Law, the Rule of Law, and Trigger Laws

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INTRODUCTION

According to one prevalent narrative, the rule of law is a bloated, rhetorical concept, suited more for condemning what one does not like and applauding what one does, than for any precise theorizing or careful analysis.[1] It attracts enthusiasm in the abstract, but proves unhelpful for evaluating specific laws and institutions. Moreover, the wide scope of its abstract appeal can be dangerously imperial. It encourages one to treat values like human rights and democracy as mere appendages to a rule of law society,[2] or else, to reduce the rule of law to a

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1. *See* BRIAN Z. TAMANAHA, ON THE RULE OF LAW 3 (2004) ("In view of this rampant divergence of understandings, the rule of law is analogous to the notion of the "good," in the sense that everyone is for it, but have contrasting convictions about what it is."); Andrei Marmor, *The Ideal of the Rule of Law, in* A COMPANION TO PHILOSOPHY OF LAW AND LEGAL THEORY 666, 666–67 (Dennis Patterson ed., 2010) ("As soon as we begin to think about the rule of law as an overall normative ideal, some dangers lurk in the background. One obvious danger is to confuse the ideal of the rule of law with an ideal of the rule of good law."); Iain Stewart, *Men of Class: Aristotle, Montesquieu and Dicey on 'Separation of Powers' and 'The Rule of Law'*, 4 MACQUARIE L. J. 187, 189 (2004); Joseph Raz, *The Rule of Law and Its Virtue*, *in* ARGUING ABOUT LAW 181 (Aileen Kavanagh & John Oberdiek eds., 2009); Richard H. Fallon Jr., *"The Rule of Law" as a Concept in Constitutional Discourse*, 97 COLUM. L. REV. 1 (January 1997).

2. *See* David Kairys, *Searching for the Rule of Law*, 36 SUFFOLK U. L. REV. 307 (2003).

system of good, wise laws—one that realizes extrinsic, independently articulable values like democracy and human rights.[3]

Framing the problem this way suggests a natural solution. The right response to the conceptual extravagances of the rule of law, according to the going narrative, is to cut the concept free from the airy domain of values.[4] One should adopt a sober minimalism. The distinctive core of the rule of law should be salvaged from its excesses. And the core, in this narrative, almost always turns out to be a list of (mostly) formal properties of rules, akin to Fuller's list of rule of law principles—things like generality, clarity, and prospectivity.[5]

This narrative is plausible and venerable, but questionable. It assumes that a far-reaching and contested ideal should be pared down and replaced with a more determinate and normatively limited concept (why couldn't the ideal be vindicated in all its breadth?), and it further assumes that either democracy or the rule of law must reduce to the other (why couldn't they reinforce each other while remaining distinct?). If these assumptions are questioned, a different outlook on the rule of law emerges according to which the chief question is not about how to pare it down, but how to give a principled account of it, such that it is worth distinguishing from other ideals, notwithstanding its expansive, sometimes inchoate scope. After all, some ideals have sweep.

My project in this paper is to motivate this latter way of thinking about the rule of law and to show that the challenge it presents can be attractively met.[6] My goal will not be, at each step, to refute the narrative I started with above, but rather to substantiate a counternarrative that would treat the rule of law in a markedly different way.

To this end, the first step is to step back and note that the disagreement about the rule of law is just one manifestation of the even more fundamental disagreement about the essence of law. Is law a moral phenomenon—necessarily an activity with moral aspirations and constraints, or a tool to make certain things happen, hopefully for good, but just as possibly for bad?[7] Following "downstream" from this question, discussions about the rule of law are of a piece with, or perhaps encompass, ongoing disputes about the relative merits of rules and standards,[8] law and equity,[9] substantive due process and history, legislatures and courts,[10] and textualism and purposivism.[11]

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3. *See* Marmor, *supra* note 1, at 666.

4. *See* Andrei Marmor, *The Rule of Law and its Limits*, 23 L. & PHIL. 1 (2004).

5. *See* LON L. FULLER, THE MORALITY OF LAW 39 (rev. ed. 1969).

6. *See* Judith Schklar, *Political Theory and The Rule of Law*, *in* THE RULE OF LAW: IDEAL OF IDEOLOGY 1 (Allan C. Hutchinson & Patrick Monahan eds., 1987).

7. *See* Raz, *supra* note 1 at 181-192.

8. *See generally* F.A. HAYEK, THE ROAD TO SERFDOM (1944); Seana Shiffrin, *Inducing Moral Deliberation: On The Occasional Virtues of Fog*, 123 HARV. L. REV. 1214 (2010).

9. *See Grupo Mexicano de Desarrollo v. Alliance Bond Fund,* 527 U.S. 308 (1999); Lawrence Solum, *Equity and the Rule of Law*, *in* THE RULE OF LAW: NOMOS XXVI 120 (Ian Shapiro ed., 1994).

10. *See* Richard Fallon, *Judicial Supremacy, Departmentalism, and the Rule of Law in a Populist Age*, 96 TEX. L. REV. 487 (2018); Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175 (1989).

11. *See* Mark Greenberg, *The Standard Picture and Its Discontents, in* OXFORD STUDIES IN PHILOSOPHY OF LAW (Leslie Green & Brian Leiter eds., 2011).

If this is right, and the root of these rule of law controversies is a deeper one about the nature of law, then it may be methodologically fruitful to start with a theory of law, and then to develop a corresponding theory of the rule of law, and finally apply the theory to actual law. The main argument of this paper follows that course.

First, I briefly introduce positivist views of law in Section I.A. Then, in Section I.B, I briefly argue for, but mostly outline, a non-positivist view of law. According to this kind of theory, law is, by its very nature, constituted by morality. The specific theory I favor focuses on the way that law guides conduct by creating obligations. Whereas promises bind only the promisor, and orders bind only the recipient of the order by virtue of an asymmetrical relation of authority, law is created by a community and binds it as well.

Second, in Section II, I illustrate what the rule of law looks like according to this theory of law. I argue that the rule of law is, as some other commentators have claimed, that by virtue of which the law succeeds at its goal of moral improvement. Since the goal of the law is to create new moral obligations, the rule of law includes those practices that identify and circulate reasons for morally valuable obligations. These practices answer to what I call the *articulation principle*. According to this principle, a legal system must show its work by supporting and exhibiting the reasoning that different legal actors are obligated to undertake.

Finally, in Section III, I apply this theory of the rule of law to trigger laws—laws with legal content that is conditioned on that very content being found constitutional by the Supreme Court. I argue that these laws offend the rule of law by violating the articulation principle.

I. THE RELATIONSHIP BETWEEN LAW AND THE RULE OF LAW

What is the relationship between law and the rule of law? How this question is understood and answered is significant because of its implications for wider debates about the nature of law and the aims of a well-organized society.

A straightforward starting point for answering this question is the claim that law is more fundamental than the rule of law—that the rule of law depends in some way on the nature of law in virtue of being the latter's perfection or instantiation. This claim is plausible and well accepted, though not universally so.[12] Dissent notwithstanding, I will assume this answer is correct in what follows.

Still, even if this answer is correct, it is hardly complete. One wants to know *how* the rule of law depends on law. The possible responses to this more specific question, if one accepts the dependence, will further depend on how one conceives of law. This only makes sense: if the rule of law depends on law, then its

12. *See* Marmor, *The Ideal of the Rule of* Law, *supra* note 1 at 667 ("If you want to claim that it is good to be governed by law, you must first tell us what law is, and what makes a form of governance legal to begin with."); *see* JEREMY WALDRON, THOUGHTFULNESS AND THE RULE OF LAW (2023) (denying this claim).

nature will depend on the latter's. In what follows, I illustrate this point with respect to positivist and non-positivist theories of law.

A. Positivist Approaches to Law and the Rule of Law

One, and probably the most, influential approach to the nature of law treats it "positivistically," which is to say, as having only a "contingent and precarious connection" to values, whether moral or otherwise.[13] More precisely, legal positivism holds that legal facts—the existence and content of specific laws (e.g., drive 20 miles per hour in school zones), and the extant law contents collectively—obtain in virtue of non-normative facts, such as facts about practices and attitudes toward them, and not in virtue of any normative or evaluative facts such as what is right or good.[14] Mark Greenberg characterizes positivism as claiming that "the content of the law depends only on social facts, understood as a proper subset of descriptive facts."[15]

If one accepts that law has no necessary connection to value, then one faces an apparent challenge with respect to the rule of law, given that the rule of law is an ideal that pertains to law. What kind of ideal is the rule of law if the law itself is necessarily divorced from what is ideal? Joseph Raz provided an influential response to this challenge.[16] According to him, although law has no connection with value, the rule of law does, albeit in a limited way.[17] The rule of law is not valuable for society as such, such that society should choose to have it. Instead, the rule of law is a safeguard. It consists of the conditions under which law cannot easily be used for ill.

