

September 2017

What is Meant by Freedom?

Paul D. Callister

University of Missouri – Kansas City School of Law

Follow this and additional works at: <https://digitalcommons.pace.edu/plr>



Part of the [Rule of Law Commons](#)

Recommended Citation

Paul D. Callister, *What is Meant by Freedom?*, 37 Pace L. Rev. 507 (2017)

Available at: <https://digitalcommons.pace.edu/plr/vol37/iss2/3>

This Article is brought to you for free and open access by the School of Law at DigitalCommons@Pace. It has been accepted for inclusion in Pace Law Review by an authorized administrator of DigitalCommons@Pace. For more information, please contact dheller2@law.pace.edu.

WHAT IS MEANT BY FREEDOM?

Paul D. Callister

Introduction – Reflections on “Purpose” and “Freedom to”

In 1955, in a neglected article in the *Harvard Law Review* entitled *Freedom—A Suggested Analysis*, Lon L. Fuller provided a framework for the basic definition of freedom.¹ More importantly, he tendered a question about the conditions of a free society: “How can the freedom of human beings be affected or advanced by social arrangements, that is, by laws, customs, institutions, or other forms of social order that can be changed or preserved by purposive human actions?”² This is the critical question this article addresses through constructing a comprehensive definition by first, considering etymology and then establishing the various modalities in which freedom operates. These modalities include the space defined by the

* Professor of Law and Director of the Leon E. Bloch Law Library, University of Missouri – Kansas City School of Law. I wish to thank the participants of the 2014 Boulder Conference on Legal Information: Scholarship and Teaching for their numerous suggestions upon reviewing this article in its initial form. I also wish to thank the Professor’s Group of the J. Reuben Clark Law Society, who reviewed this paper at their 2016 annual meeting. Karen Hall was particularly helpful. I also wish to thank Professor Nancy Levit and Chris Blackburn for their excellent editing and advice. Finally, I would be remiss if I did not acknowledge the excellent support of my successive administrative assistants, Mary Adams and Laura Riggs.

1. Lon L. Fuller, *Freedom – A Suggested Analysis*, 68 HARV. L. REV. 1305 (1955). From one of the only articles to treat Fuller’s article at any length, “[h]is important contribution has not been considered as part of this debate[,] [the defense of freedom], partly because Fuller published it prior to the report of the Wolfenden Committee, and partly because Fuller made his contribution part of a larger and more complex system of thinking about law.” Robert C.L. Moffat, “*Not the Law’s Business:*” *The Politics of Tolerance and the Enforcement of Morality*, 57 FLA. L. REV. 1097, 1111 (2005). The significance of Fuller’s essay on Freedom is suggested by its inclusion in a very short bibliography by the *Encyclopedia of Philosophy*. See P.H. Partridge, *Freedom*, 3 ENCYCLOPEDIA OF PHILOSOPHY 221, 225 (1967).

2. Fuller, *supra* note 1, at 1309.

rule of law and various antithetical non-rule-of-law states, the role of democracy and representative government in disparate levels of society, the importance of rights as trumps on power, and the challenges posed by social justice. Finally, Fuller's question raises the issue of "laws, customs, institutions [and] other forms of social order,"³ all of which luminaries such as John Stuart Mill saw as unfortunate, but necessary, evils when considering freedom.⁴ Rather than necessary evils, this article will consider the productive role ascribed to law and institutions by Scott Shapiro, who views law as a form of social planning that effectuates choices, thus enhancing freedom.⁵

Prior to constructing a definition of freedom, however, it is important to understand Lon Fuller's conceptualization of freedom because of its value as a framework for any definition. Fuller draws a sharp distinction between "freedom to," which implies choice among a range of alternatives, and "freedom from," which Fuller points out can accommodate any ideology no matter how antithetical to human choice.⁶ For example, "freedom from" can be applied to freedom from capitalist exploitation or colonialism or, in more recent terms, from Western ideological imperialism (with charges such as Twitter being an "information weapon" serving U.S. political ends).⁷ "The objectives of the welfare state and of Buddhism can with equal facility be stated in terms of 'freedom from,' the one promising freedom from poverty, the other freedom from the desire for worldly goods."⁸ In the extreme, as identified by

3. *Id.*

4. See *infra* note 108 and accompanying text. "The second great defect in Mill's essay . . . lies in his assumption that all formal social arrangements—whether legal, customary, institutional, or contractual—are limitations on freedom, that is, restrictions on choice." Fuller, *supra* note 1, at 1312.

5. See *infra* notes 106-109 and accompanying text.

6. Fuller, *supra* note 1, at 1305-07.

7. Tom Gjelten, *Seeing the Internet as an Information Weapon*, NPR (Sept. 23, 2010, 12:00 AM), <http://tinyurl.com/2fj5rsu> ("They [undisclosed countries including Russia] see information as a weapon. An official from one of those countries told me [James Lewis, adviser to U.N. Institute for Disarmament Research that] Twitter is an American plot to destabilize foreign governments. That's what they think. And so they're asking, 'How do we get laws that control the information weapon?'").

8. Fuller, *supra* note 1, at 1306.

Fuller, it can even mean “freedom from freedom.”⁹

Fuller’s framework is grounded in the “freedom to,” and in particular, “the [social] objective of keeping alive the creative, choosing, and purposive side of man’s nature.”¹⁰ Fuller admits that by exalting the “purposive” side of man’s nature, he is at odds with the sciences, both physical and social, of his time, which deny the purposive,¹¹ but he does not care. Mathematical and mechanical relations are not best described in terms of purpose, but “[e]xcept on trivial levels, we have not discovered in human behavior mechanical or mathematical relationships that will enable us to predict invariant happenings. In so far as we are able to make sense out of human behavior in its larger aspects, it is still in terms of purpose[.]”¹² In his construct, purpose and “freedom to” choose among an array of choices that are closely linked. “[I]t is easy to see why ‘freedom to’ should have become so unpopular—it savors too plainly of purpose. On the other hand, ‘freedom from’ fits unobtrusively into the language of science.”¹³ While “freedom to” and purpose may have been less popular in the science of the 1950s, their status today is even less certain:

9. *Id.* at 1313.

