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Jordi Ferrer Beltrán • José Juan Moreso
Diego M. Papayannis
Editors

Neutrality and Theory of Law

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position that Fuller looks like a paragon of interpretive charity by comparison.[34] For positivists, the fact that a norm is legally valid certainly creates a *prima facie* legal reason to decide in accordance with the legal norm, but one that is defeasible by other equitable considerations. And, conversely, Dworkin thinks his own theory of law as integrity both solves (or should we say, "dissolves") the Demarcation Problem *and* tells judges how to decide concrete cases.

The skeptical argument developed here is different. It suggests we abandon the Demarcation Problem in favor of arguing about *what ought to be done*, whether by judges confronted with novel cases, or citizens confronted with morally objectionable laws. This is the practical consideration that animates interest in the Demarcation Problem, but since human artifacts never admit of successful analysis in terms of their essential characteristics—the inductive lesson to be learned from twentieth-century philosophy, especially philosophy of science—why not address the practical considerations directly? The lesson, frankly, seems well-confirmed by the increasingly baroque attempts by legal positivists to solve the Demarcation Problem after the valiant and seminal efforts of Kelsen, Hart, and Raz. And it seems equally well-confirmed by the efforts of natural law theorists like John Finnis and Mark Murphy, who *really* want theorists to focus on *morally good* law or *practically reasonable* legal systems, but who insist on claiming that their transparent change of the subject is *really* an answer to the Demarcation Problem, *really* a case of saying what "non-defective" law is or what the "focal" cases of law are.[35] The professionalization of philosophy, including legal philosophy, guarantees, I fear, continued attention to the Demarcation Problem, since specialization always run the risk of generating both an audience and performers for ultimately pointless disputes. In the spirit of Marx's second Thesis on Feuerbach, let me suggest that a "dispute…that is isolated from practice is a purely *scholastic* question." I can see why Kelsen, Hart, and Raz might have thought that a solution to the Demarcation Problem was both possible and might be relevant to practice. I think we no longer have an excuse for believing this today.

[34] See my "The End of Empire: Dworkin and Jurisprudence in the 21st Century," *Rutgers Law Journal* 36 (2004), esp. pp. 175–177.

[35] See, e.g., the useful survey piece by Mark Murphy on "Natural Law Theory," in *The Blackwell Guide to Philosophy of Law and Legal Theory*, ed., M. Golding & W. Edmundson (Oxford: Blackwell 2005).

Chapter 9
Normative Legal Positivism, Neutrality, and the Rule of Law

Bruno Celano

> *Neutrality is not vitiated by the fact that it is undertaken for partial (…) reasons. One does not, as it were, have to be neutral all the way down (Waldron 1989, 147).*
>
> *Like other instruments, the law has a specific virtue which is morally neutral in being neutral as to the end to which the instrument is put. It is the virtue of efficiency; the virtue of the instrument as an instrument. For the law this virtue is the rule of law. Thus the rule of law is an inherent virtue of the law, but not a moral virtue as such.*
>
> *The special status of the rule of law does not mean that conformity with it is of no moral importance. […] Conformity to the rule of law is also a moral virtue (Raz 1977, 226).*

9.1 Introduction

Usually, in jurisprudential debates what is discussed under the rubric of 'neutrality' is the claim that jurisprudence is (or at least can, and should be) a conceptual, or descriptive—thus, non-normative, or morally neutral (these are by no means the

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B. Celano (✉)
Dipartimento di studi su politica, diritto e società, University of Palermo,
piazza Bologni 8, I-90139 Palermo, Italy
e-mail: bruno.celano@unipa.it

same thing)—inquiry: a body of theory having among its principles and its conclusions no substantive normative claims, or, specifically, no moral or ethico-political claims; and that the concept of law, as reconstructed in jurisprudential analysis proper, is not a normative or morally-laden concept—not the concept of how the law ought, or morally ought, to be. 'Neutrality', in short, designates a requirement, or a condition, to the effect that jurisprudential inquiry should be value-free, or non-normative, or morally neutral.

I do not know whether this requirement, in its most significant forms, can be met, but, be that as it may, I am going to discuss neutrality in an altogether different sense, namely, neutrality as an ethical, or ethico-political, ideal. Mine will be an essay in legal theory as a substantive, normative inquiry, pursuing neutrality as an ethico-political ideal the law should meet.

My starting point is normative legal positivism, or the claim that it is a good and desirable thing that the laws have easily identifiable, readily accessible non-controversial social sources (Sect. 9.2). What justifies normative legal positivism, I shall claim, is the value—or the ideal—of neutrality, suitably understood. I.e., what is desirable about laws being such as normative legal positivism claims they ought to be is, in a sense to be specified, their neutrality.

What, then, is the relevant concept of neutrality? And why is neutrality, so understood, a value? Answers to these questions, I shall argue, can be found when we consider the idea of the Rule of Law.

By the 'Rule of Law' I mean, as has now become usual among legal theorists, a set of formal and institutional features the law may possess in varying degrees (Sect. 9.3). These features define an ideal, which laws have traditionally been expected to live up to. Normative legal positivism, I claim, envisages neutrality through the Rule of Law. There are two connections, one regarding the Rule of Law generally, the other regarding a particular version of the Rule of Law (I shall call it 'Enlightenment Rule of Law'; Sect. 9.5). The first connection is through stability of mutual expectations (Sect. 9.4). The second connection stems from what I will call the 'inherent neutrality' of prescriptions (Sect. 9.6). Under both respects, it turns out, "observance of the rule of law is necessary if the law is to respect human dignity" (Raz 1977, p. 221).

9.2 Normative Legal Positivism

There are various—more or less thick—versions of normative legal positivism (hereinafter NLP) available. NLP may involve a commitment to the separation of powers and fidelity to the constitution (Scarpelli 1965); it may involve a commitment to democracy (Campbell 1996; J. Waldron's arguments, too, often point in this direction, cf. e.g. Waldron 2009, pp. 689, 698, 700). My understanding of NLP is very thin, one could say skeletal ('minimal' NLP). By 'normative legal positivism' I understand the thesis that the separation of law and morality, the separation of the

grounds of legal judgment and the grounds of moral judgment, is a good thing, something to be valued and encouraged.[1]

I distinguish two versions of NLP, an epistemic and a substantive one. Substantive NLP claims that "law should be restricted as to its moral content" (MacCormick 1985, p. 37). There are sound moral reasons why the law should reproduce and enforce only a very limited portion of the content of morality—how the relevant portion is to be circumscribed is a matter for discussion.[2] Epistemic NLP concerns the desirability of non-moral, so far as possible trivially factual, non-controversial and readily applicable, criteria—or tests—of legal validity (i.e., of membership in a legal system). Laws, epistemic NLP claims, should be recognizable and identifiable as such, and their content capable of being determined, on the basis of (so far as possible easily accessible, readily identifiable, non-controversial) social facts, or sources, independently of moral or other evaluative considerations. In its epistemic version, in short, NLP says that it is desirable that the existence and content of the laws be capable of being determined "by reference to social facts"—to non-controversial, easily identifiable social facts—and "without relying on moral considerations" (Raz 1979, p. 53).

Epistemic NLP's main claim echoes J. Raz's sources thesis. It is, however, a different claim, under two respects. First, what NLP claims is that it is desirable that the law could be identified and its content determined on the basis of 'non-controversial, easily identifiable, readily accessible' social facts. This clause is not part of Raz's sources thesis. Second, and most important, Raz's sources thesis is meant as a claim about what the law is. NLP's main claim—we might dub it the 'normative sources thesis'—is a claim about what the law ought to be. It says that it would be good, desirable etc., that the laws be such as Raz's sources thesis claims them to be. I will say that, when it meets epistemic NLP's central requirement, the law 'satisfies the sources thesis' (that it 'satisfies ST'). This should be understood as a term of art.

In what follows, I shall be concerned with the epistemic version of NLP only (unless otherwise specified, 'NLP' will designate this position).

NLP raises some issues. I will only list some of them here, deferring a detailed treatment to another occasion.

(1) Is NLP a jurisprudential position? Jurisprudence, it is often argued, is a purely conceptual inquiry, and NLP—better, the kind of theorizing NLP may be taken to

[1] I am here paraphrasing Waldron (2001, p. 411), defining NLP as "the thesis that [the] separability of law and morality, [the] separability of [the grounds of] legal judgment and [the grounds of] moral judgment, is a good thing, perhaps even indispensable (from a moral, social, or political point of view), and certainly something to be valued and encouraged". The label is to some extent unfortunate, since the phrase 'normative legal positivism' has been used, in recent times, to designate "the version of legal positivism that identifies law with norms" (Waldron 2001, p. 411). For a discussion of the terminological issue, and of the reasons for preferring the phrase 'normative legal positivism' to the alternative 'ethical legal positivism' (Campbell 1996); cf. Waldron 2001, pp. 411–412.

[2] According to MacCormick (1985, p. 32) the law should only enforce duties of justice; in the name of the sovereignty of conscience, or of respect for autonomous agency, it should abstain from attempting to enforce "matters of aspiration and supererogation", our self-regarding duties, and duties of love.

be the result of—is not. NLP is a normative position, resting on moral grounds. It is the result of substantive normative—specifically, moral—inquiry.

This is true. The premise of this argument may perhaps be doubted—some philosophers doubt whether the divide between, on the one hand, a purely conceptual inquiry and, on the other hand, normative, or moral, theorizing may be maintained all the way down. But I will not go into these matters. Whether you wish to call it 'jurisprudence' or not is immaterial to my present purposes.