Raz emphasizes that the rule of law forestalls the abuse of law.[18] He writes that the rule of law "is designed to minimize the danger created by the law itself."[19] Its value is "negative" in that "conformity to it does not cause good except through avoiding evil and the evil which is avoided is evil which could only have been caused by the law itself."[20] Others follow this essential aspect of the view. Many also follow Raz in maintaining that none of the facts that make up law are moral facts.[21]

For example, Paul Gowder offers an account of the rule of law that "presupposes a positivist conception of what law is."[22] The rule of law, he claims, is valuable

13. David Plunkett, *Legal Positivism and the Moral Aim Thesis*, 33 OXFORD J. LEGAL STUD. 563 (2013); *see* Emad Atiq, *Law, the Rule of Law, and Goodness-Fixing Kinds, in* ENGAGING RAZ: THEMES IN NORMATIVE PHILOSOPHY (Kimberly Brownlee, David Enoch, and Andrei Marmor eds., 2025).

14. *See* Plunkett, *supra* note 13.

15. Mark Greenberg, *How Facts Make Law*, 10 LEGAL THEORY 157, 157 (2004).

16. *See* Raz, *supra* note 1; *see, e.g.*, Marmor, *supra* note 4 (citing Raz); Plunkett, *supra* note 13 (citing Raz); Paul Gowder, *The Rule of Law and Equality*, 32 L. & PHIL. 565 (2012) (citing Raz).

17. *See* Raz, *supra* note 1, at 188.

18. *See id.*

19. *Id.*

20. *Id.* at 188–89.

21. *See id.*

22. Gowder, *supra* note 16, at 570 ("the unique significance of state violence generates a unique principle, the rule of law, to guard against its abuse.").

because of how it institutes equality between officials and non-officials.[23] However, this equality is achieved only derivatively, by virtue of how the rule of law constrains officials from abusing their legal power to create objectionable hierarchies.[24]

Justice Robert Jackson took a similar position in *Railway Express Agency v. New York* in reference to the presumptive requirement that laws should be general.[25] He says that this requirement is a "kind of equality," but then immediately argues that the "framers of the Constitution knew . . . that there is no more effective practical guaranty against arbitrary and unreasonable government than to require that the principles of law which officials would impose upon a minority must be imposed generally."[26]

By forestalling abusive, i.e., unjust or immoral laws, the rule of law earns Raz's judgment that its value is "negative." This kind of value is shared, for example, with various kinds of safeguards. A technological example of something with negative value might be a tamper resistant opioid pill, which dissolves over time, so that it does not satiate an addiction. This makes it harder to use the pill to feed an addiction, while still allowing it to be prescribed as a pain killer. In this case, the anti-tamper technology prevents the pill from being used improperly, making it comparatively more attractive to prescribe.

A crucial question for Raz's view is thus whether the rule of law is valuable only negatively. Many invocations of the rule of law may seem to belie that claim.[27] They seem to be about the value of living under a system of law for its own sake. But we should be cautious about reading too much into them, because they can be explained in a way that is consistent with Raz's position. Perhaps calls for the rule of law are really just a pragmatic recognition that law is the most likely organizing feature for society, and hence that it would be better that it is not abused. But we can set this explanation to one side, by asking directly, as Emad Atiq does, whether the rule of law would be worthwhile in a society of angels.[28] It seems to him, and to me, that it would be, and since there is no risk that angelic law would be abused for personal gain or dominance, this intuition points to the value of the rule of law as such. It suggests that law is a part of an ideal, "angelic" society and not just a pragmatic response to living in a fallen one, where abuse and bad faith are possible.[29]

Andrei Marmor seeks to address this aspect of Raz's view by offering an alternative way of relating the rule of law to law. Whereas Raz argues that the rule of law heads off possible wrongful abuses of law, Marmor argues that it helps law do what it is supposed to do, which for Marmor is guiding action.[30] Though

23. *See id.* at 567.
24. *See id.*
25. *See* Railway Express Agency v. New York, 336 U.S. 106, 112 (1949).
26. *Id.*
27. *See generally* Waldron, *supra* note 12.
28. Atiq, *The Rule of Law, and Goodness-Fixing Kinds*, *supra* note 13, at 5.
29. Of course, one could deny this point and argue that an ideal world is one in which law is unnecessary. Marmor, *supra* note 1, at 15.
30. Marmor, *supra* note 4, at 5.

Marmor never explains what kind of action guidance he has in mind, it's evident from his discussion that he means something like "making a certain action more likely to happen," or "making an action comparatively more reasonable for the actor to do."

The terminology of function and virtue can make Marmor's view especially clear.[31] A virtue of something is that which makes it effective at performing its function. So, the sharpness of a particular knife is what makes it effective at performing the function that it has: cutting. Various other ways of talking about the same ideas are prevalent in ordinary language. For instance, we might say that a knife is *for* cutting. We might also say that what makes something good as a knife is that it cuts well, whatever other things it may be good at, such as prying things open.[32]

Marmor posits that the (or at least one) function of law—what cutting is to a knife—is the guidance of conduct.[33] Guiding conduct is what it is for. The rule of law, he then argues, is the virtue of law—what sharpness is to a knife. The rule of law principles delineate conditions under which law is likely to succeed at guiding conduct. Marmor makes this clear by enumerating the various rule of law tenets, like generality and clarity, and illustrating how they support law in guiding conduct.[34]

If Marmor stopped at this point, contending only that the law's function was to guide conduct and that the rule of law is what ensures that law achieves that function, there would be a significant problem. The problem is that his view does not do any better than Raz's at capturing the apparent value of the rule of law. Being successful at guiding conduct is not necessarily, morally speaking, a good thing.

For illustration of this point, take the corresponding claim about knives. Sharpness makes knives cut well, but cutting well is morally indifferent. It can be put to good or bad purposes, but it is not something that is morally important to be realized, like patience or justice. The parallel point holds for Marmor's view as I've described it so far. His view shows why the rule of law makes law good as law, but why is that worth having? A sharp knife is good as a knife, but it's only situationally useful, such as if one needs to cut something. If law that is good as law is, similarly, situationally good, then it is not something important to aim for in itself. Thus, there is still the lingering question: is the rule of law worth seeking for any reason more substantial and less situational than that it will make law effective as the tool it is?[35]

To address this question, Marmor supplements his argument. He argues that when the rule of law is satisfied—and so when law is successfully performing its function of guiding conduct—it will necessarily be true that it realizes other

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31. Atiq, *The Rule of Law, and Goodness-Fixing Kinds*, *supra* note 13, at 1.

32. Emad Atiq emphasizes this kind-relative way of talking. *See id.*; EMAD ATIQ, CONTEMPORARY NON-POSITIVISM (George Pavlakos, *et al*. eds., 2025).

33. Marmor, *supra* note 4, at 4.

34. *See id.* at 5–7.

35. *See id.* at 2–3.

morally important values.[36] The realization of these values will in turn make it worthwhile, all things considered, to institute the rule of law. Therefore, the rule of law is, on Marmor's account, worth pursuing after all.[37]

One difficulty with this proposal is that the necessary connection between guiding conduct and the morally important values Marmor identifies is doubtful. Guiding conduct could be successfully accomplished without at least some of what are, intuitively at least, rule of law principles. For instance, Emad Atiq questions whether general laws are truly needed to guide conduct. In principle, individualized orders seem to be able to guide conduct just as well, but they would sacrifice the (seemingly moral) rule of law principle of generality.[38]

Marmor seems to agree with this criticism at points, though he does so most explicitly in the context of the publicity principle rather than the generality principle.[39] He writes that "[f]rom a purely functional perspective, many laws need not be made entirely public. To the extent that we have reasons to require a wider promulgation of the law, those reasons must be derived from other, non-functional values."[40] Here, it seems that the relatively moderate publicity needed to guide conduct doesn't measure up to the more robust publicity principle that is intuitively a part of the rule of law and part of what makes it attractive as an ideal.

A second issue is more important for my purposes. It concerns the form of Marmor's argument. He shows that when law is effective at guiding conduct, it will have follow-on moral benefits: "the features that law must have in order to function as law are such that they also tend to promote certain things that we value."[41] But this claim should be distinguished from the nearby claim that law aims to guide conduct in a way that is itself morally important. For Marmor, whether law guides citizens toward good or bad conduct is immaterial to its value, because its value lives in the follow-on effects of it being effective at guiding conduct. This is a strikingly indirect vindication of the rule of law. In itself, according to Marmor, the rule of law is just as valuable as a sharp knife; it just so happens that by doing its morally unimportant task, the rule of law also performs a morally valuable one, and we seek it out for that second reason. We "sharpen" law not because guiding action well is itself worthwhile, but because when law guides action, we secure other benefits.