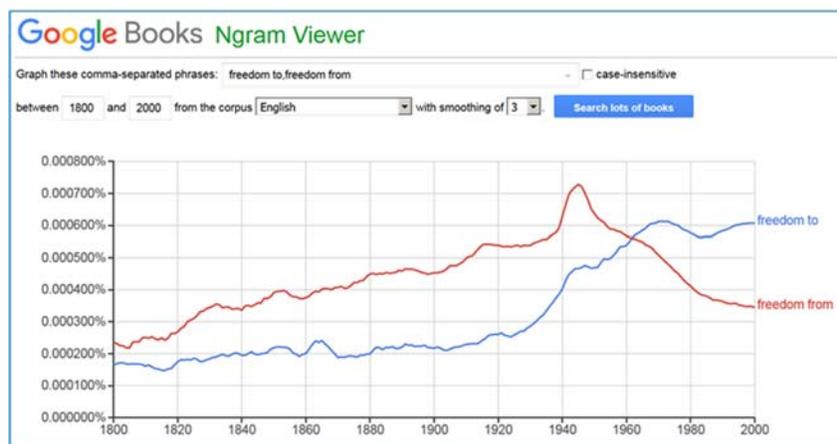
10. *Id.* at 1314.

11. *Id.* at 1308 n.2 (explaining B.F. Skinner’s criticism of purpose).

12. *Id.* at 1308.

13. Fuller, *supra* note 1, at 1309.

FIGURE 1—GOOGLE NGRAM OF “FREEDOM TO” AND “FREEDOM FROM”



As the Google Ngram in

Figure 1 suggests,¹⁴ today we actually use “freedom to” more than “freedom from” (at least in print), and we use it more than at the time Fuller wrote his article when, in 1955, the use of “freedom from” actually exceeded the use of “freedom to.” Whether this means that conceptions of freedom comport more with Fuller’s notions than the concept abandoned as irrelevant by Skinner and others in the social sciences is difficult to say.¹⁵

Exploring the concept of freedom more completely, Fuller’s framework has three “significant contexts”:

- (1) the absence of nullifying restraints and (2)
- the presence of some appropriate form of order that will carry the effects of individual decision over into the processes of society. There is a third requisite for freedom that is both more difficult to state and more difficult to realize. It

14. For Google Ngram results for “freedom to” and “freedom from,” see <http://tinyurl.com/pyeubrd>.

15. *See supra* note 11.

may be suggested by saying that, to become effective, freedom requires a congenial environment of rules and decisions.¹⁶

Against this framework of contexts, answers to the question posed in the introductory paragraph above are to be tested, including the expansive definition of freedom in this article.

Meaning of Freedom—A Working Definition

With Fuller's framework for freedom as the backdrop, this article dares to press further and posit a definition that answers his question about what types of institutions and social arrangements can facilitate freedom. Consequently, this article posits that freedom is a certain kind of relationship that exists between individuals and their kin, tribe, religious society, city, state, sovereign, or other body politic under conditions in which (1) such body is subject to the rule of law with real checks on power such that "legal standards be general, promulgated, clear, prospective, consistent, satisfiable, stable, and applied";¹⁷ (2) there exists democratic and representative government at all pertinent levels of community in which the individual is engaged and by which arrangements the individual's actions may from time to time be legitimately directed;¹⁸ (3) fundamental human rights are not only expressed in the Constitution and law, but operate as trumps on the will of the majority or sovereign; and (4) the general welfare or social justice is sufficiently observed that the exercise of fundamental rights and privileges is meaningful,

16. Fuller, *supra* note 1, at 1314.

17. SCOTT J. SHAPIRO, LEGALITY 394 (Belknap Press 2011). These principles are based upon a famous analogy used by Lon Fuller, in which principles are taken from the deconstruction of the failure of a fictional King Rex to rule his kingdom. See LON L. FULLER, THE MORALITY OF LAW 33-39 (rev. ed. 1969).

18. Fuller, *supra* note 1, at 1314-15 (discussing the relationship between decisions made by an individual and made for the individual, including the need for "consultation" of the individual in decisions made for him or her). "If individual freedom is to be meaningful, the decisions that are made for the individual must be congruent with, and form a suitable framework for, his own decisions." *Id.* at 1314.

but such rights and privileges are not suppressed by attempts to serve general welfare or social justice. Each of the four parts of the definition is referred to as a *modality* or *mode*, meaning, from the Oxford English Dictionary, “a particular form, manner, or variety in which some quality, phenomenon, or condition occurs or is manifested.”¹⁹ In the sense used in this article, freedom is not absence from restraint, which is often the counterfeit of freedom. In its truest sense, freedom is similar to citizenship, with both attendant rights and obligations. Laws and institutions can play a critical role in defining and economizing choices to heighten, rather than subvert, freedom. This article shall consider fundamental human rights to include not only such fundamental rights as expressed in the American federal and state constitutions and the decisions of courts interpreting the same, but such additional rights as may exist in the Universal Declaration of Human Rights,²⁰ or by other recognized sources of law. Just how such a conceptual definition is arrived at is the subject of this article, and what follows offers the building blocks for a construct of freedom as proffered above.

Freedom — An Etymological Journey from Negating Restraint to Citizenship

The moment in my life that I felt the most free was perhaps when I was seventeen. It was spring break, and two friends and I were in a van pulling a waterski boat toward Lake Mohave on the California-Arizona border. The music of the rock bands Asia and Journey were blaring as we raced down the highway through the desert. We were going to have four days without any parental supervision—my friend’s parents were coming out later in the week to join us. In the meantime, we were on our own to waterski, cliff-jump, swim, sun bathe, read Louis Lamour novels, or do whatever we felt like doing.

This kind of freedom is what is often referred to as

19. *Mode*, OXFORD ENGLISH DICTIONARY 5a (3d ed., 2002).

