning process of observation and discovery. "[T]here appeared a will to know which, anticipating its actual contents, sketched out schemas of possible, observable, measurable, classifiable objects: a will to know which imposed on the knowing subject, and in some sense prior to all experience, a certain position, a certain gaze and a certain function (to see rather than to read, to verify rather than to make commentaries on)." MICHEL FOUCAULT, *The Order of Discourse*, in *THE RHETORICAL TRADITION* 112 (P. Bizzell & B. Herzberg eds., 1990). Without a doubt, seeing is the privileged sense of modern science. It is curious, then, that at the "dawn" of the age of scientific "enlightenment," Justice's eyes were bound.

64. *Impeachment Trial of President Clinton*, *supra* note 3, at 1191 (statement of Rep. Hyde).



tion.' For that we had to have a war. On the other hand, this kind of problematic moral result makes the rule of law appear a more realistic possibility. Without that sort of trade-off, it looks too much like a fairy tale that is simply too good to be true.

## V. BELIEF AND PRACTICE

[T]o transform the leap of life into a walk, absolutely to express the sublime in the pedestrian—that only the knight of faith can do . . . .

Soren Kierkegaard<sup>65</sup>

The hardest rule of law question of all, it seems to me, is how real legal practice shapes and is shaped by various forms of power in our society. Here, both proselytizers and skeptics of the rule of law fail to provide useful answers.

The unquestioning believer's dichotomy is a social world that somehow always gets the law it needs, the nonbeliever's is a political power struggle masked by a legal system. Both ignore the complicated ethical, political, psychological, and analytical problems inherent in law as a social practice. If political power works through the law, how is that different than if it works through some other mechanism?

To say that one must choose between believing in a rule of law that is either completely independent of or indistinguishable from political power is to ignore the way law functions in relation to power and as a complicated form of power. It would be as if in order to understand language, I asked only whether you believed your thoughts existed before you put them into words and never bothered to ask how putting thoughts into words might both reflect and transform a speaker's thoughts and the reality in which the words are spoken. Both unquestioning believers' and critics' accounts of the rule of law generally conceive a relationship between society and law that looks like another version of Descartes' mind/body problem. Society and the law are radically separate, but somehow mysteriously joined.<sup>66</sup>

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65. KIERKEGAARD, *supra* note 25, at 52.

66. Another way to see the nonbeliever's side is as a mechanistic, monistic response to the dualism of believers. In response to Cartesian dualism, some say that there is no such thing as "mind" distinct from physical structures and processes—that all thought, and therefore all meaning, can be reduced to and explained in terms of firing neurons and interacting chemicals. However, even if that is the case, it hardly justifies a lack of interest in the structures of human thought. Thought, as a system, has remarkable effects on reality. Likewise, law as a system has a major impact on society. Maybe the ultimate cause of those mental and legal effects is chemistry or power, but that does not make the effects uninteresting or insignificant.

Implicitly, society has priority. When society, or some part of it, needs something, the law comes up with it.

In the believers' version of this dichotomy, the social demand the law fills is universal, something like "the growth of complex economic structures required the development of a flexible law of contract." For nonbelievers, the rule of law serves the needs of dominant classes or interest groups in the society, reinforcing existing or emerging power structures and legitimizing those structures as natural, reasonable, and just. Both believers and skeptics see the law as a tool: the prior social world, or some part of it, generates needs or demands, and the law responds or with justice or coercive control. The social mind calls and the legal body answers.

Robert Gordon has described this fundamental similarity between critical and mainstream views of law. Gordon astutely points out that this is the sort of functionalist approach that was abandoned long ago by sociologists.<sup>67</sup> Still, it persists in the legal literature. As Gordon and others have argued, the core distinction between law and society is virtually impossible to maintain.