(2) Is NLP in fact a form of *positivism*? Positivism, it is sometimes argued, claims that the concept *law* can and should be defined independently of any moral assumptions. Apparently, NLP does not satisfy this condition.

But, it may be replied, NLP, as defined, does not purport to provide a definition of the concept *law*. It merely claims that it would be a good thing if the law had a certain property (i.e., if it satisfied ST). This reply, however, sets the stage for a further, deeper objection.

(3) NLP presupposes proper jurisprudential, conceptual analysis, and is parasitic on it. Before you can claim that it would be a good (or, for that matter, a bad) thing if law satisfied ST, you have to know what law is—you have to gain an adequate understanding of the concept *law*. And, it is added, positivism is a position in jurisprudence, so understood. Thus, NLP is neither a position in jurisprudence nor, *a fortiori*, a form of positivism. It rather presupposes a positivistic analysis, or reconstruction, of the concept of law.

According to some defenders of NLP the concept *law* itself is normative, and morally-laden. These philosophers cast doubt on the assumption that the concept *law* may, or may interestingly, be defined independently of any moral assumptions. For these people, NLP is, in fact, a position in jurisprudence proper; conceptual inquiry into the concept *law* is not, at bottom, free from moral assumptions. And it is, in fact a variety of positivism (once 'positivism' is suitably redefined, abandoning the untenable assumption that the concept *law* should be defined independently of moral assumptions, and that this is what identifies legal positivism). I do not follow this path here. That the concept *law* be itself normative, or morally-laden, is not part of NLP, as here understood. For my purposes, nothing depends on the label 'positivism'. If you wish to withdraw from the position the label 'legal positivism', you may do it.[3] Nothing in my argument depends on hanging on to this label.

(4) A problem arises as regards the presuppositions of NLP. According to what we understand NLP as presupposing, we may distinguish two further versions of NLP; I will call them the 'Panglossian' and the 'contingency' version respectively.

[3]If you wish, you may call defenders of NLP "positivity-welcomers", maintaining that "insofar as legal norms are valid on their sources, rather than their merits, this fact [endows] legal norms with some redeeming merit even when they are (in any other respect) unmeritorious norms" (Gardner 2001, pp. 204–205). (NLP, however, does not exactly coincide with the position Gardner describes here, for reasons which are irrelevant in the present context.)

It is a necessary condition for NLP's main claim to be a sound principle of political morality that (a) the law *can* satisfy ST. If the laws could not satisfy ST, the question whether they should satisfy it or not would not even arise. But, what about the further condition (b) that it also be possible that the law does *not* satisfy ST?

Perhaps it is a matter of fact that law, as such, satisfies ST—perhaps it is a conceptual necessity that it does—*and* it is a good and desirable thing, something to be welcomed, that this is so.[4] Happily, the law—as such—in fact is, under this respect, as it ought to be. This is Panglossian NLP: luckily, we happen to live in the best (under the relevant respect) of all possible legal worlds.

Do we wish to endorse Pangloss' optimism? Arguably, for NLP to be a sensible ethico-political position, condition (b), too, has to be met. In other words, it has to be contingent that the law satisfies ST.

There are a number of ways in which the law may fail to satisfy ST. Some of them are obvious—but by no means unimportant. It may happen that the tests for identifying the laws, or for determining their content, are not, as required by NLP, easily applicable, or such that the upshot of their application is non-controversial. The relevant social facts may not be easily identifiable, or readily accessible. In such cases what the law is will be difficult to discern, controversial, or indeterminate. But the idea that the law does not satisfy ST may also be understood in a stronger way—and this seems a more interesting reading in the present context. It may be understood as allowing for the possibility that there is indeed law, well-determined law, on a given issue, but it is not—or at least not directly—source-based.

And here's the rub. In what ways should we take it to be possible that the law does not satisfy ST, on this strong reading of 'not satisfying ST'? For positivists, the most obvious possibility will be that the law, by virtue of its sources, incorporates moral standards. Accordingly, the contingency version of NLP claims that it is possible for the law, by virtue of its sources, to incorporate moral standards, and that it is better (and possible) that it doesn't.[5]

So understood, the contingency version of NLP presupposes the possibility of the incorporation of morality by law—it presupposes the falsity of exclusive legal positivism. Some will want to deny this possibility. Suppose we deny that condition (b), so understood, can be satisfied. I can think of three hypotheses.

(i) Satisfaction of (b) is impossible, because there are no moral facts for the law to incorporate. Ethical non-cognitivists will want to argue this way. To rebut thus objection, it suffices that there are criteria of correctness in (some) moral argument;

[4]This is, in J. Gardner's terminology (2001, p. 205), a position similar to that of those 'positivity-welcomers' who are also 'legal positivists' proper. (It is not the same position, however, because, in Gardner's taxonomy, inclusive positivists count as endorsing the relevant notion of a norm's positivity—its being valid in virtue of a source. According to the text, they don't; the relevant notion of positivity is, rather, satisfaction of ST.) Cf. also Green 2003, 4.3.

[5]Cf. Waldron 2001, pp. 411, 413–414: NLP "*assumes* (...) negative positivism"—i.e., it presupposes "the inclusive possibility"—"but *prescribes* something like exclusive positivism".

it suffices, that is, that it be conceded that it makes sense to argue about (some) moral issues.
(ii) The very notion of incorporation (of morality by law) is misconceived. Rather, what we actually have in cases of apparent incorporation of morality by law is, in fact, the non-exclusion of, or modulation of the application of, morality (Raz 2004). This, in fact, concedes the point. In this hypothesis, condition (b) will be held to be satisfied, not by virtue of incorporation, but by virtue of the non-exclusion, or modulation of the applicability, of morality by law. It will be contingent *in this sense* that the law satisfies ST.
(iii) Incorporation is impossible (inclusive legal positivism is false), but people mistakenly believe it to be possible, and this belief is non-dispensable. This leads to an error theory of the law. In cases of apparent incorporation there is, in fact, no law—although people mistakenly believe there is law, and this belief cannot be dispensed with. I find this hypothesis puzzling.

(5) I said that it is a necessary condition for NLP to be a sound principle of political morality that the law *can* satisfy ST. If the laws could not satisfy ST, the question whether they should satisfy it or not would be futile. Now, the idea that the existence and content of the laws may be capable of being determined on the basis of social facts alone—more so, on the basis of trivially factual, non-controversial and readily applicable tests—sounds naïve. It apparently flies in the face of what goes on in legal interpretation and legal reasoning (Chiassoni 1990; Diciotti 1999; Guastini 2004).

What NLP presupposes is not that it is possible that the law as a whole, *all* legal norms, be capable of being identified, and their content determined, on the basis of readily accessible non-controversial social facts. NLP, however, does presuppose the possibility that at least some laws—and not a negligible or insignificant part of the law as a whole—satisfy ST. This is incompatible with (a) the claim that all law—or even the bulk of, or the most important portions of, the law—is (always, necessarily) indeterminate; (b) a sceptical view of legal interpretation and legal reasoning.
(6) NLP claims that it is a good and desirable thing that laws satisfy ST. This claim should be understood as non-absolute, in two respects. First, defenders of NLP (in its contingency version) may, and—if sensible—should, grant that it is under certain social, political or economic conditions that it is a good thing that law satisfies ST. A fully developed NLP theory should specify which these conditions are. Second, defenders of NLP may, and—if sensible—should, claim that it is only *pro tanto* (or *ceteris paribus*, etc.) good that the laws satisfy ST. Whatever reasons there may be in favour of laws satisfying ST, or of complying with such laws, they are in principle overridable (cf. Moreso 2005).

So, NLP, in my favoured version, claims that it is (contingent and) desirable that the existence and content of the laws satisfy ST. But, we should ask, *why* can this be thought to be a good thing? What can be desirable about law's satisfying ST?

One possible answer is the following. If the law is to have legitimate authority it must be like that. In other words: the law should have legitimate authority (cf. e.g. Raz 2003, p. 180); for it to have legitimate authority, it is a necessary condition that it satisfies ST; thus, the law should satisfy ST.

A few comments on this argument. (1) The second premise is in the spirit of J. Raz's service conception of authority (Raz 1985, 1986, Chap. 3).
(2) The second premise, I think, can and should be weakened, in two ways: (a) satisfying ST is, not a necessary condition but, the main way in which law can be capable of having legitimate authority; (b) for the law to have legitimate authority, it is required that it, to the extent that it is reasonable, satisfies ST. Neither qualification is in the spirit of Raz's theory.
(3) The inference. like all inferences of this form, has to be taken carefully; it does not allow detachment. It is not the case that, whenever it ought to be the case that p, and q is a necessary condition of p, then it ought to be the case that q, period. But there is, under this respect, nothing peculiar to our argument.
(4) I am not claiming that law has legitimate authority, nor that since it necessarily claims that, it has to be such as to satisfy the sources thesis (apparently, this is Raz's argument, leading to his version of exclusive legal positivism; cf. Raz 1985).[6]

So this is one possible reason supporting NLP. Whatever the merits of this argument, in what follows I will explore an altogether different line of argument. What justifies NLP is the value—or the ideal—of neutrality (suitably understood). That the law be separated from morality—that the existence and content of the laws may be determined on the basis of easily identifiable, readily accessible, non-controversial social facts—is desirable, because when it satisfies this condition the law is, in a sense to be specified, neutral.

How should the word 'neutrality' be understood, here? And why is neutrality, in the relevant sense, a value? In order to answer these questions, I submit, we have to turn our attention to the Rule of Law (hereinafter RoL).