20. G.A. Res. 217A (II), art. 19 (Dec. 10, 1948), <https://tinyurl.com/cgnkmq> (last visited Nov. 16, 2015).

“negative freedom.”²¹ The restrictions that typically governed lives of myself and my friends—mandatory attendance at school, the duty to show up for dinner, do nightly homework, and keep mom and dad informed of my whereabouts, and of course curfews—had been removed. “We are negatively free to the extent to which no one stops us from acting on our desires. . . . But there is another, more positive aspect of freedom, which is the ability to do certain actions. . . . Someone can enjoy negative freedom, but have very little positive freedom.”²² In this case, we also had the positive freedom of having the keys to the van and the boat, a credit card for gas, and some spending money.

However, freedom is more complex than simply the feeling we get on spring break: it entails complex relationships. Etymologically, the English word for *free* has “the same Indo-European base as Sanskrit *priya* beloved, dear. . . .”²³ Furthermore, it compares to “the same Indo-European base Sanskrit *priyā* wife, Old English *frīg* love, (plural) affections, Old English *Frīg* the name of the goddess Frig (see FRIDAY n.), and (in a different declension) Old English *frēo* woman (rare: see note), Old Saxon *frī* woman, wife.”²⁴ Note that in German and Dutch, the word for *woman* is indistinguishable from *wife*.²⁵ So why does the word *free* have any etymological relationship with *dear*, *love*, and *wife*?

This sense perhaps arose from the application of the word as the distinctive epithet of those members of the household who were ‘one’s own blood’, i.e. who were connected by ties of kinship with the head, as opposed to the unfree slaves. In the context of wider society only the former would have full legal rights, and hence, taken

21. SHAPIRO, *supra* note 17, at 61.

22. *Id.*

23. *Free*, OXFORD ENGLISH DICTIONARY (3d. ed., 2008).

24. *Id.*

25. For Dutch, compare the entry for *wife* with the entry for *woman*. F.J.J. VAN BAARS & J.G.J.A. VAN DER SCHOOT, ENGLIS NEDERLANDS 350, 353 (Het Spectrum 1982) (both are translated as *vrouw*). For German, compare the entry for *wife* with the entry for *woman*. WÖRTERBUCH: ENGLISH – DEUTSCH DEUTSCH-ENGLISH 312, 314 (Orbis 1987) (both are translated *Frau*).

together, they would comprise the class of the free, as opposed to those in servitude. Compare the Old English compounds *frēobearn* free-born child, child or descendant of one's own blood, *frēobrōðor* one's own brother, *frēodohtor* free-born daughter, daughter of one's own blood, *frēom* □ *g* one's own kinsman²⁶

To be freeborn in the old Teutonic and Anglo-Saxon worlds was to be “wife born,” and hence not born of a slave, but to be a full member of the household and be free. To be free was not to be without family (as in the freedom I felt from my six siblings and parents when I was on my spring break vacation at Lake Mohave), but to be in relationships of kinship rather than servitude.

This is the same sense in which the Apostle Paul and the chief captain of the guard at Jerusalem declared their respective statuses (and thus Paul escaped a whipping): “Then the chief captain came, and said unto him, Tell me, art thou a Roman? He [Paul] said, Yea. And the chief captain answered, With great sum obtained I this *freedom*. And Paul said, But I was *free born*.”²⁷ Here, the Greek word, used by the captain, for “freedom” is *πολιτείαν* (*pol-ee-ti'-an*) “from (*polity*): citizenship: concerning a community”²⁸ Paul indicates that he is “free born” (*γεν* □ *ωνημαι* from *γενος*—kindred, nation or stock),²⁹ in contrast to the captain who has paid for his citizenship. Historically, freedom has been about relationships, not the absence of them. For the old Anglos-Saxons, freedom was about kinship; in the more sophisticated world of Roman-Judea, the issue was about being part of the polity or citizenship of Rome, the city state that ruled what Romans perceived was the known world. The point is that freedom, at least etymologically, has required the establishment of strong

26. OXFORD ENGLISH DICTIONARY, *supra* note 23.

27. *Acts* 22:27-28 (emphasis added).

28. Compare ALFRED MARSHALL, THE INTERLINEAR KJV-NIV: PARALLEL NEW TESTAMENT IN GREEK AND ENGLISH, *Acts* 22:28 (1975), with JAMES STRONG, THE EXHAUSTIVE CONCORDANCE OF THE BIBLE, Greek root no. 4174 (1890, 1980).

29. Compare MARSHALL, *supra* note 28, *Acts* 22:28, with STRONG, *supra* note 28, Greek root nos. 1080 and 1085.

relationships to institutions and other individuals, and not the absence of them. Indeed, circumstances which promote freedom as the absence of responsibilities and duties to others are the counterfeit of the ideal.



FIGURE 2—MAYFLOWER COMPACT

The Mayflower compact speaks to this nexus between liberty and relationships. Because the Mayflower landed off course in Cape Cod, rather than Virginia territory, colonists argued that they would have to enter into an initial compact:³⁰ “That when they came a shore they would use their owne libertie; for none had power to command them, the patente they had being for Virginia, and not for New-england, which belonged to an other Government, with which y^e Virginia Company had nothing to doe.”³¹ This is a remarkable instance of John Locke’s social contract coming into being by virtue of the colonists missing their landing zone. It also illustrates that the nature of liberty or freedom is to enter into relationships (in this case, a covenant), rather than to avoid them entirely. Indeed, the pledge is “doe by these presents solemnly & mutually in y^e presence of God, and one of another, covenant & combine our selves together into a civill body politick. . . .”³² The colonists were binding themselves to each other into a political body.

30. BRADFORD’S HISTORY “OF PLIMOTH PLANTATION”: FROM THE ORIGINAL MANUSCRIPT 180-81 (Boston Wright & Potter Printing Co., 1898) (1856) (the compact, however, dates to 1620). For source of Figure 2 and an online version, see <http://tinyurl.com/jm5w234> (electronic version prepared by Ted Hildebrandt, 2002).