What sort of 'basic' practices in our society can we find that are not partly constituted by law?<sup>68</sup> Our family relationships, status at work, connections to our homes, and the landscape all around us are all created, in part, by legal structures. Just as the nature of consciousness seems to have more to do with our existence as embodied creatures than Cartesian dualism would allow, our social 'needs' are created by law as well as filled by it. Even Descartes recognized there were problems with the one-way model: "I am not present in my body merely as a pilot is present in a ship," he conceded."<sup>69</sup>

I have suggested that formal legal procedures may limit the behavior of legal decisionmakers in ways that could be seen as an embodiment of the rule of law. That view takes rule of law constraints to be a kind of social practice that can be analyzed the same way we study other forms of individual and institutional behaviors and practices. The limitation of this approach is that while it offers a naturalistic, or behavioral, theory of rule of law constraints, it does not

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67. Robert W. Gordon, *Critical Legal Histories*, 36 STAN. L. REV. 57 (1984).

68. *Id.* at 103-04. See also E.P. THOMPSON, *WHIGS AND HUNTERS: THE ORIGIN OF THE BLACK ACT* 261 (1975): "How can we distinguish between the activity of farming or of quarrying and the rights to this strip of land or to that quarry? The farmer or forester in his daily occupation was moving within visible or invisible structures of law."

69. RENE DESCARTES, *Meditations on First Philosophy, Sixth Meditation*, in DESCARTES: PHILOSOPHICAL WRITINGS 117 (Elizabeth Anscombe & Peter Thomas Geach trans. & eds., 1971).

provide any support for the belief that those constraints necessarily produce predictable substantive results.

Critics of the rule of law ideal have argued convincingly that it is impossible to predict the outcomes of legal cases based on legal rules. First, it is often impossible to identify a single controlling rule. Typically, all sorts of rules and principles apply to any given case, many of which conflict. Even when there is a consensus on which rules control, once they are brought to bear on the particular facts, the necessary gap between general rules and principles and the particular situation at issue leaves plenty of room for subjective interpretation.

Perhaps, as I have proposed, the constraining value of legal rules comes partly from their enacted procedural ritual and does not depend on their uniform interpretation, but on a determined effort by practitioners to follow the rules as they understand them, thereby limiting their own speech and actions. This still leaves a gaping question, though, about what determines the substantive result of legal proceedings. If the critics are right about the level of indeterminacy in the application of legal rules and in language itself, then procedures that help decisionmakers transcend personal biases still will not result in any necessary commonality between one decision and the next. At best, the formal rituals may help legal decisionmakers withstand pressures that might otherwise prevent just decisions. The basis of the rule of law's ability to produce just or uniform results is left to be explained.

Still, incomplete as it is, the idea that the restrictions of formal public legal process may contribute to rule of law constraints could help us understand more about how some aspects of our legal system actually function to support or undermine a rule of law. For instance, the notion that legal ceremonies may help legal decisionmakers subvert their own subjective prejudices raises some practical questions about a current trend in judicial practice. An increasing number of federal appeals do not receive oral argument or formal published opinions.

More than half of all federal appeals are now decided on the basis of the papers filed alone, and three out of four decisions do not get full published opinions (up from forty-five percent in 1985).<sup>70</sup> Most of the concerns expressed about these developments have focused on the lack of full-fledged written opinions.<sup>71</sup> Some observers of—and participants in—the judicial system contend that carelessness creeps in when

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70. William Glaberson, *Caseload Forcing Two-Level System for U.S. Appeals*, N.Y. TIMES, Mar. 14, 1999, at A1.

71. *Id.*

decisions are issued without "all the pomp and circumstance," as Judge Patricia Wald calls it, required for publication in the Federal Reporter.<sup>72</sup> My intuition that the performed formalities of traditional judicial process may help produce a legal perspective that diverges from a judge's ordinary subjective point of view suggests that we ought also to be concerned about the loss of live appellate arguments.

Perhaps by skipping formal argument in open court, we are jet-tisoning a practice that helps judges to do justice, behaviorally as well as substantively. That does not mean that other concerns, such as rising case loads, would not still dictate a need to cut argument in some cases. But the behavioral aspect of formal public argument might be considered in deciding which cases are argued. Maybe suits that raise social issues about which we recognize there are many preconceptions, or suits that are filed by individuals often denigrated in society—prisoners, people on welfare—should be set down for argument time, rather than reserving argument primarily for cases that raise knotty technical legal problems.