The point of the preceding discussion is to illustrate how a non-positivist conception of law has consequences for how one can theorize the rule of law. For Raz and Marmor, law has the formal aim of guiding conduct, whether good or bad. If law works like this, then the rule of law will necessarily be a qualified ideal. For Raz, the rule of law is an ideal that is qualified in virtue of having only

36. *See also* Colleen Murphy, *Lon Fuller and the Moral Value of the Rule of Law*, 24 L. & PHIL. 239 (2005) (arguing that the rule of law has more than negative value).

37. *See* Marmor, *supra* note 1, at 15.

38. Atiq, *supra* note 13, at 11.

39. Though he also seems to agree with Atiq regarding the generality principle.

40. Marmor, *supra* note 4, at 19.

41. Marmor, *supra* note 1, at 7.

a negative value. The rule of law is not an ideal to aim for, but rather, an ideal of minimizing the damage that law itself can do, given that it is open, by its nature, to being used for abuse. Likewise, for Marmor, the rule of law is a qualified ideal. It is not a way of minimizing the damage that law can do if it is used to guide citizens toward bad conduct, but rather a way of ensuring that law can guide conduct well, regardless of the conduct selected. But guiding conduct well is not fundamentally valuable, which is why Marmor adds that in guiding conduct well, some other moral benefits are realized too.

In the next section, I will offer a contrasting picture according to which law is necessarily connected to guiding conduct toward what is morally required. This in turn opens up a different way of understanding the rule of law, not as valuable in a qualified way, but rather in an unqualified way, such that it is worth seeking in itself.

B. Non-Positivist Approaches to Law and the Rule of Law

A different set of theorists reject the positivist claim that law is exclusively constituted by non-normative facts. These theorists, known as non-positivists, hold instead that legal facts are partly constituted by normative facts. On their position, accepting the dependency of the rule of law on law will have different consequences than for positivists such as Marmor and Raz. My goal in this section will be to illustrate those consequences, and so to develop a non-positivist theory of the rule of law. Since my goal is to develop that position rather than to refute positivism, I will not argue at length that non-positivism is correct or superior. Instead, I will briefly discuss the work of Mark Greenberg to illustrate the viability of non-positivism generally and to explain his worked-out version of that position. Finally, I will show how this position can yield a distinctive theory of the rule of the law.

Greenberg argues in favor of non-positivism across several papers, most foundationally, in *How Facts Make Law*.[42] There, he introduces and defends the following premise: legal facts (e.g., one has to use reasonable care while driving) are rationally determined by law practices—the "nonnormative . . . contingent" facts about what people like legislators, judges, and other officials said and did.[43] By claiming that the one rationally determines the other, he means to point out that how law practices affect law is something that can be reasoned about. For example, the effect that a statute has on the law, is not arbitrary, or brute.[44] Rather, the effect of, say, a statute, is something that one can correctly reason to, by applying the correct model of how law practices—who said and did what (e.g., these people, voted for this bill, with this content)—result in changes to the law, such as by creating new legal obligations.

42. *See* Greenberg, *supra* note 15.
43. *Id.* at 157.
44. *See id.* at 164.

Greenberg then argues that the correct model cannot be determined by the law or by law practices. The law cannot determine which model (of how law practices determine law) is correct, because this would be circular, "for the . . . law depends on which model is correct."[45] Moreover, one cannot appeal to law practices to determine which model is correct, because one must have a way to identify which practices are the relevant practices, and practices cannot determine their own significance. Greenberg writes that, "practices cannot determine legal content without standards independent of the practices that determine which differences are relevant and irrelevant."[46] If neither law nor law practices can determine which model of how law practices make law is correct, then a plausible conclusion to draw is that some other, third order of fact does, and normative facts are a plausible candidate for this job. Hence, non-positivism is correspondingly plausible: law is constituted partly by normative facts in combination with law practices.

If one accepts this conclusion, then one will want to know how exactly this works. How are legal facts constituted by normative facts? Greenberg has a distinctive answer, which he calls the Moral Impact Theory.[47] According to it, legal facts are not the normative principles that best justify law practices (and the principles' entailments), but rather, the normative consequences of the law practices. The difference, put very roughly, is that Dworkin's view treats law as "upstream" of law practices—law is what best justifies the practices, whereas Greenberg's view treats law as "downstream" of law practices—law consists in those moral obligations that are traceable to these practices.[48]

In refining this rough characterization, I will limit my discussion, as Greenberg does, to that part of the law that concerns obligations.[49] With that limitation in mind, the Moral Impact Theory can be more precisely stated like this: legal obligations are those moral obligations that have been brought about, in the right way, by law practices.[50]

Here's an example that illustrates this idea. Imagine a statute that is passed in the ordinary way. One bit of text in the statute states "X is obligatory." According to the Moral Impact Theory, the fact that the statutory text says that "X is obligatory" does not, itself, succeed in making X a legal obligation.[51] Rather, whether this bit of text succeeds in creating a legal obligation turns on whether the law

45. *Id.* at 179.

46. *Id.* at 181.

47. *See* Mark Greenberg, *Moral Impact Theory*, 123 YALE L. J. 1288 (2014).

48. *Id.* at 1301.

49. *See id.* at 1308.

50. Greenberg's official term is "the actions of legal institutions," but he uses "legal practices" or practices as well. I think the differences, if there are any, are immaterial to my explanation of the view. *See id.* at 1305–1306.

51. Greenberg calls the view that the text of, say, statutes, constitutes the law, the "Standard Picture." *Id.* at 1296; *see also* Mark Greenberg, *The Standard Picture and its Discontents*, *in* 1 OXFORD STUDIES IN THE PHIL. OF LAW 39 (Leslie Green, and Brian Leiter eds., 2010).

practices that constitute the passage of this statute, along with this text, creates or gives rise to, a moral obligation in favor of X.[52]

So, if X is morally odious, then the statute will not create a legal obligation in favor of X, because it will not succeed in making X morally obligatory. The statute does not (could not, given the odiousness of X) have the right "moral impact" and so does not create a legal obligation. Note though that just because morally odious obligations cannot be legal obligations does not mean that all morally important obligations are automatically legal obligations, as a natural law theory might say. After all, many moral obligations do not arise from law practices.

A second example will help further illustrate the Moral Impact Theory. Imagine the same statute, except X is not morally odious. Rather, X is something that is permissible in itself (i.e., giving money to fund a public program). Moreover, there being an obligation to X would be a moral improvement, though not morally optimal (a different configuration of obligations that excluded X would be, from a moral perspective, even better). In this case, the statute might, despite the non-optimality of X, succeed in making X obligatory, in virtue of the fact that a regular democratic procedure that results in the declaration that some non-odious course of action is obligatory can make X morally obligatory. This is parallel in structure to the way promises work.[53] If someone, not under duress and in the right kind of situation, declares that they will do something that is not morally odious (but not morally optimal), then they thereby create a promissory obligation to do it. The parallel is this: just as promissory obligations can be created by the right procedures in the right circumstances (even if they are not morally optimal),[54] so too can other, not necessarily optimal, moral obligations be created by the right law practices in the right circumstances.

This is not to say that all statutes passed by regular majoritarian procedure automatically create moral obligations or that there is a standing requirement to obey the law.[55] More the opposite: which legal obligations are created by law practices is a case-by-case matter that turns on how circumstances are changed by law practices. The effect of a statute on legal obligations is not automatic, or to be read off from its text. Rather, the nature of the legal obligations that result from the

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52. *See id.* at 1342. "On the Moral Impact Theory, the legislative enactment of a statute may often have roughly the net effect of adding to the content of the law a norm that is more or less captured by the linguistic content of the legislation ["X is obligatory"]. But, when it does so, the explanation will be that the enactment of the statute changed the relevant circumstances, thus changing what people are morally required or permitted to do—not that the legal norm obtains simply because it was authoritatively pronounced."

53. *See* SCOTT HERSHOVITZ, LAW IS A MORAL PRACTICE 18–20 (2023) (using promises as a way of understanding the relationship between law and morality).

54. *See id.* at 36.

55. It is not that a legislature or court pronounces a norm, which thereby becomes a valid legal norm, and, because of moral reasons for obeying the law, ultimately gives rise to a genuine (moral) obligation. The order of explanation between the legal obligations and the moral obligations is reversed in my account: the legislature votes or the court decides a case, thus possibly creating genuine obligations through the kinds of mechanisms I have been illustrating. Those genuine obligations then are legal obligations.

statute is a matter of what moral obligations result from its passage, if any. This is not necessarily a skeptical point. For many advanced legal systems, things are arguably such that ordinary procedures largely succeed in generating the legal obligations that they purport to generate.