31. *Id.*

32. *Id.* at 182.

Like Paul's Roman Captain, the essence of freedom was to be exercised into creating binding forms of political citizenship, rather than escape from obligations (as the first part of the compact makes clear by the colonists referencing themselves as "loyall subjects" of King James). The compact is recognition that the colonists are not bound by the same conditions they would have been had they landed in the territory of Virginia; they are, in effect, "free agents" to enter into a new agreement, although with some relationship back to the British crown.

Returning to etymology, in *freedom*, the suffix – *dom* adds a legal connotation and is "in Old English *dóm*, statute, judgement, jurisdiction," and

in Old English as a suffix to n[ouns] and adj[ective]s, as *biscopdóm* the dignity of a bishop, *cyningdóm*, *cynedóm*, royal or kingly dominion, kingdom, *ealdordóm* the position or jurisdiction of an elder or lord; *þeowdóm*, the condition of a *þeow* or slave; *fréodóm*, *háligdóm*, *wisdóm* the condition or fact of being free, holy, or wise.³³

Thus, the – *dom* in *freedom* means the condition of being free, but it also reflects the jurisdictional aspect of being found to be free.

Being free, then, is not about being released from relationships, but about the *kind* of relationships we bear toward one another and the various institutions in our societies. It reflects a particular kind of jurisdiction quite different from servitude or that of a sovereign lord.

Similar to *freedom*, *liberty* has an interesting etymology: "Anglo-Norman *libertee*, Anglo-Norman and Middle French *liberté* freedom from constraint or necessity, free will (late 12th cent. as *livreteit*, after *livrer* liver v.) (in plural) freedoms or immunities (accorded to a town, etc.) (1266) . . ."³⁴ While *liberty* has meant lack of restraint, it has also been used to describe the "freedoms and immunities" of the *polis* or town (or the jurisdiction of that town). Relationships to the community

33. *Dom*, OXFORD ENGLISH DICTIONARY (1897).

34. *Liberty*, OXFORD ENGLISH DICTIONARY (3d. ed. 2010).

are central to the concept of liberty. Indeed, this article argues that this does not mean the absence of all restraint, and it is not in this sense that we should use the term or the word *freedom* when thinking about and discussing the question of freedom presented in this article—i.e., does it vary with information environment? Rather, it shall be argued that *freedom* and *liberty* carry with them relationships to individuals and institutions that do in fact vary with the times according to the information environment of that time and season.

As we think in more abstract terms, on a larger societal scale, freedom manifests itself in different modalities.

**Modalities of Freedom – –Considering Definition
Elements (1) – –(4)**

Freedom is a state of affairs that can be considered in four modalities based on this article’s working definition: rule of law, participatory and representative government, individual rights, and social justice.³⁵ These modalities act as different lenses through which to view freedom. Restrict or deny any of the elements of freedom described in these modalities as follows, and the state of affairs becomes less free.

35. *See supra* text accompanying notes 17-18.

Modality (1) – The Rule of Law and Antithetical States

In considering what institutions can do to advance the cause of freedom, the presence of the rule of law is a key consideration to any analysis. Societies exist in differing states with relation to the rule of law. Consider the chart in Figure 3 below:

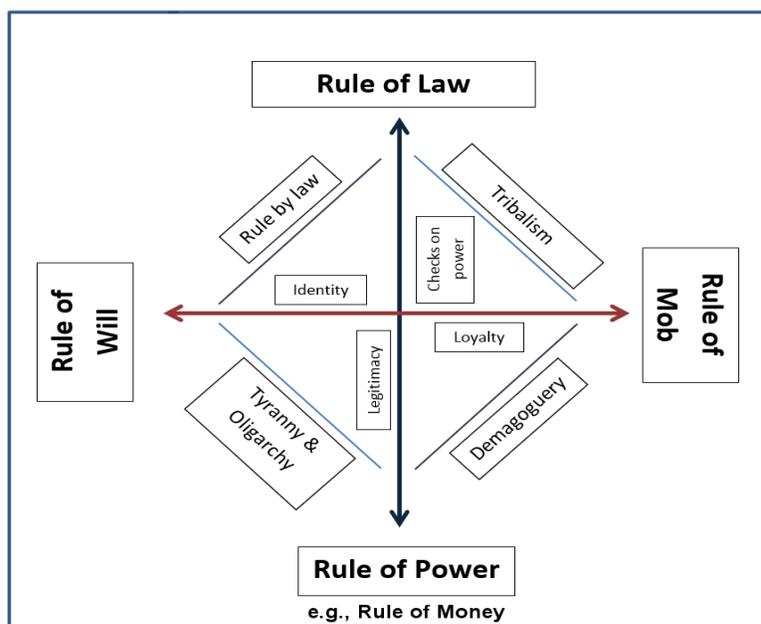


FIGURE 3 – RULE OF LAW AND ANTITHETICAL STATES

Essentially, any given society's relationship to the rule of law can be described with reference to a plane defined by two axes. See Figure 3 above. Suppose the horizontal axis is *rule of will* (in its most singular form, it is expressed as that of a tyrant, whose every whim and fancy, unchecked by law, must be met) lies opposite the *rule of the mob* (for example, a lynch mob, who likewise ignores rule of law—the niceties of legal procedures and individual rights to expedite its sense of justice or entitlement). The opposite of *rule of the will* is the rule of the many or the mob, and the collapse of order. I will not call this

anarchy because there are philosophical forms of anarchy that accept order if free from threat of violence or coercion,³⁶ a concept to be elaborated upon later.

The vertical axis is represented by *rule of law* (to be explained later in what immediately follows) versus the *rule of power* (for example, the rule of money, such as prevails in Afghanistan following the U.S. intervention).³⁷ It is particularly significant that *rule of law* lies opposite the *rule of power*. As shall be discussed later, in its most basic form, rule of law represents a check on power,³⁸ and as a corollary unlimited power would not be subject to any checks. Consequently, the sliding scale is from *rule of law* to *rule of power* (or the absence of meaningful checks on power).