NLP, I shall argue, envisages neutrality through the RoL, in two ways. The first connection is via stability of mutual expectations (below, Sect. 9.4). Neutrality surfaces here in two forms: (1) indifference; (2) reciprocity and fairness. The second connection stems from what I will call the 'inherent neutrality' of prescriptions (below, Sect. 9.6).

[6]Note, however, that Waldron (2001, pp. 412, 432) ascribes Raz, albeit hesitatingly, to the NLP party. It all depends, in his view, on whether Raz is understood as claiming that law claims authority, or that it is a good thing that society be organized through a system of directives claiming authority (cf. e.g. Raz 1996a, p. 115).

9.3 The Rule of Law

There are many different ways of understanding the phrase 'the Rule of Law'.[7] Here I adopt the one which has become common in contemporary jurisprudence in the last 40 years or so.[8] Accordingly, by 'the Rule of Law' I understand a loose cluster of (1) formal features of the laws (prospectivity, publicity, relative generality, relative stability, intelligibility and relative clarity, practicability,[9] consistency), plus (2) institutional and procedural desiderata (such as, for instance, that the making of singular norms, applying to individual cases, be guided by general rules; and, further, so-called principles of 'natural justice': that the resolution of disputes be entrusted to somebody not having an interest at stake in the judgment, and not being otherwise biased; the principle *audi alteram partem:* and so on).[10] Items on the list partly vary according to the accounts given by different authors. The core, however, is stable.[11]

Some of these are features that the law may possess in varying degrees. Most of them specify, more or less directly, what is instrumentally required in order to achieve an end—namely, the end of guiding human behaviour through rules.[12] In other words, they are features the laws must possess if they are to be capable of being followed and obeyed.[13] So understood, the features constituting the RoL are

[7]For a survey cf. Waldron 2002a, pp. 155–157; Id. 2004, pp. 319–320; Bennett 2007, pp. 92–94. According to some (including Waldron; see 2002a, pp. 157–159), the concept of the RoL is an "essentially contested concept", in W. B. Gallie's sense. This claim will not be discussed here.

[8]Accounts in this family have the form of "a sort of laundry list of features that a healthy legal system should have. These are mostly variations of the eight desiderata of Lon Fuller's 'internal morality of law'" (Waldron 2002a, p. 154). Cf. ibid., 154–155, for a survey of some of the main accounts in this vein (L. L. Fuller, J. Raz, J. Finnis, J. Rawls, M. Radin).

[9]I.e., conformity to the principle *'ought' implies 'can'*.

[10]For a list of these institutional and procedural requirements see e.g. Raz 1977, pp. 215–218 ("the making of particular laws (particular legal orders) should be guided by open, stable, clear, and general rules"; "the independence of the judiciary must be guaranteed"; "the courts should have review powers over the implementation of the other principles"; "the courts should be easily accessible"; "the discretion of the crime-preventing agencies should not be allowed to pervert the law"). On principles of natural justice cf. Hart 1961, pp. 156, 202. For similar lists of the RoL requirements see Fuller 1969, Chap. 2; Finnis 1980, pp. 270–271; Marmor 2004, 5ff. For sorting out principles constituting the RoL in formal and procedural ones see Waldron 2008a (but cf. also Raz 1977, p. 218).

[11]As noted by Waldron (2002a, p. 155), the accounts given by these authors (Fuller, Finnis, Raz, Rawls, Radin)—their partly differing "laundry lists"—"seem quite congenial to each other; they are filling in the details of what is more or less the same conception in slightly different ways".

[12]In L. L. Fuller's phrase, "the enterprise of subjecting human conduct to the governance of rules" (1969, p. 106).

[13]According to Raz (1977, p. 214) the "basic idea" underlying RoL requirements ("the basic intuition from which the doctrine of the rule of law derives") is "that the law must be capable of guiding the behaviour of its subjects" ("if the law is to be obeyed *it must be capable of guiding the behaviour of its subjects*. It must be such that they can find out what it is and act on it", ibid., my emphasis). Cf. also Marmor 2004, p. 5.

features an instrument (laws) must possess in order to perform its function (guiding human behaviour) well—they are analogous to the good-making properties entailed by the meaning of any functional term. RoL requirements are analogous to the sharpness of a knife (Raz 1977, p. 225; cf. also Marmor 2004, p. 7).

RoL features define an ethico-political ideal, which laws are usually expected to live up to.[14] But, I emphasize this, this view of the RoL has nothing to do with ideologically-driven views, widely spread in contemporary (non-jurisprudential) literature, that oppose the RoL to social and economic legislation, which—it is complained—"interfere[s] with market processes, limit[s] property rights, or make[s] investment in the society more precarious or in other ways less remunerative".[15] Such conceptions of the RoL I take as spurious.[16] I side with traditional, formal *cum* institutional and procedural, understandings of the RoL.

9.4 Neutrality (I): Stability of Mutual Expectations

NLP, I said, envisages neutrality through the RoL. There are two connections. In this section, I will lay out the first.

Consider the following train of thought (I shall call this 'the common measure myth'). Thanks to law-making satisfying NLP's main desideratum, some standards of conduct become the law of the land: by virtue of their satisfying ST, they are singled out as unique in being the rules of the group as a whole. Different individuals or different groups of individuals in the society may have different views about how to act in given circumstances, about the best or proper way of pursuing a common goal, about what course of action to settle on in case of a felt need for a common decision,[17] etc. Laws satisfying ST, so the story goes, settle these uncertainties, thus resolving such quandaries. The many private judgments of individuals and groups are replaced by a source-based—in principle, readily accessible and applicable—common measure: a single public judgment, counting as the judgment of the group (its 'public reason', supplanting the many conflicting 'private' reasons of individuals).

This is, as it stands, a myth. The mere fact that a directive is enacted as source-based law, by itself, does not solve disagreements, nor does it create a common

[14]The much debated question whether the features constituting the RoL are part of the very concept *law* I simply leave aside here. Cf. e.g. Bennett 2007; Waldron 2008a, Id. 2008b; Viola 2008.

[15]I borrow this characterization from Waldron 2007, p. 92.

[16]Cf. generally Waldron 2007.

[17]"We may say (...) that the felt need among the members of a certain group for a common framework or decision or course of action on some matter, even in the face of disagreement about what that framework, decision or action should be, are the *circumstances of politics*" (Waldron 1999a, p. 102 cf. also Id., 1999b, p. 154, and 2000, p. 1849). Some disagreements or conflicts are such that not all parties involved would prefer the adoption of a common course of action to doing, each one of them, what they prefer (Gaus 2002; Benditt 2004; but cf. Waldron 2000, pp. 1840, 1844).

measure, expressing a purported public judgment of the group as a whole. Of course, if the law is backed by an effective coercive apparatus there may be self-interested reasons for members of the group to comply with it. But talk of such laws as the 'public reason' of the community as a whole, or as expressing a 'public judgment' and 'common measure', which replaces the many diverse and conflicting private judgments of individuals,[18] does not contribute to clarity. Directives enacted as law claim legitimate authority. They become the common measure of the group—expressing what *ought* to count as the judgment of the group as a whole—only if they in fact have legitimate authority.[19]

There is, however, a grain of truth in the common measure myth. Directives enacted as source-based law are, in a sense, neutral. And this is, *ceteris paribus*, something valuable about them.

There is, first, a trivial sense in which this is true, Consider normative ST: it is a good and desirable thing that the existence and content of the law may be determined without recourse to moral argument. 'Neutrality', here, is exemplified, trivially, in the following way: what the law is on a given matter (i.e., what the law requires, or permits) may be determined on the basis of morally neutral considerations. Among people who endorse different and conflicting ethical views, what counts as law is something that can be determined in a neutral way (with regard to these different views). This may bring obvious advantages.

But, it seems to me, the grain of truth in the common measure myth goes deeper. Laws satisfying ST—directives enacted as source-based laws—may work as neutral social interaction devices, in that they may become the common focus for relatively stable mutual expectations. This may happen in two ways.

(1) Laws may afford the resolution of coordination problems proper (I mean coordination problems in the strict, game-theoretical sense), by singling out one coordination equilibrium among many. By hypothesis, each party is (almost) indifferent as to which among the different equilibria available is selected, and will do

[18]This is a permanent temptation in talk of law as Hobbesian "public reason" (Gauthier 1995).

[19]Cf. Raz 1979, pp. 50–51: "social life requires and is facilitated by various patterns of forbearances, co-operation, and co-ordination between members of the society or some of them. The same is true of the pursuits of goals which the society or sections in it may set themselves. Different members and different sections of a society may have different views as to which schemes of co-operation, co-ordination, or forbearance are appropriate. It is an essential part of the function of law in society to mark the point at which a private view of members of the society, or of influential sections or powerful groups in it, ceases to be their private view and becomes (i.e., *lays a claim to be*) a view binding on all members notwithstanding their disagreement with it. It does so and can only do so by providing publicly ascertainable ways of guiding behaviour and regulating aspects of social life. Law is a public measure by which one can measure one's own as well as other people's behaviour" (my emphasis). Cf. also Raz 1996a, pp. 100–104, 107–110. This is not to deny that, under some conditions, efficacy (or, specifically, public efficacy) may play a decisive role in endowing directives—e.g., some legal directives—with legitimate authority (cf. Raz 1986, Chap. 3, 1996a, p. 115, and 2006, p. 158; cf. also, for a related argument, Waldron 1999a, pp. 104–105, and 2000, pp. 1839–1840, 1847). In such cases, however, the story will have to be much more complicated than the common measure myth suggests.

his part in it provided he expects that the others will do theirs. Being singled out by law-making institutions, one equilibrium becomes salient, and the parties converge on it.