A final point concerns the limitation of legal obligations to those moral obligations that are created by the law practices in the "right way." This limitation is designed to address the fact that law practices may create moral obligations in a deviant fashion. For example, a statute that declares "X is obligatory" where X is morally odious does not succeed in creating a moral obligation in favor of X, but it arguably succeeds in creating a moral obligation in favor of repealing the statute. Nonetheless, the obligation to repeal the statue should not be considered a legal obligation, though it is perhaps a political one. "In the right way" is meant to rule out moral obligations that result from law practices in a "deviant" fashion—as a countervailing obligation to address or reverse the law practices.

We are now in a position to take stock. According to the Moral Impact Theory, what legal obligations follow from law practices "involves straightforward moral reasoning about the moral consequences of various facts and circumstances."[56] Law aims to bring about beneficial changes in moral obligations.[57] Law practices may not succeed at this aim, but when they do, the resulting moral obligations are legal obligations. Hence, on the Moral Impact Theory, being a legal obligation is an approbation. Such an obligation is necessarily a beneficial moral obligation that resulted from the law practices of the society in the right kind of way.

More broadly then, law is artificial morality, but not artificial in the sense of "fake" or "not genuine"—legal obligations are genuine moral obligations, but rather in the sense of "created." Law consists of the beneficial moral obligations that communities create for themselves by changing circumstances in ways that implicate underlying, more fundamental moral obligations. For instance, creating a tax system can change the circumstances of citizens who would otherwise have an insuperably indeterminate obligation to make certain goods widely available, such that their compliance in the system becomes morally obligatory.[58]

So far, I have motivated non-positivism about law and identified a defensible specification of that commitment—Greenberg's Moral Impact Theory. I now turn to the question of how we should understand the rule of law, if we understand law as the Moral Impact Theory does.

My answer, in brief, is that the rule of law is the epistemological complement to the metaphysical nature of law, as put forward by the Moral Impact Theory. It

56. Greenberg, *Moral Impact Theory*, *supra* note 47, at 1302.

57. A statute that says "X is obligatory" aims to create a moral obligation in favor of X.

58. *See* Greenberg, *Moral Impact Theory*, *supra* note 47, at 1341. Consider again the example of the tax scheme. There is a pre-existing problem, and, consequently, important moral reasons to help to solve it. But those pre-existing moral reasons do not determinately and clearly support one particular solution. The legal system is able to channel the pre-existing moral reasons toward a particular solution. The legal system's action of publishing a particular scheme, setting up implementing mechanisms, and making others' participation likely changes the morally relevant circumstances." *See also id*. at 1314.

consists in the conditions under which a society collectively understands the moral changes its law practices have made, and hence the resulting legal obligations, both what they are and why they obtain. This understanding is valuable because it makes it possible for citizens to follow the law in a distinctly valuable, non-alienated way; namely, by following it on the basis of their correct judgment that it is worth following.

To expand on this summary, recall that according to the Moral Impact Theory, law guides action morally. Legal requirements are, necessarily, morally obligatory. Moreover, they are necessarily, at least in principle, possible for citizens to work out, from the law practices. However, the in-principle possibility of working out one's legal obligations is compatible with that task being, in fact, difficult and controversial. After all, citizens often lack knowledge of law practices, as well as training in how to infer the legal obligations that they create. Still further, there is often great disagreement about the law even among those who are highly trained in that task. Judges and lawyers frequently disagree about the law. This is, according to the Moral Impact Theory, because moral reasoning is notoriously controversial.

The difficulty and controversy of working out what is legally required makes necessary an ongoing social process of reasoning about what legal obligations there are. This process includes, to give one example, the reasoning of judges who must say what the law is and to provide the reasons why.[59]

Robustly fostering this process of reasoning is the province of the rule of law, so that ordinary citizens can better understand their legal obligations and the reasons that give rise to them. Fostering this process is valuable because it constitutes a distinctive way of guiding citizens toward satisfying their moral obligations; namely, by engaging their participation in the identification and understanding of the same.

The result is that the rule of law is a part of enacting a community of moral understanding or engaging in a project of moral consensus building, in which citizens can value the law of the community for the right reasons, with some confidence that they are doing so in concert with others. A rule of law community is thus not just one in which citizens know and care about the law, but one in which they do so with the further awareness that they are working with others on that project, collectively.[60]

Of course, a community of moral understanding is an abstraction. In the real world, courts and other officials routinely make mistakes about which legal obligations obtain and why. But when their declarations are false, in what sense are they valuable? The answer lies in the nature of understanding, which can be pursued through mistakes, since mistakes are ways of learning. Stating one's conclusions and the reasons for them promotes understanding, even when one's conclusions and reasoning are erroneous. This is because mistaken reasoning and erroneous conclusions can be waypoints on the path to the truth. The common law is often said to work this way, through a process of trial and error, out of

59. *See generally* Ruth Bader Ginsburg, *The Obligation to Reason Why*, 37 FLA. L. REV. 205 (1985).
60. *See generally* SEANA VALENTINE SHIFFRIN, DEMOCRATIC LAW (2021).

which better reasoning evolves over time. Circuit splits are another legal example. They frame the debate more clearly for the legal community, leading to better evaluation by subsequent courts.

The point is not that the rule of law is fundamentally valuable because it will necessarily produce a system of substantively good law, as some critics charge. It may not produce such a system. Rather, it is valuable because it aims, in virtue of supporting reasoning about law, to make a system of substantively just law effective in a community through the community's reasoning. It is constitutive of that value, even when it goes astray in particular cases or holdings.[61]

Restated more concretely: the rule of law still realizes its value even if the society has unjust laws, so long as its law are the focus of widespread restatement and interrogation. Such a society is committed to reaching good laws by openly reasoning about law, rather than hitting on them by luck or through the teachings of an enlightened dictator. To be sure, a community with substantively unjust laws is flawed—the laws should be reformed. But if the community realizes the value of the rule of law, it is seeking better laws through reasoning, and that's worthwhile by itself.

I will close by comparing the rule of law theory I've put forward with Marmor's. Recall that Marmor sees the rule of law as being constituted by a set of principles that govern legal rules. Such rules must be general, public, prospective, clear, non-contradictory, not impossible to comply with, stable, and consistently applied. Whether the theory of the rule of law I have adopted is consistent with every member of this set would require investigation. But note that many readily follow from what I have argued. Unclear, impossible, secret and contradictory laws cannot be satisfied out of understanding, and neither can retroactive laws.

A second point of comparison concerns the value of the rule of law. Marmor thinks the rule of law is limited to how the law can guide conduct, whereas I claim that the rule of law is a commitment to guiding conduct through the appreciation of the conduct's moral credentials. The difference is that the rule of law, on my view, is not merely incidentally valuable—that is, valuable only indirectly, in virtue of making law more successful at guiding conduct. Instead, the rule of a law is valuable because it constitutively supports the guidance of conduct through (legal) reasons.

II. ARTICULATION OF LAW AS A RULE OF LAW PRINCIPLE

This section expands on the arguments that the law is for creating a community of moral understanding and that the rule of law is valuable because of the constitutive role it plays in realizing that ideal. I argue that the rule of law requires not just that law be clear, prospective, public, and so on, but also articulated. I call this requirement the *articulation principle*.

To articulate something is to give it perspicacious expression or emphasis, such as by illustrating its parts or structure. Consistent with this usage, the articulation principle requires that the organization and actions of the legal system be

61. *See* Jeremy Waldron, *Self-Application*, (NYU Law, Working Paper No. 16-46, 2016).

legible, accessible, and amenable to critical appraisal by those who sustain it and interact with it. When a legal system conforms to the articulation principle, it is a readily comprehensible object of common knowledge for community members. It is ready for those who live under it to internalize it and its reasons and rationales, as well as to interrogate them.

The articulation principle as I have characterized it draws support from the research of Jeremy Waldron's work on the rule of law, which emphasizes due process and the relationship of the law to thinking and giving reasons.[62] Waldron addresses my subject directly, in a discussion of what he too calls articulated governance. It's worth quoting at length, as an eloquent illustration of my subject.