Interestingly, in a recent article, Nick Cheesman pointed out his dissatisfaction with the problem that *rule by law* and a

36. See SIVA VAIDHYANATHAN, *THE ANARCHIST IN THE LIBRARY: HOW THE CLASH BETWEEN FREEDOM AND CONTROL IS HACKING THE REAL WORLD AND CRASHING THE SYSTEM 4* (2004) (“Anarchists do not oppose or deny governance as long as it exists without coercion and the threat of violence.”).

37. Based on conversation with researcher, Andrea V. Jackson, then from the Institute for Rule of Law, Identity, Stability, and Culture, whose viewpoint (after considerable time in Afghanistan) is that the country has become subject to the “Rule of Money” with the United States being the supplier that is distorting government and social structures.

38. RANDALL PEERENBOOM, *CHINA’S LONG MARCH TOWARD THE RULE OF LAW 65* (2002) (“[T]here is general agreement in China and elsewhere that rule of law requires at minimum that the law impose meaningful limits on state actors, as reflected in the notions of a government of laws, the supremacy of the law, and the equality of all before the law.”). Rachel Kleinfeld also gives significant weight to “checks” on power:

At its heart, the rule of law is about the structure by which the government and governed determine the rules of society and hold each other accountable to those rules. Therefore, work to reform the power structure within other countries focuses on building the checks and balances on power that form the bedrock of a rule-of-law state. Some of these power centers are “vertical”—they check government from below, such as through organized groups of concerned citizens, religious institutions, and other areas of legitimacy within society. Other power centers are “horizontal”—they might provide checks and balances between and within government agencies, such as internal investigative units among police, or the division of powers between an independent judiciary and other parts of government.

RACHEL KLEINFELD, *ADVANCING THE RULE OF LAW: NEXT GENERATION OF REFORM 20* (Carnegie Endowment for International Peace 2012).

related concept, *law and order*, do not seem to be symmetrical or on the same sliding scale that descends from *rule of law*.³⁹ “The opposite of law and order is, well, the absence of order.”⁴⁰ In Figure 2, the absence of order might be initiated by the rule of the mob, but the absence of order is not necessarily the opposite of the *rule of law*. There might be a rule of someone or some will, but without the checks on power of the rule of law. Consequently, *rule of law* and *law and order* are, in Cheesman’s terminology, “asymmetrical opposites.”⁴¹ Furthermore, the fact that *rule by law* occupies a space between the two axes of Figure 2 above, rather than lying directly on the *rule of law* axis, is in harmony with Cheesman’s general thesis.

In the figure, no society finds itself on any of the cardinal points. Rather, they are described in relation to the four points. For example, in the United States, we have rule of law (law operates as a check on many abuses of power), but one might argue that it is heavily peppered with the rule of money (or power), given the cost of running for office. This is but one dimension in the figure. The United States must also be described in terms of the rule of will (whether of one or oligarchy) and the *rule of themob* (or the many). Although the United States can take pride in its democratic tradition, its history is littered with examples of the lynch mob. In contrast, in modern day Russia, rule of law may curb some of the worst abuses of power, but fear of the FSB (the successor to the KGB) and a culture of intelligence gathering operate to concentrate

39. See Nick Cheesman, *Law and Order as Asymmetrical Opposite to the Rule of Law*, 6 HAGUE J. RULE OF L. 96, 107 (2014) (“And so dissatisfied with the analytic limitations of the rule-by-law concept, I turn to the last part of my argument that law and order is a concept asymmetrically opposed to the rule of law . . .”). To Cheesman’s question, “What is zero rule of law?” I have answered with the “Rule of Power” or the absence of any checks on power. *Id.* at 106. Cheesman does not come out and say that *rule by law* is asymmetrical to *rule of law*, rather he expresses dissatisfaction that this is so, and then presents his analysis that *law and order* are asymmetrical to the *rule of law*, leaving the reader to question whether *rule by law* and *law and order* are the same or even related concepts.

40. *Id.* at 108.

41. See Cheesman, *supra* note 39, for reference to “asymmetrical opposites.”

power in the hands of a few.⁴² Thus states are described with reference to two dimensions, or scales, rather than one. Cheesman's asymmetrical opposites function to provide dimension to describe the state of any given society. A two-dimensional chart, which separates *rule of law* and *rule of will*, thus adds significantly to understanding the *rule of law* and related concepts such as *rule by law* and *law-and-order*.

Referring back to the horizontal axis in Figure 2, the *rule of will* is best exemplified by Mao Zedong. Mao so dismantled the legal apparatus of China that there was not even appearance of *rule by law*, let alone *rule of law*.⁴³ *Rule by law* is the counterfeit of *rule of law*. In such instances, law operates not as a check on power, but as an instrument to impose the will of the sovereign of the day. In Figure 2, *rule by law* is a function of two scales or axes—*rule of law* and *rule by will*. There will be more on *rule of law* as a cardinal element later.

Finally, there is *rule of the mob* – –the lynch mobs of the nineteenth and twentieth century. The problem for the mob was always the same – –if we, the mob, pause for legal procedure and allow the accused his or her modicum of human rights, there is a good chance he or she might just go free. Another example is the democratic assembly of 500 Athenian “jurors” who elected to put Socrates to death for corrupting the minds of the youth in Athens.⁴⁴

42. See, e.g., *Lawyers, Legal Scholars Warn of Erosion of Rule of Law in Russia* (British Broadcasting Service, Lexis Advance July 28, 2013) (“The law-enforcement agencies and security services – the Investigations Committee, internal affairs bodies FSB [Federal Security Service], the prosecutor’s office – blatantly and sometimes even demonstratively, cynically violate the constitutional and other legal norms, including by fabricating criminal and administrative cases against those who criticize the authorities.”).

43. PEERENBOOM, *supra* note 38, at 74 (“The legal system during the Mao era, particularly during the Cultural Revolution, was a good example of an extreme version, to the point where at times it could hardly be described as even a rule-by-law-legal system, which, after all, implies some form of law-based order.”).