In such cases, the common measure myth is, in fact, no myth. In coordination problems proper, there is no question of authority (Ullmann-Margalit 1981; Green 1988, pp. 111–115): it is enough that one pattern of coordination is publicly selected, so as to become salient in the eyes of the parties. Coordinative agencies need not have authority (i.e., issue preemptive, protected reasons) in order to accomplish this task.[20]

Neutrality, here, is indifference. The choice of a particular equilibrium is neutral, in the sense that, by hypothesis, it is (almost) indifferent to the parties which, among the many equilibria available, will be the chosen one.[21]

In such cases, laws do indeed qualify as a common measure. These are, however, marginal cases, of limited import. Arguably, real-world interaction problems do not often exhibit this simple pattern. And, in any case, critical interaction problems—those where disagreement and conflict loom large, and where the need for a common decision is most acutely felt—are not coordination problems (in this restricted sense).[22]

(2) In the case of strategic interaction problems of different, more intractable sorts (Battles of the Sexes, Prisoner's Dilemmas, problems of collective action of various kinds) the law may purport to afford a unique resolution of conflicts, answering to the felt need for a common decision or course of action. In such cases, however, unless the law enjoys legitimate authority, the common measure myth is, indeed, a myth.[23] I.e., unless the law enjoys legitimate authority, purported 'solutions' of the relevant problems only qualify as such in so far as they are backed by an effective coercive apparatus, rendering compliance with enacted directives in the self-interest

[20]The law performs, here, the function of a mere indicator. What it affords to the parties, is the possibility of forming shared, or mutual, expectations, of various orders, about what course of action will be followed by the others. The course singled out by the law will appear as salient to each of the parties (i.e., it will appear such that it appears salient to each of the parties, and it will thus *be* the salient option). And this, given the structure of the problem, is sufficient reason for the parties to converge on it.

[21]A related case is that of Assurance Games (Elster 1983). In AG's there is no indifference. But the law may work in the same way.

[22]This is a widely acknowledged point. Cf. e.g. Waldron 2000, pp. 1838, 1844.

[23]This is not incompatible with J. Waldron's view (1999a, pp. 104–105, cf. also 2000, pp. 1839–1840, 1848) that some issues—especially issues concerning details or, generally, the *determinatio* of general norms—may have a structure such that it is preferred—strongly enough—by each of the parties that the issue be somehow settled (rather than that it be settled in the way he prefers it to be settled), so that the fact that the law can select a particular decision becomes a reason for all to accept it and to comply with it. Issues having this structure are Battles of the Sexes the law can solve; it follows trivially that the law can solve them. It does not follow, as Waldron notes (1999a, p. 104), that the law, as such, generally solves Battles of the Sexes, and that "this is why we should respect it". More generally still, wherever it matters a lot that an issue be somehow settled, and "univocality, determinacy, decisiveness" (Waldron 2002b, p. 368) are to be highly prized, the law may play a decisive role.

of the parties and changing, in fact, the shape of the problem (by altering the pay-off matrix). It may plausibly be argued, moreover, that many real-world disagreements and conflicts between people endorsing different conceptions of the good life, or different religious views, are not amenable to game-theoretical or public choice modeling.[24] In the case of such conflicts talk of legal directives, as such, as a common measure is mere rhetoric.

There is, however, a connection between law's purported resolution of conflicts in these kinds of cases and the idea of neutrality. In such cases, directives publicly enacted as laws—specifically, laws satisfying ST—may afford stability of mutual expectations. It is common knowledge that, probably, people will comply with them[25]; and this allows each of the parties to form expectations about how the others will act, on the basis of expectations about how the others will expect him to act, about how the others will expect him to expect them to act, and so on. Interlocking mutual expectations of this sort will enable individuals to make reasoned choices, and to plan their future.[26]

And it is here that the RoL comes into play. RoL requirements define an ethico-political ideal. It is one political ideal among many (I mean many other respectable ideals: democracy, justice, equality, human rights, and so on), not to be confused with any one of them (Raz 1977, p. 211). It is, moreover, a modest ideal. Not in the sense that it is easily attainable, but in the sense that it is compatible with gross injustice, and in general with gross violations of other ideals.

However modest, the ideal defined by RoL requirements is crucially important in the present connection. For the following reason.

Apparently, we could argue this way: source-based laws generally tend to afford stability of mutual expectations; stability of mutual expectations, however, is most firmly secured where RoL requirements are met;[27] therefore, the relevant sort of

[24] And, *a fortori*, not amenable to a simple Battle of the Sexes matrix (Gaus 2002; Benditt 2004; but cf. Waldron 2000, pp. 1840, 1844).

[25] On the notion of common or mutual knowledge see respectively Lewis 1969, 52ff.; Schiffer 1972, 30ff.

[26] Of course, the relevant expectations may also concern the ways in which the law will be modified (i.e., they may be grounded in the rules—themselves legal rules—according to which legal norms are created, changed, or repealed). More generally, secondary rules, too, may become the common focus for stable mutual expectations.

[27] This, I suggest, is how we should understand what is involved in the RoL requirement of publicity. When it is required that laws should be public, what is meant by this is not only that each one of the addressees should know what the law is, but also that everybody should know that everybody knows... (and so on, up through a chain of suitable mutual beliefs) what the law is. (Think of a regime in which laws are made known to their addressees by sending each one of them sealed envelopes. Everybody knows what the law is. But, would in this case the RoL requirement of publicity be met?) Cf. the discussion of a related point in Marmor 2004, p. 17, and Celano forthcoming. (So understood, the RoL condition of publicity corresponds to Rawls' first level of publicity of the principles of justice in a well-ordered society; cf. e.g. Rawls 1999, pp. 292–293, 324. Thanks to José Juan Moreso and Jahel Queralt for reminding this to me.)

neutrality is most firmly secured where the laws, apart from satisfying ST, also satisfy RoL requirements.

The connection, however, is tighter than that. When we find ourselves inclined to say that source-based law generally tends to afford stability of mutual expectations, it is in fact source-based law meeting, to some degree, at least some of the RoL requirements that we are thinking of.[28] It is laws that satisfy ST *and* meet, at least to a minimal degree, some of the RoL requirements (prospectivity, intelligibility, publicity, relative generality, regular application by unbiased judges) that work as neutral social interaction devices, affording stability of mutual expectations.

And, where RoL requirements are met, we can clearly see what is valuable in stable mutual expectations. RoL requirements imply that the expectations the law will give rise to will be—in so far as the law itself is concerned—*reliable* expectations. In affording the rise of mutual expectations, the law will not work as an "entrapment" device, encouraging expectations that it will afterwards frustrate (Raz 1977, p. 222). Laws meeting RoL requirements will, in sum, give rise to a stable, reliable system of interlocking mutual expectations, thus guaranteeing a measure of trustworthiness, fairness and reciprocity in the interaction of rulers and ruled (Fuller 1969, pp. 39–40; Finnis 1980, pp. 272–273; MacCormick 1985, p. 26), and of law's subjects with each other. This, I submit, is a form of neutrality: neutrality as fairness.

So understood, neutrality is, of course, compatible with gross injustice and discrimination. Where source-based laws are in place, e.g., the slave knows what he can expect from his master, because he knows what the master expects from him, and so on. Their dealings conform, however, to a stable, mutually reliable pattern.[29]

In both cases—coordination problems proper, and deep forms of social conflict and disagreement—, then, laws satisfying NLP's main desideratum, and the RoL, will more likely achieve the relevant aim (stability of mutual expectations), and instantiate the relevant value (respectively, neutrality as indifference, and neutrality as fairness).

9.5 Enlightenment Rule of Law

I now come to the second connection between NLP and neutrality (via the RoL). This connection concerns a particular version of the RoL. The building blocks of this version of the RoL have been developed, very roughly, in European legal culture in the eighteenth and nineteenth centuries; it is associated, *inter alia*, with

[28] Witness some kinds of sources which afford stability of mutual expectations only to a very limited extent: ordeal, drawing lots, divination by authorized soothsayers (I owe this point to Francesca Poggi), e.g. it is common knowledge that a certain dispute will be resolved by drawing lots; it is unknown, however, what the outcome will turn out to be.

[29] A putative counterexample is given by laws such as 'Whenever they wish, members of the ruling elite may seize and kill members of group X'. Such counterexamples are, however, ad hoc. These rules are general in their logical form only. They are not general in the way required by the RoL.

(Poggi, e.g.) J. Bentham's understanding of the formal features laws should possess. In this understanding, what is central to the RoL is the activity of legislating—i.e., the issuing of prescriptions.

Prescribing, as a kind of purposive human activity (roughly, trying to make people do something by telling them to do it), and prescriptive relationships (i.e., the kind of relationship which comes into being, by virtue of the happy issuing of a prescription, between a prescriber, or lawgiver in a wide sense, on the one hand, and those to whom her prescription is addressed, on the other hand) have many formal features. As with any other purposive, goal-oriented activity (and functional terms generally) some of these features express the requirements that the activity has to meet, in order to achieve—and to achieve well—its constitutive purpose. Some of these features aptly instantiate elements of the RoL ideal. So, for instance, prescribing is a procedure openly and publicly directed at the issuing of public directives.[30] And, as we have seen, publicity of the relevant standards of behaviour is one of the requirements of the RoL. Thus, where prescriptions are involved, not only the standard itself, but also its mode of birth, are laid out in the open.[31] Further, prescriptions typically have to be prospective, and intelligible; if they are to be capable of achieving their purpose (i.e., guiding human behaviour), they have to be laid out in advance, and clear enough for their addressee to understand them (cf. Marmor 2004, pp. 19–20, 26–27). Further still, the activity of prescribing is subject to rational pressure in favour of conformity to the principle *'ought' implies 'can'*, and the avoidance of conflicts (so called 'antinomies').[32] The latter, too, are, as we have seen (above, Sect. 9.3), among the requirements of the RoL—respectively, practicability, and consistency.