> We begin with an action or type of action that it is envisaged the state may want to perform. We propose and deliberate upon the contours of that action as a matter of general policy and the formulation of authorizing norms. The representatives of the people settle, deliberatively, on a clear set of formulations and then vote. Those formulated and authorized norms are then communicated both to the people (individuals and firms) and to the agencies that will be responsible for their administration. The people (and firms) have time to take the norms on board, internalize them, and organize the conduct of their lives and business, while the agencies begin the process of weaving these norms into the broader fabric of their supervision of various aspects of social life and begin developing strategies for (as it might be) inspection and enforcement. In these ways, the norms embodying the original policy have time to "settle in" and become a basis on which people can order their expectations. And then various disputes or allegations of violations may arise. The agencies responsible for the norms may initiate an action—a prosecution or something of the sort. If the matter is not resolved, it will go before the court, where the issue of compliance will be argued out, not just factually, but in terms of how the norms that were communicated to the people are to be understood and how it is to be related to the rest of the law. After a hearing, there will be a determination, and if necessary further enforcement of, or supervision of compliance with, whatever order the court makes. . . Each of those elements embodies concerns about liberty, dignity, and respect that the rule of law represents. They offer multiple points of access, participation, and internalization . . . The legislature, the judiciary, and the executive—each must have its separate say before power impacts on the individual.[63]

I will make my (and Waldron's) remarks more concrete by discussing at least three things that the articulation principle requires: differentiation, separation, and reason-giving.

The articulation principle requires differentiation in the sense of distinguishing various activities of the legal system, so that they are not "run together into a

62. *See* WALDRON, *supra* note 12.

63. Jeremy Waldron, *Separation of Powers in Thought and Practice*, 54 B.C. L. REV. 433, 457–59 (2013).

single gestalt."[64] Notice that differentiating legal activity is a pervasive feature of legal thinking throughout history. Plato thought that justice and, thereby, a just state both shared a unified, tripartite structure.[65] In England, Chancellors were understood to represent that part of the King's justice identified as his conscience.

Today, it is usually thought that legal activity should be distinguished into the judicial, legislative, and executive, and this division is plausible. There are likely sub-differentiations within these categories, as the judicial function involves saying what the law is, finding facts, and issuing remedies. The legislative power may involve creating regulatory bodies with rule-making power, but also legislating, or even censuring. My point is not that these distinctions are universally sound, plausible as they are. It is only that differentiation, however it is best achieved, is a matter of drawing these kinds of distinctions.

In some cases, the differentiation required by the articulation principle can be accomplished nominally, without any corresponding division in authority or institutional form. For instance, a judge who imagines and perhaps represents herself as moving between law and equity may sufficiently differentiate those two roles.[66] A judge in a bench trial might do the same thing with the role of factfinder as well as judge. In the same vein, Congress may act in a "judicial" capacity during an impeachment proceeding and legislatively at other times, without much confusion as to which role it is playing.

In other settings though, the differentiation of legal activities should, ideally, be instituted with a corresponding separation, understood as the granting of an independent existence and authority to institutions tasked with different legal responsibilities. The reason is not the negative value that is often supposed for that ideal—that the only way to check the grasping impulses of officials is to set them against each other.[67] Rather, the articulation of law may warrant a separation of powers because of the latter's ability to clarify ambits of authority and responsibility; encourage expertise, as well as identification and investment with a role; and cement the impression and actuality of evenhandedness, so that a legal actor is not the "judge" in its own case.[68]

Examples are legion. The U.S. Constitution differentiates the legislative, executive, and judicial branches (and the people) as well as providing for their independent existence and authority through things like the political question doctrine.[69] There are sub-separations too, down to an almost capillary level. Congress is separated into two chambers, and those chambers into committees.

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64. *Id.* at 457.

65. *See generally* PLATO, REPUBLIC (Alexander Kerr ed., 1918).

66. Samuel L. Bray & Paul B. Miller, *Getting into Equity*, 97 NOTRE DAME L. REV. 1763, 1794 (May 2022).

67. *See, e.g.,* THE FEDERALIST NO. 51, at 347–353 (James Madison) (J. E. Cooke ed., 1961).

68. W. B. GWYN, THE MEANING OF THE SEPARATION OF POWERS 6–7 (1965).

69. *See generally* Steven G. Calabresi & Joan L. Larsen, *One Person One Office: Separation of Powers or Separation of Personnel*, 79 CORNELL L. REV. 1045 (1993–1994); M. Elizabeth Magill, *The Real Separation in Separation of Powers Law*, 86 VA. L. REV. 1127 (2000).

Trial courts are separate from appellate courts. Even juries have a chairperson with their own office. I don't wish to give the impression that more separation is always better, but only that it often it is, by virtue of how it promotes institutional clarity and allegiance, division of responsibility, and deliberateness of process.

A further rationale for the separation of powers starts to push toward the giving of reasons. It is that separation de-personalizes or, better, de-privatizes legal judgment. I do not mean, by this, that separation of powers permits the law to "eliminate the human element in decision-making," and hence to "free ourselves from ourselves."[70] To the contrary, I think that the judgment that legal actors are called to exercise is inevitable and desirable.

What I mean by saying that law de-privatizes legal judgment is that it disciplines decision-making through the imperatives of intersubjectivity and cooperation. Separated legal actors must work together, which means that they must communicate their view of how the law works, their own authority, and the obligations of other actors. These acts of communication develop the law into a public object, much as trying to articulate one's thoughts in words turns one's attention, imaginatively, to the perspectives of others. This articulation can change one's perspective on a subject, but even when it does not, it inevitably and necessarily erodes idiosyncrasy, so that one person's idea can be better taken by another. Making one's thoughts and feelings known to another is difficult and requires skill.[71] We can't read each other's minds, and hence making ourselves understood takes work.

Separating legal activities and actors fuels the articulation of law by requiring that institutional actors voice their sincere views on the law—as in judicial opinions. This makes the law less a product of any one institution or actor and more a product of them all, triangulating in on an equilibrium understanding of how it works. Publicity is not just a requisite for the rule of law, but also for what the rule of law ideally achieves. Formal publicity—things like open courts and legislative sessions and recorded opinions and statutes—paves the way, ideally, to a more substantive publicity, understood as a public consciousness of what the law is and why it is.

Sometimes communicative cooperation can take place by the declaration of conclusions alone. A judge may summarily affirm, a grand jury may simply say whether a crime has been committed, a petit jury may deliver a simple verdict, and the President may order an attack by the military. Still, cooperation at a deep level requires more than just the communication of what one thinks. It also requires communicating why one thinks it. This requirement is of course different depending on the kind of decision that one is called on to make. Congress need not give reasons in the same way as the Supreme Court. Still, the ongoing dialogue between branches, and between sub-branches (think of precedent as the form of dialogue that obtains between courts), as to why the law is what it is helps

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70. Kairys, *supra* note 2, at 319.

71. Joe Moran, *You Are Not an Angel*, 21 INT'L J. PRAC. & THEORY OF CREATIVE WRITING 380, 381–382 (2024).

to solidify its moral vision, submit it for continual contestation, and clarify how it should be applied and reformed. Reason-giving then is how various parts of an articulated legal system articulate themselves, to each other and to citizens, in the course of creating a rich stock of public perspectives on the community's commitments.

I will end this section by relating the discussion so far to the slogan that it is desirable to have a "government of laws and not of men."[72] This is a rule of law aspiration, but is it an appropriate datum for theorizing, or mere rhetoric? Plenty have concluded that it is the latter.[73] After all, a government of laws must be, at root, a government of people too.

The proper response is to treat the aphorism with more charity. It need not mean that government must be devoid of people, but only that there is a distinction between a well-organized system of law, administered by people, and one that permits persons as such to wield power—a government of people only. Indeed, the aphorism mostly comes to the fore, not when people are involved with government—as they necessarily must be, but when power is concentrated in the hands of particular individuals rather than in offices or stations given legal personhood through the rights and obligations that constitute them. The problem with such concentration is between lawmaking power that is integrated within a wider legal system, and unaccountable power wielded by particular individuals.

The story I told in this section would explain this, not just because concentrated power can be abused, but also because it is "privatized." When a police officer acts as "judge, jury, and executioner,"[74] or a chancellor exercises too much discretion, or a vigilante takes the law into their own hands,[75] or when a king is the judiciary, legislator, and executive, the legal activities that would ordinarily take place among various actors through communication and process are collapsed into the mind of a single person. What should be articulated and intersubjective becomes undifferentiated and subjective. The exercise of different legal authorities becomes blurred, communication is stunted, and reason giving becomes a sham, because the party giving them and receiving them are the same.