44. See generally Douglas Linder, *The Trial of Socrates* (2002), <http://www.famous-trials.com/socrates>.

Returning now to the rule of law. Essentially, the rule of law operates to check the most egregious abuses of power. A number of years ago, a “thin theory” of rule of law was developed by scholars to try and separate out rule of law from democratic practices and western notions of human rights – not that these latter practices are inessential to freedom. The point of this theory is that democratic elections and human rights are not the only factors contributing to freedom. There is something that law, in particular the rule of law, provides that is important and distinctive from democracy and human rights. The thin theory of rule of law consists of a number of certain practices:⁴⁵

45. PEERENBOOM, *supra* note 38, at 65 (Autumn 2002) (citing FULLER, *supra* note 17, at 39). Other conceptualizations or lists of the requirements of what is known as the “formal version” of the rule of law have been formulated. Lon Fuller’s theory, called “legality” has been summarized as “generality, clarity, public promulgation, stability over time, consistency between the rules and the actual conduct of legal actors, and prohibitions against retroactivity, against contradictions, and against requiring the impossible.” BRIAN Z. TAMANAHA, *ON THE RULE OF LAW: HISTORY, POLITICS, THEORY* 93 (2004) (citing FULLER, *supra* note 1, at ch. 2). Joseph Raz listed the elements to:

include that the law must be prospective, general, clear, public, and relatively stable. To this list Raz added several mechanisms he considered necessary to effectuate rules of this kind: an independent judiciary, open and fair hearings without bias, and . . . discretion of police to insure conformity to the requirements of the rule of law. The first set of requirements also found in [Friedrich] Hayek and [Roberto] Unger, is a standard statement of the dominant formal version of the rule of law.

TAMANAHA, *supra* note 45, at 93. See also Paul P. Craig, *Formal and Substantive Conceptions of the Rule of Law: An Analytical Framework*, PUB. L. 467, 469 (Autumn 1997) (adding a requirement of “access to the courts” and clarifies that “the discretion which law enforcement agencies possess should not be allowed to undermine the purposes of the relevant legal rules”). Another prominent author, Judith Shklar, summarizes Fuller’s “inner morality” or formal theory of rule of law: “Law must be general, promulgated, not retroactive, clear, consistent, not impossible to perform, enduring, and officials must abide by its rule.” JUDITH N. SHKLAR, *POLITICAL THOUGHT AND POLITICAL THINKERS* 33 (Stanley Hoffmann ed., 1998). A relatively recent reformulation by Rachel Kleinfeld, extending beyond “thin theory,” but incorporating some of its elements, is:

Governments are subject to laws and must follow pre-established and legally accepted procedures to create new laws.

Citizens are equal before the law.

- Law is based upon procedural rules for enactment and made by an institution with authority (to this I would add that the thin theory presupposes a shared cognitive authority⁴⁶ – that there are certain touchstones in a society, that its members recognize as authority).
- Under the theory, the law must also be transparent, public, and accessible (this is where factors such as literacy, libraries, and affordable access to legal services and published law comes into play). Law that is intermediated by a professional class of lawyers, clerics, or priests can operate to either clarify or obfuscate the law.
- The law must be general – it must not be targeted to the advantage or disadvantage of similarly-situated groups – it must generally apply in equal measure to similarly-situated groups.

Judicial and governmental decisions are regularized: They are not subject to the whims of individuals, or the influence of corruption.

All citizens have access to effective and efficient dispute-solving mechanisms, regardless of financial means.

Human rights are protected by law and its implementation.

Law and order are prevalent.

KLEINFELD, *supra* note 38, at 14-15. Kleinfield's theory incorporates human rights, but I have chosen to treat them separately in this article's section, *Modality (3)—Individual Rights*. Kleinfield's treatment of the subject of Rule of Law is an essential read. However, given the varying formulations of rule of law and finding that Peerenboom's statement of the thin theory of the rule of law is the most elaborate, I have used Peerenboom's elements and embellished them for my own formulation of rule of law.

46. See generally Paul Douglas Callister, *The Book as Authoritative Sign in Seventeenth-Century England: A Review through the Lens of Holistic Media Theory*, in *LAW, CULTURE AND VISUAL STUDIES* 49, 51-54 (Anne Wagner & Richard K. Sherwin eds., 2014); Robert C. Berring, *Legal Information and the Search for Cognitive Authority*, 88 *CAL. L. REV.* 1673 (2000).

- The law must be clear and be capable of being understood; ironically and hyper-technical areas of the law like tax and intellectual property might actually serve to undermine rule of law, although providing careers for attorneys, law professors, and the compliance industries that grow around these technical areas.
- The law must be prospective – no ex post facto laws (i.e. laws passed to outlaw deeds or omissions that have already transpired).
- Laws must be consistent – that is, they must be rational. The great example of a rational field of knowledge has always been geometry because of the consistent outcomes for innumerable scenarios that geometry could produce from five basic axioms or postulates. Of course, rational systems, like geometry, have a great weakness, as illustrated by the development of non-Euclidean geometries, whereby it was possible to produce equally rational (or consistent system) by denying some of the postulates or axioms (e.g., the shortest distance between two points is not a straight line, but a curve or the sum of the angles of a triangle is greater than 180 degrees). Furthermore, non-Euclidean geometries proved useful in advanced sciences and navigation. What this suggests for rule of law is that just because its basic tenants produce consistent results does not ensure that the whole system is not arbitrary and that some other rational system of law might produce a better, more equitable, state of affairs.
- The law must be stable. Similar to rationalism, consistency is part of this element, but beyond that question is one for positive law about how frequently legislative bodies and courts should change the law. Generally, predictability is thought to be the hallmark of a good legal system. Lack of consistency undermines

this and discourages investment, contracting, formation of capital, employment, and the general stability of a society. At the same time, the law must be flexible: “[The] [l]aw must be stable and yet it cannot stand still.”⁴⁷