This legislative twist to the RoL should not be surprising. After all, most of the requirements of the RoL follow, as I have remarked, from what is instrumentally required when we want to subject human behaviour to the guidance of rules

[30]For a detailed discussion of this point see below, Sect. 9.6.

[31]Cf. Waldron 2007, p. 99: the legislature "is an institution set up explicitly to make and change the law. (...) Law-making by courts is not a transparent process; law-making in a legislature by contrast is law-making through a procedure dedicated publicly and transparently to that task" (the "transparency" of legislation). See also Waldron 2009, p. 693.

[32]These are all features that prescriptions *typically* exhibit, and pressures prescriptions are *standardly* subject to. The possibility of non-standard prescriptions is not ruled out (cf. e.g. below, n. 56). These will be cases of abuse of the institution of prescribing. So, for instance, one assumption which makes possible the issuing of prescriptions, and the coming into existence of prescriptive relationships, is that the lawgiver wants the addressee to do what she tells him to do (von Wright 1963, pp. 7, 119; Id., 1983, I, 8; Celano 1990, p. 127). This is a defeasible presumption. It is, however, standardly true; and an explicit denial of this condition would prevent a prescription from coming into being ('I hereby order you to do A, but I don't care whether you do it or not'; cf. Searle 1969, pp. 60, 64ff.). In the light of this presumption, the principle *'ought' implies 'can'* applies to prescriptions (so, e.g., a prescription enjoining an action explicitly acknowledged to be physically impossible would sound odd). Likewise, purported logical relations between prescriptions may be interpreted, via the assumption that whoever prescribes somebody to do something wants the addressee to do it, as criteria of a rational lawgiving will (von Wright 1983; Bobbio 1971; Celano 1990, pp. 268–282).

('subjecting human conduct to the governance of rules'; above, Sect. 9.3). And, of course, prescribing just *is*, in a straightforward sense, trying to subject human behaviour to the guidance of rules (trying to make somebody do something by telling them to do it).[33] True, prescribing is not necessarily the issuing of *general* directives, or of 'rules' proper. Under this, and perhaps other, respects the requirements of the RoL do not apply to prescribing, as such. But let us abstract from these, and focus on the respects listed above, in which prescribing does indeed instantiate the kind of activity RoL requirements apply to. When we see things in this light, a particular version of the RoL emerges, comprising the conditions which a certain form of guidance of human behaviour has to satisfy, if it has to succeed; comprising, i.e., what is in fact involved in a particular method of social control, which consists primarily in the issuing of prescriptions, that is, of directives communicated to persons, who are then expected to understand and to conform to these directives.[34] This includes, of course, orders backed by threats; it is not, however, limited to these. It encompasses (with some qualifications, to be spelt out along the way) all cases of *telling somebody what she should do*.[35] Henceforth, I shall call this version of the RoL 'Enlightenment RoL' (ERoL), due to its embodying some more or less utopian, eminently rationalistic (see below, Sect. 9.6) and, perhaps, simplistic desiderata. ERoL gives pride of place, in law's development and operation, to legislation.

A few comments about the role of legislation in ERoL are in order. (1) Some conceptions of the RoL celebrate it as a spontaneous, non-manufactured, unintended, gradually evolving order of human interaction whose administration and piecemeal development is entrusted to the collective, 'artificial' reason of the judiciary. But, as J. Waldron notes, such views forget "the rule of law difficulties of the Common Law—its opacity, the ad hoc character of its development, its impredictability, its inherent retroactivity".[36] There is no need for us, here, to adjudicate this controversy. It is enough that we establish the credentials of a 'legislative' version of the RoL.

[33]Waldron (2007, pp. 109–110) rightly observes that L. L. Fuller's treatment of the subject in Fuller 1969, Chap. 2, "illustrates a strong (...) tendency to associate the rule of law with formal features of legislation, as opposed to other modes of law and law-making". Cf. also Viola 2008, p. 159.

[34]I am here paraphrasing Hart (1961, p. 202, speaking of "any method of social control" consisting primarily of "general standards of conduct" addressed to "classes of persons").

[35]Two clarifications are needed here. (1) In order to make room for power-conferring rules (and, especially, for rules conferring to private individuals the power to achieve some ends of theirs: 'If you wish to do this, this is the way to do it', Hart 1961, p. 28), this phrase, as I use it here and in what follows, should be understood as including cases of *telling people how to pursue the goals they want to achieve* (or *telling people how to do what they want to do*). (Cf. Raz 1977, p. 215: "power-conferring rules are designed to guide behaviour".) 'Prescribing', so understood, covers both the issuing of mandatory directives, and the issuing of power-conferring rules. (2) 'Telling' people what they should do, as I mean it here, refers to cases of *issuing* prescriptions, not to 'detached' statements of what the addressee should do according to a given set of prescriptions (Raz 1979, pp. 153–157).

[36]Waldron 2007, p. 95; cf. also Bobbio 1961, pp. 91–96. *Contra*, cf. Viola 2008, pp. 159–164.

(2) The notion of a legislation-oriented RoL—ERoL—runs counter the well-established contrast between the RoL and 'the rule of men'. But this is a mythical contrast.[37] Traditionally, formal and procedural or institutional aspects of the RoL have played a central role in the ideal; and "in both cases, the importance of these features in the rule of law tradition belies any claim that legislation is incompatible with or repugnant to the rule of law".[38]

I do not mean to rule out the possibility of giving a definite meaning to the 'Rule of Law' vs. 'rule of men' antithesis. So, e.g., a non-mythical way of understanding the contrast is the one suggested by F. Schauer (2003, 276). Generalizations—thus, treating unlike cases alike—, Schauer notes, are ubiquitous in legal practice (witness decision-making by rules, reliance on precedent, and the practice of giving reasons). And, Schauer argues

> when the 'rule of law' is contrasted with the 'rule of men', the core idea is that individual power, creativity, initiative and discretion have their dark side. The rule of men would be fine if all men were good, but when many men are not so, and when a degree of risk-aversion is justified, we may often prefer to lose the most positive efforts of the best of men in order to guard against the most negative efforts of the worst of them. (...) [L]aw may be the institution charged with checking the worst of abuses even if in doing so it becomes less able to make the best of changes (ibid.)

And, we may add, there is such a thing as limited (constitutional) government. or 'government under the law'. But, unless by 'law' we mean, here, natural law, room has to be made, in these ways of understanding the traditional antithesis, for the idea that it is men that make the laws. So, when men rule 'under the law', it is man-made law that the government rules under. And, in fact, Schauer's understanding of the traditional antithesis implies that the rules and generalizations constraining the discretion of individual officials are themselves made by men. So understood, the contrast is about the allocation of decisional power, i.e., the desirability, as regards certain classes of decisions to be made by certain classes of decision-makers, of decision-making on the basis of entrenched generalizations (themselves framed, it is assumed, by other human decision-makers), or of "rule-based particularism", rather than (purely) particularistic decision-making (Schauer 1991, Chap. 7). Taken literally, I think, there is no such a thing as 'the rule of laws, not men'.[39]

[37] Cf. Raz 1977, p. 212; Bobbio 1983; Marmor 2004, pp. 2–3; Waldron 2007, pp. 101–104.

[38] Waldron 2007, p. 104. Cf. also ibid.: "traditional rule of law theorists" (e.g., Fuller) have emphasized "procedural requirements, like due process in legislation and the separation of powers, and formal requirements, like generality, publicity, prospectivity, constancy and so on"; "these standards implicitly acknowledge that law is an instrument wielded by men; the traditional view concedes that men rule; it just insists that their rule be subject to the formal and procedural constraints of legality".

[39] Or, alternatively, *all* legal systems are cases of the 'rule of laws, not men' (Kelsen 1945, p. 36; cf. Celano 2000; and see also Raz 1977, p. 212).

(3) There may be various, more or less weighty ethico-political reasons for endorsing, as an ideal, a conception of the RoL which—just like ERoL—emphasizes the role of legislation in law's development and operation.[40] Its connection with neutrality (below, Sect. 9.6) is only one of these.

(4) In focusing on the activity of prescribing, and on prescriptive relationships, considered in themselves, I am abstracting from the complex, articulated procedural and institutional aspects of legislation proper, as it occurs in developed legal systems. These, too, may be interpreted as instantiating the RoL, or as dictated by RoL considerations,[41] but I shall not follow this path here. Prescribing is legislation at its minimum, so to speak. True, issuing prescriptions may also be the instrument of ad hoc decisions. The aspects of prescribing I shall focus on, and which constitute its distinctive sort of neutrality, however, are not peculiar to the ad hoc issuing of decrees.

So, I assume that the very simple fact of someone trying to make someone else do something by telling him to do it (and the relationship that comes into being as a consequence of this fact) is a suitable model for understanding what goes on in legislation proper (although it certainly does not give us an exhaustive picture of it). This is by no means obvious, or undisputed (cf. e.g. Hurd 1990, part II). Under many respects, the activity of a legislature in a modern democracy cannot be assimilated to that simple model (Waldron 1999a, part I; Id., 1999b, pp. 26–28). But I shall not try to defend this assumption here.