III. APPLYING THE ARTICULATION PRINCIPLE: TRIGGER LAWS

The main question of this section is: do trigger laws offend against the rule of law? To answer this question, we need an adequate characterization of trigger laws. The term itself—trigger *law*(s)—suggests a genus whose species consists of different kinds of laws with a triggering structure, i.e., that there might be trigger statutes, trigger regulations, trigger common law rules, trigger holdings, and

72. I'll say "people" instead of men in what follows.
73. *See* Raz *supra* note 1, at 182–183; Marmor, *supra* note 4, at 2–3.
74. Gowder, *supra* note 22, at 593.
75. *See* this symposium.

so forth.[76] And while it might be worthwhile to explore the coherence and extension of this genus, the use of the term by commentators suggests a fairly narrow and specific meaning; namely, a piece of legislation that includes content that is applicable only conditionally, where the condition is some other legal activity, such as a judicial ruling. This is the kind of trigger law I am interested in: legislation with a "juridical condition precedent."[77]

This characterization still leaves a lot open. It encompasses state and federal legislation with triggers consisting of a diverse range of federal and state court actions. So, to narrow my subject still further, I will focus on the most prominent and apparently paradigm species of trigger law: a state statute that is triggered by the U.S. Supreme Court holding that the statute is constitutional. This class of trigger laws is exemplified by state abortion prohibitions that are triggered by the Supreme Court's reversal of *Roe v. Wade* in *Dobbs v. Jackson Women's Health Organization*.

For example, Louisiana's Human Life Protection Act prohibits "causing or abetting the termination of the life of an unborn human being," but crucially, this language was conditional on either "any decision of the United States Supreme Court which reverses, in whole or in part, *Roe v. Wade*" or adoption of an amendment to the United States Constitution which, in whole in part, "restores to the state of Louisiana the authority to prohibit abortion."[78] Several other states have similar provisions.[79]

One other brief clarification. I will distinguish the trigger of legislation from its triggered content. In the Louisiana abortion statute discussed above, the trigger is the reversal of *Roe v. Wade* and the triggered content is the prohibition on abortions.

With these clarifications, we can return to my main question: do trigger laws offend against the rule of law? Commentators claim that they do.[80] However, I am not fully convinced by their arguments. I outline my reservations in the next section, as a prelude to using the articulation principle to offer a different line of criticism.

A. *Current Criticisms*

In this section, I critically evaluate some rule of law arguments against trigger laws. One general reason for dissatisfaction is that many of these arguments depend on analogizing trigger laws to some other kind of law, e.g., sunset laws,

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76. An interesting question is whether there is such a thing as a "trigger opinion" or "trigger case law." I'm inclined to think that the nature of judicial power would foreclose that possibility, but I don't insist on that conclusion. *See* Margaret H. Lemos, *Should Judicial Opinions Be Read Like Statutes?* (Duke Univ. Sch. of Law, Working Paper No. 2024-51, 2024).

77. *Id.* at 101.

78. William Aceves, *The Problem with Dobbs and the Rule of Legality*, 111 GEO. L. J. ONLINE 75, 91 (2022).

79. *See id.* at 93.

80. *See id.*; Nora Greene, *Denouncing the Revival of Pre-*Roe v. Wade *Abortion Bans in a Post-*Dobbs *World Through the Void Ab Initio and Presumption of Validity Doctrines*, 30 AM. U. J. GENDER SOC. POL'Y & L. 343 (2022).

entrenched laws, "revived" or zombie laws, or laws that have fallen into desuetude.[81] Not only are these analogies imperfect in crucial respects, but, even if they were beyond doubt, they would not succeed in showing that trigger laws are distinctly objectionable. It seems that unease about trigger laws has something to do with their defining structure, as involving a judicial condition precedent. Analogies to laws that do not have this structure do not isolate what, if anything, is distinctly worrisome about trigger laws.

One argument that does not operate by analogy appeals to the separation of powers. One version of this argument holds that trigger laws violate separation of powers by objectionably delegating legislative power to the judiciary. According to William Aceves, a trigger law would empower the Supreme Court to decide "if, when, and even how" such a law would go into effect.[82]

But the criticism in this claim is hard to make out, whether put in conceptual or constitutional terms. Conceptually speaking, it does not seem that trigger laws delegate any legislative power to courts or violate the separation of powers. It's true that a trigger law of the kind I specified above only comes into effect "if" and "when" the Supreme Court fulfills its triggers, but the Supreme Court action that fulfills the trigger is not legislative, but rather an ordinary exercise of judicial power.

To see this, compare the Louisiana abortion law I discussed above to the Rules Enabling Act.[83] This latter statute permits the Supreme Court to create procedural rules for federal courts.[84] Under this statute, the Supreme Court can legislate, in the sense that it can make rules about something directly, rather than creating rules by virtue of deciding a "case or controversy." But a trigger law does not permit the Supreme Court to create rules about abortion directly. Rather, it conditions content that a state legislature has drafted on an action that the Supreme Court is uncontroversially empowered to take; namely, overruling a past decision when confronted with a controversy that warrants doing so. So, while it is true that trigger laws are triggered if and when the Supreme Court acts, they do not thereby give the Supreme Court the power to write laws or to decide, directly, whether to implement them.

Aceves and others also raise separation of powers concerns about trigger laws in terms of constitutional doctrine.[85] But the weakness of arguing this way is that it does not address the fundamental question of whether trigger laws are thereby violations of separation of powers understood as a normatively desirable rule of law principle. This is because constitutional law may or may not align with rule of law principles. It's possible that the rule of law, again, understood as a concept

81. *Id.*
82. Aceves, *supra* note 78, at 94.
83. *See* 28 U.S.C. § 2072(a).
84. *See id.*
85. Aceves, *supra* note 78 at 83–88; *see* Greene, *supra* note 80.

or a normative ideal, permits trigger laws even if the Constitution does not, and vice versa.

My arguments just above about how trigger laws do not delegate legislative power provide a way to distinguish constitutional precedents about the separation of powers and non-delegation. Take, for example, *INS v. Chadha*.[86] In that case, Congress statutorily delegated some of Congress's naturalization authority to the Attorney General.[87] However, this delegation was qualified. Under the statute, the House of Representatives could veto the Attorney General's deportation decisions.[88] The Supreme Court found that this veto power violated the separation of powers, because it allowed one house of Congress to do something that required both houses and the implicit assent of the President after presentment.[89]

Chadha's reasoning does not suggest that trigger laws are generally unconstitutional. Whereas the statute in *Chadha* allowed Congress a constitutional back door for influencing naturalization decisions that were delegated to the Attorney General, trigger laws give legislatures no new powers. To the contrary, they are an attenuated exercise of legislative powers. Moreover, a trigger law could be fully consistent with the ordinary legislative process for a state legislature. For example, a trigger law might be presented to the state's executive branch for approval or veto before ultimately going into effect.

In response, it could be argued that attaching collateral consequences to judicial action can objectionably distort judicial reasoning. Imagine a state trigger law that withheld all welfare benefits to people in the state if a particular, unrelated precedent was overruled. This law amounts to taking one's own citizens hostage. And such hostage-taking would put unreasonable pressure on the Supreme Court not to overrule the relevant precedent, but for a reason unrelated to the correctness of that precedent. This kind of pressure would constitute interference with the responsibility of the Supreme Court to say what the law is.

Still, this admittedly objectionable trigger law is not an indictment of trigger laws per se. On one hand, the same kind of hostage-taking could be accomplished without the use of a trigger law. A legislature could credibly threaten to pass a drastic but ordinary law if the Supreme Court overruled a particular precedent. Such a threat would constitute an objectionable attempt to improperly influence judicial reasoning, but it would not be a trigger law.

On the other hand, trigger laws are not necessarily unreasonable burdens on Supreme Court decision-making, for the simple reason that their triggered content may be related in the right way to the Supreme Court ruling that triggers it. By overruling *Roe v. Wade* in *Dobbs v. Jackson Women's Health Organization*, the Supreme Court necessarily enlarged the power of state legislatures to prohibit abortion. That was not a collateral consequence of the case. But then, it seems

86. *See generally* INS v. Chadha, 462 U.S. 919 (1983).
87. *Id.* at 954–55.
88. *Id.* at 925–26.
89. *Id.* at 959.

hardly burdensome for a state to exercise that very power upon that decision being rendered. Put differently, the fact that Louisiana will prohibit abortion if *Roe v. Wade* is overturned is not a collateral, or additional cost to deciding *Dobbs* the way it was decided, but rather, the very consequence that was at issue in that case and one that the ultimate decision aimed to make possible and permissible.