Finally, it strikes me that the lack of the performed limitations of formal procedure was part of what ultimately kept the Clinton impeachment trial outside the rule of law realm. Of course, the impeachment was in one sense a highly formal affair, conducted with great ceremony. The crucial ingredient for the sort of behavioral constraint I am suggesting legal procedures may provide, however, is the adoption of formal limits in advance of the legal proceeding to be performed. Though atmospherically ceremonial, the impeachment process had fewer predetermined procedural limits than most court proceedings. Because it lacked formal rules regarding the order of proceeding, whether or not to hear live testimony, whether the adjudicating Senators should abstain from contact with the parties outside the trial, the Senate improvised.

It is certainly questionable whether procedural formality could have fostered objectivity in a case so fraught with political pressures. This was a polarized, partisan situation in which the decisionmakers were officially affiliated with the parties. Still, the confluence of the lack of preset formal directions and the obvious partisanship was striking. In the end, neither side saw their articulated version of the rule of law fulfilled. The prosecutors failed to achieve the conviction that they contended was necessary to restore the substantive rule of law.

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72. *Id.* at A26. "Most judges, myself included, are not nearly as careful in dealing with unpublished decisions," said Chief Judge Posner of the Seventh Circuit. *Id.* See also Thomas E. Baker, *The Ninth Circuit: To Split or Not to Split?* 45 *FEDERAL LAWYER* 30, 31 (1998).

The President's lawyers walked through a proceeding that almost no one thought embodied procedural rule of law virtues.

At least one critic of the impeachment trial expressed his distaste in part by likening it to a theatrical performance. Judge Richard Posner, for whom the Senate trial was "a parody of legal justice,"<sup>73</sup> begins his book on the impeachment with a list of "Dramatis Personae."<sup>74</sup> It is easy to see why theatrical metaphors spring to mind when a writer wants to emphasize the spectacular and illusionist nature of an event. But, for me, the impeachment trial lacked the attribute of theatrical practice most significant in the performance of legal proceedings: the existence of rigorous formal constraints. To that extent, it was a most antitheatrical judicial event.<sup>75</sup> So, as it turned out, the case that brought the rule of law ideal into the public spotlight demonstrated little of the commitment to formal process that may facilitate a legal system's ability to move decisionmakers out of their habitual political perspectives. Where the formal practices that could support it were absent, "belief in" the rule of law did not count for much.

## VI. UNREASONABLE BELIEF

My inquiring student's eyes must surely have glazed over long ago, and I still have not answered her question. Do I believe in the rule of law? It must be clear by now what attracts me about the concept: It is a shameless search for transcendence. Do I have doubts? You bet. I am enough of a skeptic to squirm at taking the dream on faith. So, I go hunting for some hint of rule of law constraints in real live legal practice. Perhaps as pure wish fulfillment, I find the promise of such constraints in the formal legal procedures that remind me of the self-limiting—and self-transcending—techniques performers and painters use.

But is that really why I believe? No. Like all believers, even skeptical ones, I suppose I believe because of what I would lose if I stopped believing. The notion that I cannot bring myself to give up is the possibility of doing something better with a rule of law than I could do without it. So, absurdly, indefensibly, self-aggrandizingly, I

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73. POSNER, *supra* note 11, at 1-2.

74. *Id.* at vii-viii. See also the title of a news story reporting on the distribution of the furniture and objects used in the trial that speaks of "Impeachment's Props." *Impeachment's Props Become Stuff of History*, N.Y. TIMES, August 26, 1999, at A14.

75. Milner Ball wrote an article about trials as theater that includes a short section in which he argues, on slightly different lines than I have here, that the theatrical nature of justice is to be embraced as encouraging impartiality. As Ball sees it, acting the part of unprejudiced decisionmakers helps judges and juries to rise to the level of the objective characters they portray. MILNER BALL, *THE PROMISE OF AMERICAN LAW* 59 (1981).

do believe in the rule of law. Certainly not because "reason requires it,"<sup>76</sup> and not because of any willingness to sacrifice my own interests to an ideal of public service or a universal moral order for which men fought and died. I believe in the rule of law because I cannot bear to give up on its dream of self-transcendence.

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76. Carrington, *supra* note 6, at 228.