9.6 Neutrality (II): The Inherent Neutrality of Prescriptions

The second connection between NLP and neutrality (via the RoL) stems from the 'inherent neutrality' of prescriptions.

Laws meeting RoL requirements may have almost any content. But, I suggest, what is peculiar, as regards the RoL, is the *form* that the exercise of power takes. The RoL is, in the first instance, a specific mode of the exercise of power.

It is certainly not unusual to characterize the RoL as "a particular mode of the exercise of political power". When it is so characterized, the RoL, understood as "governance through law", is usually contrasted with "managerial governance or rule by decree".[42] Or it is contrasted with 'arbitrary' power, meaning by this public power wielded in the pursuit of private interests (Raz 1977, pp. 219–220). These contrasts are not mistaken, of course. But, I suggest, in order to understand what is

[40] See e.g. Waldron 2007, pp. 99–100 ("in general, legislation has the characteristic that it gives ordinary people a stake in the rule of law, by involving them directly or indirectly in its enactment, and by doing so in terms of fair political equality", ibid., 100). What Waldron has in mind, here, clearly is *democratic* legislation.

[41] Cf. Waldron 2007, p. 107.

[42] The quoted phrases are taken from Waldron 2008a, p. 78.

peculiar to the RoL (and to ERoL), and to see what is neutral about it, we have to widen the scope of the comparison. We have to contrast the RoL (specifically, ERoL) with other modes of the exercise of power over human beings—modes that are by no means anomalous, rare or bizarre, but often go unnoticed in these debates.[43] Power exercised by *telling* people to behave in the desired ways—thus, power exercised by issuing laws meeting ERoL requirements—has to be distinguished from power exercised through different means, or through linguistic means used differently. Thus, it has to be distinguished from symbolic, charismatic, and pastoral[44] power; from power exercised through manipulation, indoctrination, propaganda, or various forms of deceit (such as, e.g., power exercised through lying, or by modifying, unknown to the agent, the options that are available to him); and, finally, from persecution, disciplinary power (*pouvoir disciplinaire*; Foucault 1975, pp. 159–227), mute punishment, and sheer physical interference. What distinguishes it from these forms of power is the combination of two features: (1) it is rational; (2) it is public, transparent, out in the open. Let me explain.

When the government treats its subjects in accordance with the ERoL, it treats them as adults, capable of making their own decisions on the basis of their own preferences and their own understanding of the relevant facts. It tells them explicitly 'I want you to behave in such and such a way; these will be the consequences—I shall inflict you such and such a harm—in case you don't; now it's up to you'. Let us contrast this mode of exercising power over a human being with the way in which children are often treated. In order to make children do what we want them to do we sometimes tell them lies ('Candy shops are closed now'); we fake non-existing unpleasant consequences ('The wolf will come and get you'); in various ways, we distort reality. Or we try unknown to them directly to manipulate the environment, or their preferences, by working behind their back, so to speak. Or, again, we rely, in trying to make them do what we want them to do, on an aura of parental authority, or on symbols. In acting in these ways, we do not recognize children the dignity of responsible agents, capable of autonomous choice; we do not treat them as autonomous agents capable of—and entitled to—making their own choices on the basis of preferences and beliefs which are in fact their own (on the basis, thus, of their awareness of the way things in fact are, or of the way they see things, rather than on the basis of a mistaken understanding of reality, that we have induced on purpose).[45]

Let us try to spell out what is involved in this contrast. We are considering a simple situation: X issues a prescription addressed to Y—for instance, X orders Y to do something, and his order is backed by the threat of visiting her with an evil

[43] But cf. Raz's discussion of "enslavement" and "manipulation" in Raz 1977, 221; and A. Marmor's (2004, 15–16) discussion of "subliminal advertising".

[44] On "pastoral" power cf. Foucault 1981.

[45] What matters, here, is not that their preferences and beliefs are not the upshot of some form of conditioning or other disreputable process. It is, rather, that *we* are not responsible for these processes.

in case of non-compliance. The latter is what Hart (1961) famously referred to as 'the gunman situation'. In what follows, I shall use this label, because I think it is important to stress, in the present context, that it is also this kind of situation that I am focusing on. But it should be remembered throughout that the gunman situation is only one among different kinds of prescriptive relationships. What I am interested in is, generally (albeit with some qualifications), the mode of power exercised in trying to make somebody do something by telling her to do it.

The gunman situation has two basic features: it relies on the rational agency of the parties, and it is fully public. (These are features that prescriptions *typically* exhibit, and defeasible presumptions. Non-standard prescriptions are possible.)

(1) *Rationality*. In the gunman situation, appearances notwithstanding, rationality is pervasive. The gunman situation is, conspicuously, a form of *rational* interaction—i.e., a kind of situation an adequate description of which is premised on the assumption that the parties involved possess, and are capable of exercising, distinctively rational abilities, and that their attitudes, choices and actions meet standards of minimal rationality (Celano 2002, 2.1). True, in the gunman situation X exerts a kind of causal influence over Y. But, contrary to what happens in cases, e.g., of sheer physical force, or of straightforward manipulation of the agent's preferences, or of symbolic influence, the influence being exerted on the subject's behaviour is mediated by (thus, it depends on, and requires) the exercise, on the part of the individual whose behaviour is being affected, of a varied set of complex rational skills and abilities.

(a) The individual whose behaviour is affected by the gunman's order is presumed by the gunman to be a rational agent. 'Rationality', here, designates in the first instance the ability to understand the utterance of a sentence, to grasp its meaning and force. The act of issuing an order backed by a threat is a communicative linguistic act: the order is a message addressed to somebody of whom it is assumed that he is able to understand a message, and to act in one or the other of two alternative ways on the basis of this understanding. (This is why it is usually assumed—a plausible assumption—that it would make no sense to address an order backed by a threat to a stone, a colour, or a number.)

The gunman situation is, thus, a situation whose description (when adequate) entails that the individual whose behaviour is affected is endowed with highly developed communicative competences—specifically, linguistic competence. The relevant competence includes the mastery of—i.e., the ability to grasp and to apply correctly—concepts.

Moreover, an order backed by a threat is issued, typically, with a certain intention, and its workings rest on a complex set of interrelated intentions, and their successful expression and detection (Grice 1957; Strawson 1964, pp. 256–257; Schiffer 1972, p. 19; Celano 1990, pp. 127–151, 205–213; cf. also Raz 1996b, p. 283). Typically, the lawgiver has, first, the intention to make the addressee perform a certain action; and, second, he intends to make the addressee perform a certain action as a consequence of his uttering a sentence. Third, he intends to make the addressee perform a certain action (as a consequence of his uttering a sentence) by virtue of the recognition, by the

addressee, of these very same intentions. It is not enough, for a prescription to come into existence, that the aim of the lawgiver be that the addressee act the way he desires, and that this should happen as a consequence of his uttering a sentence. It is necessary, further, "that the speaker should intend the person addressed to recognize that this is his purpose in speaking",[46] and to recognize this intention. In issuing a prescription the lawgiver assumes his addressee to be capable of detecting—and of expressing her detection of—a complex set of nested intentions. The addressee is presumed to be capable of understanding (1) that the speaker wants her to behave in a certain way; (2) that he wants to make her behave in the desired way; (3) that he wants to produce this outcome as a consequence of his uttering a sentence; (4) that he wants to produce this outcome by virtue of her recognition of this whole set of intentions, (1) to (4). Thus, for a prescription to affect its addressee's conduct in the way it is intended to, it is necessary that the addressee understand that her understanding of the prescription—this very understanding—is a necessary condition for it to produce the desired outcome.

So, in claiming that the gunman situation is a case of rational interaction, what I mean by 'rationality' is, first, an individual's ability to understand a non-naturally meaningful message addressed to her—an ability which, in turn, involves the mastery of concepts, and the ability to have, to recognize and to express the recognition of, complex intentional structures of the required sort. As a consequence, the influence exerted by the lawgiver on the addressee may be said to be a kind of 'causal-*cum*-rational' influence: in order for the addressee's conduct to be affected in the desired way, she has to understand that it is being affected in this way, and what this way consists in. A prescription is a kind of tool that works (in the way it is intended to work) only if the object it causally affects understands that it is so working. Under this respect, it is a kind of tool very different from tools whose operation relies on physical processes only. (Imagine a hammer which works in pinning down nails only if the nail understands (1) that it is being pinned down, and (2) the physical laws according to which the hammer's blows cause its being progressively pinned down.) The addressee's understanding of the process leading her to act in the relevant way is a necessary step in this very same process.

(b) But how can understanding an utterance of the relevant sort lead an individual to act in a given way rather than another?

X orders Y to perform action A, and he threatens her with the infliction of a sanction—something unpleasant—in case Y does not comply. If Y understands the order (and the annexed threat), and if X is in fact capable of, and is willing to (or, if Y believes he is)[47] visit her with the threatened evil in case of non-compliance, it may happen that Y decides, on the basis of her understanding of the order, and of her desire to avoid the unpleasant consequence X has threatened, to do what X ordered her to do. This illustrates a further sense in which the influence a prescription

[46]Hart 1961, p. 235, cf. also Id. 1982, pp. 250–252. This is the set of intentions constitutive of what H. P. Grice (1957) has called "non-natural meaning".