A different criticism of trigger laws is rooted directly in democratic values. A prominent form of the argument depends on the idea that a trigger statute may be popular when passed but unpopular when triggered. Aceves puts the argument like this: "The lag time between adoption and activation of [trigger laws] maybe years or even decades. As this lag time grows, their electoral legitimacy becomes more tenuous. Moreover intervening development between adoption and activation may sever any meaningful connection between these distinct temporal moments."[90]

The problem is that this risk—of decaying democratic legitimacy—is not unique to trigger laws. It is a risk inherent in almost all legislation, and not one that necessarily raises serious rule of law problems. For instance, consider laws that involve phasing in some set of rules over a period of years, or laws that are conditioned on an event like war or a state of emergency (not court action). Approval for these laws when they take effect may be markedly lower than when they were adopted. And yet they are not thereby violations of the rule of law. For one thing, the legislators in office when such laws come into effect can repeal them. Admittedly, this is not always practicable—legislatures may not be able to perfectly discern when a statute lacks democratic support, and even then, they may not have the wherewithal to repeal it. Still, the mere fact that a statute no longer enjoys majoritarian support does not mean it is invalid or offends against the rule of law.[91]

A second point is about the contingency of the democratic objection to trigger laws. Though a trigger law might be unpopular when it is triggered, it might also be as or more popular. This may even be, statistically speaking, likely. After all, many states that passed abortion restrictive trigger laws were still hostile to abortions at the time of the *Dobbs* decision. Indeed, if they had not passed any trigger laws, it's likely that *Dobbs* would have prompted them to pass legislation to the same effect. If this counterfactual is true, it does not seem that trigger laws necessarily suffer a fatal democratic deficit.

B. A Different Criticism Based in the Articulation Principle

Though I am not fully convinced by the foregoing arguments against trigger statutes, I share the intuition that such statutes are suspect. In this section, I

90. Aceves, *supra* note 78, at 102; *see also*, Heidi Alexander, *The Theoretic and Democratic Implications of Anti-Abortion Trigger Laws*, 61 RUTGERS L. REV. 381, 395–96 (2008) ("Applying trigger laws, which currently have no legal force, to future majorities implicates the doctrine of desuetude. Utilizing this doctrine allow courts to invalidate these laws by demonstrating that without continued use, trigger laws fail to maintain their democratic legitimacy.").

91. I discuss this more below.

explore the possibility of supporting this intuition with the articulation principle. My argument to that effect can be broken down into two premises. The first, major premise, is that whether legislation comports with the rule of law depends on whether it is an adequate exercise of legislative reasoning or judgment. The second, minor, premise is that a trigger law is not an adequate exercise of legislative judgment. If the argument goes through, it has the advantage of being connected to the nature of trigger laws rather than to a feature they have only contingently. Note that the argument's conclusion is only that trigger laws offend rule of law values. I do not claim that they are, on that ground, void.

The first premise follows from the articulation principle. It requires that a legal system operate through the organized combination of sincere judgments that various legal actors reach regarding the distinct questions assigned to them. Legislatures reason about what rules and institutions would be good for the polity and then enact them in the legible form of a statute. Hence, a statute must, to comport with the rule of law, be the product of sufficiently well-supported legislative reasoning.

A statute can fail to be adequately supported by legislative judgment in different ways. Some such failures are glaring. For instance, imagine that a legislature asks a random process to generate a law, such as by agreeing to put into law whatever a roomful of monkeys hammering on typewriters ended up writing, or by asking an AI to "make a law about something." Now suppose that the AI or the monkeys came up with content that was coherent and constitutional—imagine that by sheer luck the text of the Fair Credit Reporting Act were outputted. I think there would still be a serious rule of law issue with regard to the ensuing legislation. The nature of the problem is intuitive, which is that the outputted law is not a product of the legislature's reasoning, except in the trivial sense that it commissioned the AI or the monkeys to get to work.

Though the claim I just made is not intended to be one about current U.S. law, its plausibility can be bolstered by considering some aspects of current constitutional doctrine that are consistent with it. For instance, the tiers of scrutiny are addressed to the legislature's proffered justification and not the fact that sufficient justification exists for the law. Rational basis review is not directly about the content of law, but about whether it could be a sensible output of legislative judgment on the relevant issue. Intermediate scrutiny, especially as applied to gender, provides a further example.[92] *Dobbs* itself provides a third example. In that opinion, the Court characterized its decision at several points as returning the authority to make law about abortion to "the people and their elected representatives."[93]

If we accept that statutes must reflect adequate legislative reasoning to comport with the rule of law, then we might suspect that there are different ways that they can fail this requirement.

92. *See* Craig v. Boren, 429 U.S. 190 (1976).
93. Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 292 (2022).

One way is through long disuse. Legislative reasoning can only be robustly exercised to the extent that the legislature knows the conditions of the world it is legislating for.[94] Since the future is unknown, legislation aimed at the far future can only be backed by an attenuated exercise of legislative reasoning.

There is a distinction between legislation that is exclusively aimed at the far future and legislation that is merely applicable in the far future. Some very old legislation is still adequately supported by legislative reasoning today, not because the legislature that passed it could see the future, but because their reasoning has been renewed through interaction with other actors in the political system.[95] Such legislation avoids obsolescence by being applied within an articulated system of law.

By contrast, statutes that are passed but are never invoked, tested, or interpreted tend to lose their claim to be adequately based in legislative reasoning over time. Some laws may risk such a loss by their very design. For example, a statute that required a massive road system to be built one hundred years in the future would raise anticipatory desuetude concerns because it would, in the normal course of things, lay dormant for many years. I am not claiming such a law would be void from inception, or even void in one hundred years. My point is that the application of the law to future circumstances will not be robustly supported by legislative reasoning in favor of its application to those circumstances. I leave open what the consequence or "remedy" for this fact should be.

Now consider trigger laws. They too have an inadequate connection to legislative reasoning. Their problem is not that they eschew legislative reasoning altogether, nor that they delegate it away to a random process or an AI, nor that they exercise it too ambitiously, towards the unknown far future. Their problem is that they shirk the reasoned, cooperative communication about the law that is required by the articulation principle. They do this in two ways, corresponding to a legislature's articulation obligations to speak to the judiciary and to listen to it in turn.

Trigger laws fail a legislature's obligation to speak sincerely, because this idea requires abiding by one's own judgment about when to contribute to a conversation. If one believes X and believes that X is important and relevant to the discussion, but waits until others also believe X to say it, then one has not done one's part in the discussion. Instead, one has partly facilitated group think, by only adding one's opinion when it will be greeted with agreement, rather than introducing it because one believes it should be reckoned with. Sincerely participating in a discussion requires putting forward one's view when they believe it is worth considering as correct. Whether something is worth considering as correct should not depend on whether others already think it is correct.

94. The AI example is one in which the legislature does not reason about the content of the law, and examples involving desuetude are ones in which the legislature does not (cannot) reason about the world that law should be made for.

95. Compare the way that the failure to invoke an old precedent puts that case as neither overruled nor good law, whereas the continual use of a precedent reveals it to be vital, or still "good law."

These comments can be applied to legal institutions. A legislature should pass laws that it thinks are worth being law—this is what it is to sincerely exercise legislative reasoning as a part of a discussion with other legal actors. If a legislature puts forward legislation on the condition that other actors will agree that it is or should be law, then it fails its obligation to engage in the process of submitting its sincere judgments to other legal actors. It legislates in a way that is likely to produce its desired outcome, but at the cost of avoiding the give and take of reasons that should ideally precede it and pave its way.

Trigger laws also constitute a refusal to listen to the judiciary. To show how, I first discuss precedent among courts. To rule correctly on a case, a court must do more than reach the right result. A lower court's disposition of the case may be reversed because its reasoning or analysis was not conducted properly.[96] The lesson is a familiar one: applying precedent is not just about case outcomes but how a court interacts with the relevant legal reasoning, such as precedential decisions.

Now consider a situation in which a lower court believes that a Supreme Court precedent, precedent X, will be overturned, though it has not been yet.[97] Can the lower court decide cases as if precedent X has been overturned, based on its prediction? Many say no,[98] but the key for my purposes is the reasons for that answer. One important reason a lower court should not decide cases as if precedent X had been overruled is that even if it were absolutely correct in its prediction, and hence even if its decisions end up being emphatically affirmed, its preemptive or anticipatory action cannot be an application of, or in dialogue with, the *reasoning* behind the Supreme Court's opinion overturning X. Because that reasoning has not happened yet. For this reason, the lower court has objectionably stepped outside the precedential dialogue between it and the Supreme Court. It has exercised its own judgment to decide cases, unguided by the Supreme Court's. In doing this, it has decided to act without listening to the judgment of an actor it is obligated to listen to.

Now return to trigger laws. Imagine that statutory content C (e.g., an abortion ban) would be constitutional, but for a current Supreme Court precedent X (e.g., *Roe*). A legislature passes a trigger law: the law implements C upon the Supreme Court's overturning of X. Subsequently, the Supreme Court overturns X for various reasons, and C goes into effect.