- The law is fairly applied. Law that is not fairly applied, particularly along economic, ethnic, and racial lines, produces a distrust of the law among those not favored by it. The support of all classes of society for rule of law is essential to its existence.
- The law must be applied as it has been promulgated, often in writing. Interpretation of the law to favor one party or another, in the end, undermines law as a credible institution.
- The law must be uniform. We have already discussed uniformity in terms of fairness and consistency, but there is another aspect in which the law must be uniform – coverage. The great city of Athens should not be said to be subject to the rule of law if all that its law governed was parking – where and when to park. Theoretically, a society could be lacking in rule of law – crucial codes to punish theft and murder, tort laws to cover injury and negligence, etc. – and still have a carefully-administered set of traffic and parking laws. There needs to be uniformity of coverage.
- The law must be enforced (meaning, the gap between law on the books and practice must be narrow). It is fairly obvious that the failure to prosecute murder or theft on a regular basis by the state would undermine the rule of law. What does it mean for a state or city if no one adheres to traffic laws? Is there rule of law? Thorny subjects include wholesale refusal to enforce immigration laws, laws against recreational drug use, prostitution, copyright, and intellectual property. If

47. ROSCOE POUND, *INTERPRETATIONS OF LEGAL HISTORY* 1 (1923).

breaking such laws becomes the norm, then the rule of law is threatened.

- Finally, the law must be accepted by a majority of those affected. I remember watching with a mixture of horror and bemusement as drivers in New York in oncoming lanes refused to stop for red lights that would have otherwise permitted cars in my lane from lawfully turning left to cross or carry traffic safely. How could there be such whole-scale willful violation of law? Assuming this attitude were to multiply to an extent that the law, in general, became something to be ignored, disrespected, or treated as irrelevant, a serious breakdown of rule of law would occur.

The above outline of thin theory, embellished by me but present in legal literature since the 1960s, can serve as a useful canary in the coal mine for assessing rule of law in a society. The theory's elements collectively operate as a major component of freedom because, as a whole, rule of law operates as a check on power and the curse of oppression. Lon Fuller, who first outlined this theory, referred to the elements as law's "internal morality,"⁴⁸ and this served as his rationale for rejecting the philosophy of legal positivism,⁴⁹ a debate about which we need not concern ourselves here. However, these elements serve as touchstones of freedom. Even when democratic elections and human rights are absent, the elements of thin theory can reveal whether there are checks on power—a minimum standard that might serve as one former U.S. Army major unofficially put to me: "of a country we can do business with."

Thin theory is also consistent with Fuller's article on freedom.⁵⁰ Thin theory's check on power provides a protective barrier for "nullifying restraints"—an element of the requisite

48. SHAPIRO, *supra* note 17, at 394 (citing FULLER, *supra* note 17, at 33-38).

49. SHAPIRO, *supra* note 17, at 394 ("Contrary to legal positivism, therefore, the existence of the law does depend on moral facts.").

50. *See* Fuller, *supra* note 1.

contexts for freedom.⁵¹ Acceptance of laws by the majority, the law's consistency, stability, fairness, and uniformity, and the recognition of procedural rules for the adoption of laws, all support Fuller's requirement for a congenial environment for rules and decisions.⁵² We should hardly be surprised, however, that Fuller is consistent with himself.

Returning to the two axes and law coordinates in Figure 2—rule of will, rule of mob, rule of law, rule of power— every society finds itself somewhere on this plane, but none are represented by a single coordinate.

Some interesting combinations arise in relation to the different axis points. Tribal societies often have rigid codes of honor, but may function more by rule of the mob – in the sense that obligation of kinship or groups supersede allegiance to laws of the state, even when enacted through duly-elected representatives. The tribes envisioned by the chart are not those held together as personality cults behind strong central leaders, but rather by tradition and law in a decentralized environment with competing and coexisting tribes operating under similar principles of law and custom. On the opposite side of the chart, tyranny and oligarchy operate with apparatus of the state in a centralized environment.

Extreme manifestations of the welfare state, where votes are bought in exchange for the promise of social benefits, may be represented in a quadrant dominated by demagoguery, mobocracy, and power. The essence of demagoguery is when powerful individuals or groups use the money, media, and other forms of power to win support of the masses to effect rule. The problem is that rule by the masses or the mob can be inherently unstable and unpredictable. Mobs are, by their nature, unruly, demanding and fickle. Kitty-corner on the diagram, rule of law becomes rule by law when it ceases to operate so much as a check on power and becomes an instrumentality to execute the will of a supreme sovereign or clan of oligarchs. Rule by law is a counterfeit of rule of law – it has rules, but no real checks on power.

51. *Id.* at 1314; *see also supra* text accompanying note 16.

52. *See generally* Fuller, *supra* note 1; *see also supra* text accompanying note 16.

There are a number of exchanges that operate in this plane as well. Those who rule by will may exchange some form of identity (the hopes, dreams, sense of belonging, historical territorial claims, and aspirations of people) for loyalty of the masses. This exchange has been discussed at length in my earlier articles on the Market for Loyalties.⁵³ Power holders (the wealthy, military, and those in charge of domestic intelligence agencies) are willing to exchange rule of law in the forms of some checks on this power in exchange for legitimacy.⁵⁴ Indeed, it is often in the interest of all states to pursue rule of law as a pathway to legitimacy, and thus a way to consolidate their rule.

Modality (2)—Democracy and Representative Government

Most of us remember our high school civics lessons on the virtues of democracy and republican forms of government. But the subject is far from stale or static. Like changes in information environments in the past, the Internet is challenging how we think about and implement democratic and representative forms of government in new communal contexts. An important work in this area is *The Anarchist in the Library: How the Clash Between Freedom and Control is Hacking the Real World and Crashing the System* by Siva Vaidhyanathan.⁵⁵ Vaidhyanathan describes the Net in terms of community – a community that is governed not by hierarchically proscribed laws, but by communal protocols.⁵⁶ Indeed, such an approach allows Vaidhyanathan to take anarchy seriously—not anarchy

53. See generally Paul D. Callister & Kimberlee Everson, *Analysis of Freedom of Information for its Effect on Society by Considering 2011, the Year of the Arab Spring*, 6 INFO. L.J. 36 (2015); Paul D. Callister, *Identity and Market for Loyalties Theories: The Case for Free Information Flow in Insurgent Iraq*, 25 ST. LOUIS U. PUB. L. REV. 123 (2006); Paul D. Callister, *The Internet, Regulation and the Market for Loyalties: An Economic Analysis of Transborder Information Flow*, 2002 U. ILL. J.L. TECH. POL'Y 59 (2002). See also *Market for Loyalties Theory*, WIKIPEDIA, <http://tinyurl.com/hso245v> (last visited Feb. 14, 2017) (explaining market for loyalties theory).