[47]I shall leave this complication aside here.

produces on its addressee's conduct may be said to be a form of 'causal-cum-rational' influence. The influence which is being exerted on the addressee's behaviour depends on, and is grounded in, a piece of reasoning—drawing the conclusion of an inference—on the addressee's part (e.g., 'Unless I do A, I shall incur in sanction S; I do not wish to incur in S; thus, I ought to do A').[48]

Orders backed by threats, thus, 'work'—i.e., they manage to produce their intended outcomes—by relying on their addressees' ability to perform practical inferences, and to act according to the latter's conclusions. A prescription's characteristic mode of operation is, in short, mediated by its addressee engaging in a piece of practical reasoning.[49]

Let us take stock. A prescription is addressed to an individual of whom it is assumed that she can understand the utterance of a sentence, and is, further, capable of deciding, on the basis of this understanding, to act in a certain way rather than another—is, i.e., capable of making choices on the basis of the weighing of reasons for and against compliance. The kind of—causal—influence a prescription is meant to exert on an individual, thus, may be said to be a kind of rational influence in so far as the working of a prescription—Y's conduct being affected by X's uttering a sentence—(1) is premised on Y's (and, of course, X's) ability to speak a language—thus, on their mastering concepts, and their ability to form, express, and detect complex intentional structures of a Gricean sort; (2) is grounded in Y's—and X's—performing the relevant pieces of practical reasoning—and, crucially, on X's anticipating Y's practical reasoning (including Y's representation, in her practical reasoning, of X's practical reasoning, and of this very anticipation); and (3) under both

[48]On this variety of practical inferences cf. von Wright 1962. This is only one among many possible forms, of course.

[49]Specifically, orders backed by threats work (when they do work) by altering the addressees' preference ordering. A given option (e.g., giving one's purse to a stranger)—an option the agent, if rational, would not have chosen, given his current preference ordering, had the order not been issued—becomes, by virtue of the order, and the associated threat, the preferred one, so that (on a simple maximizing conception of practical rationality) choosing it is, now, rationally mandated (i.e., it has now become what a rational agent, given his newly shaped preference ordering, should do). Behaviour in accordance with the order is the object of a choice; this choice is, in turn, the outcome of a piece of practical reasoning. The order does indeed affect the preference ordering of its addressee; it does so, however, in a peculiar way, very different from the one involved in manipulating the agent's preferences by acting 'behind his back'-e.g., by pouring, unknown to him, a drug in his tea, or through brainwashing. In the latter cases, X operates 'behind Y's back' in the following sense: X produces the desired outcome—making a given option Y's preferred one (thus, altering Y's preference ordering)—by exerting a purely causal influence. Typically, the agent will remain unaware of the way in which her preference ordering has been modified. In the case of an order backed by a threat, on the contrary, the agent is made to face a choice. Her being aware of the mechanism through which X tries to make her behave in a certain way, her taking this mechanism's workings into account, is part and parcel of its very same workings. An order backed by a threat is a device, which works only if the individual on which it exerts its influence understands that, ad how, it is exerting its influence. When an order backed by a threat has success, its addressee chooses, decides to comply (*coactus tamen voluit*).

respects, it relies on Y's understanding of this working itself. It is in virtue of these features that, I think, the gunman situation may be characterized as a form of rational interaction—a kind of situation an adequate description of which entails, or presupposes, that the parties involved be endowed with rationality.[50]

(2) *Common knowledge*. The mode of power we are discussing is a kind of power whose exercise takes place out in the open between lawgiver and prescription-addressee.

In order for the lawgiver to achieve his aim, it is necessary for him to make his intention—the intention of making the addressee perform a certain action through the utterance of a given sentence—known to the addressee. This is not, however, sufficient for his utterance to count as a prescription. If odd or deviant ways of influencing others' behaviour through linguistic means have to be ruled out (Strawson 1964, pp. 256–257, 263; Schiffer 1972, p. 30), a condition of common knowledge has to be satisfied. In prescribing, the lawgiver intends to make the addressee perform a given action by virtue of the recognition, by the addressee herself, of this very same intention (cf. above). Thus, an utterance may count as a prescription only if the addressee believes that the lawgiver has the relevant intentional structure, if she believes the lawgiver to believe that she believes he has it, and so on. Likewise, it is necessary that the lawgiver believes that the addressee recognizes this structure, he believes her to believe that he believes this, and so on. In short, a prescription only has been issued—and a prescriptive relationship between X and Y only comes into existence—if a suitable system of interlocking mutual beliefs comes into place: only if it is common (or mutual) knowledge between lawgiver and addressee that it has been issued.

This is, once again (above, Sect. 9.4) the idea of publicity. Legislation—i.e., the issuing of prescriptions—egregiously qualifies as a way of meeting this requirement.

Thus, the mode of power exercised in trying to make somebody do something by telling her to do it has two basic features: it relies on the rational agency of the parties, and it is fully public. When power is exercised in this way—thus, when ERoL requirements are satisfied—I suggest, a kind of neutrality is achieved. Lawgiving neutralizes some of the differences between lawgiver and addressee, levelling, in a sense, their respective positions. By this I mean two things.

(1) In a prescriptive relationship, lawgiver and addressee are put in a position of reciprocity: they interact as rational agents, in the light of an appropriate set of mutual beliefs concerning, *inter alia*, their status as rational agents. I.e., they presume each other to be endowed with the relevant rational abilities. To this—limited, of course—extent, their respective positions are levelled. They face each other as equally engaged in communicating with each other.

(2) In a prescriptive relationship, the subject to whom the relevant prescription is addressed is kept at a distance, so to speak. She is not regarded by the lawgiver as an appendix to, or an extension of, his own body, as merely a tool, or as one commodity among others at his disposal, or again as something in the environment to be manipulated. Causal efficacy on her conduct is mediated by her own understanding of its being exerted, and how—and this is common knowledge between the two.

All this may look overstated. Orders backed by threats are sometimes harsh, brutal. They may be addressed by a master to his slave. The operation of requests may rest on sweeping forces and all too powerful incentives, such as, e.g., parental love, or the implicit threat of their withdrawal. (Some 'offers' simply 'cannot be refused'.[51]) The two features I have listed, however, concern the form, or structure, of the relationship (at least when conditions are satisfied, designed to rule out 'offers that cannot be refused').[52] When we contrast the issuing of a prescription with recourse to sheer physical force, or to silent manipulation of the subject's environment, I think we can see this twofold difference.[53] Under both respects, I think, one distinctive feature of prescriptive relationships is that rulers regard their subjects, literally, as addressees—i.e., as subjects capable (and worthy; see below) of being addressed. To borrow a phrase from Strawson, their dealings with them, as addressees, are not premised on "objectivity of attitude": a "purely objective view of the agent as one posing problems simply of intellectual understanding, management, treatment and control".[54]

[50] J. Austin was well aware of this; see Austin 1832, at 18, 20; this is also Bentham's view (see Hart 1982, pp. 244, 251). Cf. also Raz 1977, p. 222: "a legal system which does in general observe the rule of law (...) attempts to guide [people's] behaviour through affecting the circumstances of their action. It thus presupposes that they are rational (...) creatures and attempts to affect their actions and habits by affecting their deliberations".

[51] Thanks to José Juan Moreso for reminding me this point.

[52] Think, for a related case, of threats having a 'Your money or your life' structure. These do not exemplify the structure described in the text: they do not offer the subject a choice. In case the subject complies, the gunman will get her money. In case she doesn't, the gunmen will get *both* her life and her money. This is, in fact, no (well-formed) alternative. The latter hypothesis includes the former—they are not logically independent.

[53] Doesn't charismatic power, too, work by *telling* people what to do? Not in the way described here. Charismatic power does not, by hypothesis, offer the subject a choice—it does not rely on the subject's weighing reasons for and against doing what the leader wants her to do. Rather, it works by virtue of some sort of magnetism (however this may then be explained) a person exerts on another person—and this is, precisely, why the former may properly be said to be the 'leader', rather than a lawgiver.

[54] Strawson 1962, p. 87. "To adopt the objective attitude to another human being is to see him, perhaps, as an object of social policy; as a subject for what, in a wide range of sense, might be called treatment; as something certainly to be taken account, perhaps precautionary account, of; to be managed or handled or cured or trained" (ibid., 79). Strawson writes that "if your attitude towards someone is wholly objective, then though you may fight him, you cannot quarrel with him, and though you may talk to him, even negotiate with him, you cannot reason with him" (ibid.). But this, it seems to me, downplays what is involved, by way of reasoning with someone, in *talking* to him.

Lawgiving, thus, in a sense neutralizes asymmetries between lawgiver and addressee, levelling their positions. Prescriptions are, in this sense, inherently neutral devices for the exercise of power. This is not substantive neutrality—not taking sides in favour of any particular subject, or group of them. As far as their content is concerned, laws meeting ERoL conditions have, as such, nothing neutral in them.[55] What I have called their inherent neutrality concerns their form: the kind of communicative attitude involved in their workings.

Prescriptions satisfying ST will egregiously exemplify this model. In fact, prescriptions as such are, typically, source-based: directives enacted as prescriptions, as such, typically satisfy ST. But, does this kind of 'neutralization' have anything of value in it?

Once again, the RoL—and, specifically, ERoL— is a modest ideal. It is compatible with violations of other ideals. But, when we consider the inherent neutrality of prescriptions, we see that there is something valuable in ERoL.

When the government treats its subjects in accordance with the ERoL, it treats them as rational agents, capable of (1) mastering concepts, and of detecting, grasping, forming, expressing and generally finding their way in, complex structures of communicative intentions; (2) making their own decisions on the basis of their own preferences and their own view of the relevant facts. By treating them in this way, government recognizes them the dignity of beings worthy of being publicly, openly addressed, and of being guided through their understanding of the way in which power is being exerted on them.