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96. Spokeo, Inc. v. Robins, 578 U.S. 330 (2016).

97. *See* Evan H. Caminker, *Precedent and Prediction: The Forward-Looking Aspects of Inferior Court Decisionmaking*, 73 TEX. L. REV. 1, 25 (1994); Margaret N. Kniffin, *Overruling Supreme Court Precedents: Anticipatory Action by United States Courts of Appeals*, 51 FORDHAM L. REV. 53, 80 (1982).

98. *See* 28 U.S.C. § 2072(a); Agostini v. Felton, 521 U.S. 203, 237 (1997) ("[i]f a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions."); Commonwealth v. Watson, 827 S.E. 2d 778, 780 (2019). *But see* C. Steven Bradford, *Following Dead Precedent: The Supreme Court's Ill-Advised Rejection of Anticipatory Overruling*, 59 FORDHAM L. REV. 39, 84 (1990).

The problem with the trigger law in this scenario is similar to the problem with the lower court's anticipatory overruling. The lower court's ruling is the correct outcome, given that precedent X will be overturned, but the ruling is defective because it does not take into account the reasons for overturning X. Those reasons haven't been given yet.

The trigger law has the same deficiency. The content of the trigger law is "correct"—constitutional in the abstract, given that precedent X was overturned. But the trigger law is nonetheless defective because it did not, when it was passed, take into account the reasons why X was overturned. Those reasons hadn't been given yet. In this way, a legislature that passes a trigger law steps outside the rule of law dialogue it is required to have with the Supreme Court. It aims to implement content C in a way that is, necessarily, not responsive to the reasons given by the Supreme Court for why content C may be lawfully implemented. This is a failure of the legislature to play its role in an articulated system of law.

One objection to this argument would be that a legislature is not a lower court and so is not obligated to follow the reasoning of a Supreme Court decision. A legislature, it might be said, can pass a law with content C for any reasons it wants once the Supreme Court has held that laws with content C are constitutional.

The objection is correct in the claim that a legislature is not, like a lower court, obligated to follow Supreme Court precedent. But that is not necessary for my argument. I claim only that the legislature must legislate in light of, or against the background of, the reason giving of other branches. In other words, I claim that when the Supreme Court overturns a precedent and thereby restores power to a legislature to legislate on some issue, the legislature's power is necessarily a power to legislate in response to, or in light of the reasons given by the Supreme Court for restoring that power.[99] The power is shaped by the reasons that give rise to it. Hence, a trigger law is objectionable because it is, by virtue of its triggering structure, precluded from being a response to the decision that triggers it.[100]

Some elaboration will help make this point clearer. Imagine the Supreme Court overturned *Roe* for a different reason than *Dobbs* did. This hypothetical Supreme Court rests its reversal of *Roe* solely on the fact that women are now more able to participate in the political process than in the past. If this were the rationale, then a trigger law that was passed before women were able to robustly participate in the political process would be suspect, by the lights of the opinion, even though the opinion permits restrictions of abortion going forward.

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99. *See generally* Michael E. Solimine & James L. Walker, *The Next Word: Congressional Response to Supreme Court Statutory Decisions*, 65 TEMPLE L. REV. 425 (1992) (focusing on statutes); A. Christopher Bryant & Timothy J. Simeone, *Remanding to Congress: The Supreme Court's New on the Record Constitutional Review of Federal Statutes*, 86 CORNELL L. REV. 328 (2001) (review based on the degree of congressional factfinding); Matthew R. Christiansen & William N. Eskridge Jr., *Congressional Overrides of Supreme Court Statutory Interpretation Decisions, 1967-2011*, 92 TEX. L. REV. 1317 (2014).

100. *Id.*

Alternatively, imagine the Supreme Court overturns *Roe*, but points out that there are serious reliance issues with doing so,[101] and requests that legislatures act to address them, given that they involve non-justiciable political decision about things like adoption and public health.[102] This commentary would not be binding on legislatures, but it changes the backdrop of reasons against which legislative action will take place. It changes the meaning of the decision, as sure as a ringing dissent may change reactions to the majority opinion, perhaps tempering it or placing it in context with other concerns. And legislatures should have to legislate in response to such reasoned communication from the judiciary, even if their response is to ignore it.

Note that my arguments here are not affected by the fact that *Dobbs* as it is actually written is unlike the previous hypothetical cases in being an enthusiastic, unqualified grant of power to states to limit abortion, nor that many states would take no notice of any such qualifications, nor that most states have not moderated their legislative aims in response to the dissent. My point is rather that there is a rule of law requirement, via the articulation principle, to keep such possibilities open by at least waiting to hear what the Supreme Court says. A legislature cannot use trigger laws to legislate, as it were, blind to the reasons that warrant the decision that grants them the power to legislate. They must at least leave open the possibility of engaging with those reasons in the crafting of legislation.

Let me summarize and conclude. Legislatures enjoy the power to legislate through articulated legislative reasoning. Failure to legislate in this way is problematic, because it interferes with the articulation of law. Some failures to legislate through articulated legislative reasoning are egregious and obvious. The legislature could create laws using AI or totally delegate its power to the executive.

However, the legislature can also fail to exercise its obligation to legislate through articulated reasoning in more subtle ways. One way involves failing to be a responsible participant in a jurisdiction's legal discussion. This involves putting one's view forward courageously, when one thinks it's worthy of acceptance and not just when it's already been accepted. It also involves responding to the views of others. Trigger laws refuse these obligations. They put forward legislation on the condition that it will be accepted as constitutional by courts, and they do so without being sensitive to the reasons for its acceptance. In these ways, trigger laws subvert the legal conversation that legislatures must engage in, according to the rule of law.

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101. Seana Valentine Shiffrin, *Reliance Arguments, Democratic Law, and Inequity* 13 (UCLA Sch. of L., Pub. L. Rsch. Paper No. 23-09, 2023).

102. *See e.g.*, In re Application of U.S. for an Ord. Authorizing Disclosure of Location Info. of a Specified Wireless Tel., 849 F. Supp. 2d 526, 530 (D. Md. 2011) ("In light of legitimate privacy concerns and the absence of any emergency or extraordinary considerations here, the Court concludes that approval of use of location data for this purpose is best considered deliberately in the legislature, or in the appellate courts."); United States v. Jones, 565 U.S. 400, 429 (2012) ("In circumstances involving dramatic technological change, the best solution to privacy concerns may be legislative."); *see generally* Ruth Bader Ginsburg, *A Plea for Legislative Review*, 60 S. CAL. L. REV. 995 (1987); Bethany Blackstone, *An Analysis of Policy-Based Congressional Responses to the U.S. Supreme Court's Constitutional Decisions*, 47 L. & SOC'Y REV. 199 (2013).

CONCLUSION

According to some, the rule of law is a narrow concept. It concerns the properties of legal rules, requiring that they be things like prospective, clear, non-contradictory, possible to follow, stable, and consistently applied. This view fits naturally with the positivist conception of what law is. Since law has no necessary connection to morality, the rule of law, insofar as it is an ideal that is constitutively about law, should not have a necessary connection to morality either. It only concerns how effective rules are as rules, at guiding conduct, whatever their content.

I aimed to suggest a different picture of law, and a correspondingly different, broader picture of the rule of law. Specifically, I adopted Mark Greenberg's non-positivist Moral Impact Theory, which holds that law is a subset of morality; it is the part of morality that owes its existence to law practices, such as judicial decisions and legislation. If one accepts this view of law, then law guides conduct in a distinctly valuable way, not just when it succeeds in bringing about the conduct, or even making the conduct reasonable under the circumstances, but when citizens conduct themselves according to the law out of an understanding of why it is morally incumbent on them to do so.

The rule of law, in turn, is valuable because it supports the understanding of law. It consists in those conditions under which reasoning about which legal obligations there are, as well as the reasons that support them, takes place robustly. Accordingly, the publicity of law and its accessibility by all citizens is paramount, and it goes beyond the public promulgation of statutes and the public operation of courts. It extends to the reasons for which different actors reach judgments about legal obligations as well as the architecture by which these judgments are synthesized, exchanged, and tested. This extended form of publicity is what I called the articulation principle. This principle requires that law practices be divided but clearly related, so that citizens and officials can follow the legal system's reasoning about the law and participate in it at various points.

Finally, I argued that the articulation principle can provide the basis for a potential criticism of trigger laws, which I defined narrowly as state laws that come into force upon a ruling by the Supreme Court upholding their constitutionality. Such laws are problematic because they exercise a permission to legislate without access to the reasons for the permission. In this way, they refuse to engage in the community's understanding of the law.