So, when treating its subjects in accordance with ERoL requirements government recognizes people the dignity of responsible agents, capable of autonomous choice; it addresses them openly, and tries to guide their behaviour through their very understanding of what it is trying to do, and how. In short, it treats them with, and shows them, *respect*. (Recall the contrast with manipulation, indoctrination. propaganda, deceit, persecution, *discipline*, mute punishment.) This way of exercising power, I said, is very different from the way in which people sometimes try to guide children's behaviour—distorting reality, or trying to manipulate the environment or their preferences, by working behind their back; relying on the efficacy of symbols or charisma. These, of course, are ways in which even adult men and women are often treated—and sometimes wish to be treated (or have to be treated). But they are not, I submit, respectful ways.[56]

[55] I hope it is clear enough from what I have said so far that my claim is not that law is—or should be—value-neutral, or morally neutral. This claim is simply untenable. Cf. e.g. Raz 1996a, p. 112, n. 17; Green 2003, 4.3: "law is not value-neutral. Although some lawyers regard this idea as a revelation (and others as provocation) it is in fact banal. The thought that law could be value neutral does not even rise to falsity—it is simply incoherent. Law is a normative system, promoting certain values and repressing others. Law is not neutral between victim and murderer or between owner and thief. When people complain of the law's lack of neutrality, they are in fact voicing very different aspirations, such as the demand that it be fair, just, impartial, and so forth. A condition of law's achieving any of these ideals is that it is not neutral in either its aims or its effects".

[56] Remember that we are dealing, here, with standard cases. Abuses are possible. So, for instance, one interesting way of acquiring and exercising power over human beings is by inducing in them strong feelings of guilt, or the sense of their constitutive insufficiency, or weakness—and setting ourselves as their healers (either because we are uniquely authorized to correct them for their faults, or because we know how, and are able to, supplement them in their insufficiency or weakness). One way of doing this is by issuing prescriptions we know they will not be able to comply with—setting a standard we (and they) know they will not be capable of living up to. I.e., by flouting the requirement that whoever prescribes wants the addressee to do what he prescribes her to do (see above, n. 32), and tries, by issuing a prescription, to make her perform the desired action. In such cases, we do not actually want the addressees do what we (seem to) require from them; it is thanks to their (expected) *non*-compliance that we (mean to) acquire power over them.

Individuals are, to the extent that they are all addressed as the addressees of prescriptions, treated with *equal respect*.[57] (Remember that this concerns the form of the relationship only, not the prescription's content.[58]) This is compatible with all sorts of disrespect and unjust discrimination, of course. But it positively is, it seems to me, a valuable feature of laws satisfying ST and meeting ERoL desiderata.

9.7 Conclusion

My conclusion, then, is that, if you have some sense that the law ought to be neutral, and if you are looking for a way of giving a definite, respectable meaning to this distressingly vague and generic thought, then you have a good reason for claiming that the law should satisfy ST, and conform to ERoL requirements (you have, then, good reasons for endorsing NLP).

I have tried to flesh out this claim by explaining some of the ways in which the idea that the law ought to be neutral can sensibly be understood and, correspondingly, to explain why conformity to the RoL—and, specifically, ERoL—requirements, and to ST, warrants neutrality, in the relevant sense, or senses.[59] Laws satisfying ST

[57] This, I think, is the point of Bentham's criticism of the Common Law as "Dog Law" (cf. e.g. Bentham 1970, p. 184, and Postema 1986, p. 277). Cf. also MacCormick 1985, pp. 24–27.

[58] There is, however, a continuum ranging from, at one extreme, prescriptions as a vehicle of respect for their addressees and, at the other extreme, prescriptions wielded as weapons by people intending only to make other people do certain things—or positively aiming at humiliating them. Orders may be barked at night by armed guards to deprived, terrorized people at their arrival at the concentration camp, so as to make them reach as soon as possible their barracks, or the gas chamber. If prescriptions are to work as vehicles of respect, such cases have to be ruled out, by imposing additional conditions. One such condition is, I think, that meaningful options should be open to the addressee in case he acts as he is ordered to. (On the other hand, I have already hinted at a condition ruling out 'offers that cannot be refused'; more generally, if prescriptions are to work as vehicles of respect meaningful options have to be open in case of non-compliance.) Or, again, we should allow for the possibility that, in some circumstances, treating somebody as the addressee of a prescription (thus implying that he enjoys the dignity of a rational being) may be a peculiarly effective way of shaming him (thanks to Nicola Muffato for this point). It should also be noted that the utterance of sentences in the imperative mood—or, generally, sentences standardly used for issuing prescriptions—may simply trigger a conditioned reflex, or work through symbolic properties. Prescriptions, as discussed in the text (and as envisaged in ERoL) as the prime instrument of government, are an ideal communicative type.

[59] 'Neutrality' has no definite meaning. I have tried to set out relevant specifications of this—admittedly vague and generic—idea. They may also be understood, however, as different—though related—meanings of an equivocal term. (Thanks to Pierluigi Chiassoni and Frencesco Viola for

and meeting RoL desiderata may achieve neutrality as indifference (in the case of coordination problems proper) and neutrality as fairness (via reliability of mutual expectations, in the case of interaction problems and patterns of disagreement where conflict is serious). Further, laws meeting ERoL desiderata may achieve, via the inherent neutrality of prescriptions, neutrality as equal respect.

In ERoL, these two perspectives combine: the first connection combines with the second. Where the law satisfies ST and meets ERoL requirements, fairness and respect for persons are instantiated in the structure of the law. Or, in Raz's words, "observance of the rule of law is necessary if the law is to respect human dignity" (Raz 1977, p. 221).[60]

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ought to be neutral that are expressed by some of the RoL requirements themselves. So, e.g. the idea that laws should be general (as to their subjects and to the acts required), or the desideratum that their administration be entrusted to an impartial judiciary (thanks to Mauro Barberis, Paolo Comanducci and Riccardo Guastini for this).

[60]Reciprocity and fairness (as realized in the operation of laws as neutral interaction devices stabilizing mutual expectations; above, Sect. 9.4), too, involve—and express—respect for human beings as responsible agents, entitled to make autonomous choices. As noted by many, this is true of the RoL ideal as such. Cf. e.g. Fuller 1969, pp. 162–163; Finnis 1980, pp. 272–273; MacCormick 1985, p. 26; Marmor 2004, p. 21 (on prospectivity), 32 (on practicability); Waldron 2008a, p. 76 (thanks to conformity to the principles of legality—i.e., the requirements of the RoL—laws attain *both* "efficiency from the point of view of the ruler" (Hart's 'craft of poisoning' analogy; efficiency at making people do what the ruler wants them to do) *and* "efficiency for the subjects" ("the purpose of advancing not the ruler's own aims, but of making room in the ruler's calculations—*respectful* room—for the purposes of the individuals who live under his power", my emphasis)). It is worth here to quote at length Raz's statement of this point. According to Raz (1977, pp. 221–222) "observance of the rule of law is necessary if the law is to respect human dignity. Respecting human dignity entails treating humans as persons capable of planning and plotting their future. Thus, respecting people's dignity entails respecting their autonomy, their right to control their future". There are, Raz argues, two main ways in which disregard for the RoL "violates human dignity": by generating uncertainty and by frustrating expectations the law itself has encouraged (a kind of "entrapment": this expresses "disrespect", "disrespect for people's autonomy"). "A legal system which does in general observe the rule of law treats people as persons at least in the sense that it attempts to guide their behaviour through affecting the circumstances of their action. It thus presupposes that they are rational autonomous creatures and attempts to affect their actions and habits by affecting their deliberations". I have tried to make explicit various aspects of this, and have argued that laws satisfying ST and meeting ERoL requirements are more likely to display these features to a high degree.

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Chapter 10
On the Neutrality of Charter Reasoning

Wilfrid Waluchow

10.1 The Central Problem

Judicial review under a charter or bill of rights[1] is not an easy practice to justify in a liberal democracy, particularly one marked by the "fact of reasonable pluralism."[2] It appears to be an unavoidable feature of modern, liberal democracies that reasonable people of good will and integrity, faced with what John Rawls calls "the burdens of judgment," will continue to disagree fundamentally about moral and political matters, even after what looks like an exhaustive, good faith investigation of all relevant reasons and arguments.[3] Even if there is a truth of the matter with respect to the important questions of political morality that concern us in liberal democracies, to a very large extent, it seems, that truth is epistemically inaccessible to us. And if it's epistemically inaccessible to us, we have no way of discovering which, among the various reasonable answers offered to the questions posed, are

[1]Henceforth I will refer to this practice as "charter review." Charter review comes in a wide variety of forms, but for purposes of this paper, I will assume a form such as one finds in Canada and the United States. In these systems judges are empowered to strike down official government acts, most notably acts of congress or parliament if, in the best judgment of the court, such acts violate rights of political morality to which their charter and bill of rights (respectively) make reference. I have in mind rights to such things as "due process," "freedom of expression," "equality," "equal protection" and "fundamental justice."

[2]John Rawls, *Political Liberalism* (New York: Columbia University Press, 1996), 36. How one distinguishes reasonable from unreasonable views is, of course, an important, difficult and highly contentious issue. It's also one that I will leave unexplored in this paper.

[3]*Ibid.*, pp. 54–58.

W. Waluchow (✉)
Department of Philosophy, McMaster University,
1280 Main Street West, Hamilton, Ontario L8S 4K1, Canada
e-mail: Walucho@Mcmaster.ca