54. See PEERENBOOM, *supra* note 38, at 126.

55. See generally VAIDHYANATHAN, *supra* note 36.

56. See *id.* at 33-38.

in the sense of violent overthrow of the government, but an approach that rejects the need for centralized authority. It instead recognizes the role of Web protocols, mavens, and peer-to-peer networks in not just building the Web,⁵⁷ but in facilitating new organizational structures for society. This is an anarchy reminiscent of the “social anarchism” described in a well-known article by Peter Coy—violence against the state is not its defining feature.⁵⁸ Rather, in an essay by Herbert Read, “the main consideration in any political philosophy should therefore be the preservation of individual freedom. . . . Such freedom, I argue, can only be preserved in small communities, free from a central and impersonal exercise of power . . .”⁵⁹ It is, rather, a rejection of government, particularly a centralized government that is the common theme. “Peace is anarchy. Government is force, force is repression, and repression leads to reaction, or to the psychosis of power which in turn involves the individual in destruction and the nations in war.”⁶⁰ It is this kind of anarchy to which Vaidhyathan refers as he describes the Net.

57. *See id.* at xvi-xvii and 12-21.

58. *See* Peter E. Coy, *Social Anarchism: An Atavistic Ideology of the Peasant*, 14 J. INTERAMERICAN STUDIES & WORLD AFFAIRS 133 (1972). “[T]errorism is a form of government and the abolition of government is what Anarchism is all about. Moreover, even Lenin recognized that pamphlets were more effective agents of social change than firearms.” *Id.* at 136. Coy does not appear to totally eschew violence, at least in his idealized description of a Mexican highland village, where there are limits on the practice of religion, or lack thereof, enforced by incarceration:

Villagers are permitted by their fellows to vary in quantity and quality of their piety according to their needs and means. There is only one minimal standard: that no one within the community public demonstrate his disbelief; he who does so, whatever his power and position is likely to find himself thrown into village lockup

Id. at 146. Apparently, religion is coopted by anarchist philosophy, and so the complete denial of it is not tolerated. *See id.* at 145-46.

59. HERBERT READ, ANARCHY AND ORDER: ESSAYS IN POLITICS 25 (1971).

60. *Id.* at 121.

In some of Vaidhyathan's new structures, scholars Margaret Keck and Kathryn Sikkink have identified, on an international scale, as transnational advocacy networks.⁶¹ "By building new links among actors in civil societies, states, and international organizations, they [advocacy groups] multiply the channels of access to the international system . . . By thus blurring the boundaries between a state's relations with its own nationals and the recourse both citizens and states have to the international system, advocacy networks are helping to transform the practice of national sovereignty."⁶² This is a fairly important change to the international order of things, which has traditionally been viewed as billiard balls that may hit and knock each other about on their surfaces, but which do not have relations internally.⁶³ Notably, the United States currently favors the role of nongovernmental "stakeholders" in governing the Net, rather than the dominance of governments favored by Russia and China.⁶⁴ The change means that many more of us have a voice in the international system; the places to vote are increasing. From the prospective of freedom, the change challenges us—having a voice in each of the communities to which we belong may mean democracy has become more complex, multilayered, and dependent on status in the respective communities.

Returning to networks, many of these transnational advocacy networks have special expertise and, in the words of John Gerald Ruggie (who borrows from Michael Foucault), are

61. See MARGARET E. KECK & KATHRYN SIKKINK, *ACTIVISTS BEYOND BORDERS ADVOCACY NETWORKS IN INTERNATIONAL POLITICS* 2-4 (1998). See also Eric Dannenmaier, *Lawmaking on the Road to International Summits*, 59 DEPAUL L. REV. 1, 3 (2009).

62. KECK & SIKKINK, *supra* note 61, at 1-2.

63. Alex Prichard, *Anarchy, Anarchism and International Relations*, in CONTINUUM COMPANION TO ANARCHISM 96, 101 (Ruth Kinna ed., 2012) "This 'billiard ball model' of international relations presents world politics as consisting of hermetically sealed states with no linkages between them, ricocheting off one another, with the largest bouncing the hardest and invariably swallowing up smaller ones like in some epic interplanetary collision." *Id.*

64. See *Unified Internet at Stake in UN Negotiations*, ELECTRONIC COM. L. REP. (Bloomberg BNA), Aug. 26, 2015.

“epistemic communities”⁶⁵ because they are built around “bureaucratic position, technocratic training, similarities in scientific outlook and shared disciplinary paradigms.”⁶⁶ The global nation-state system has moved from communicating exclusively through diplomats to communication through members of epistemic communities, and the Net has been at the heart of this change. In some instances, the field of democracy may be expanding, and the Net is primed to facilitate such changes. Freedom requires that the right be heard, and that each of the stakeholders have access to a forum.

In the end of *Anarchist in the Library*, after reviewing the power of the Net to both enhance swarming mobs and oligarchical structure, Vaidhyanathan calls for civic republicanism—in his case, meaning a Net whose most egregious abuses of property rights (copyright and trademark) are curbed, but at the same time governed by institutions run by people who hopefully are accountable to the netizens who find community and freedom in the domain we call the Web.⁶⁷ Recall that citizenship is fundamental to freedom in our prior discussions of the etymology of freedom.

What is so fundamentally different about the Web is the use of private ordering,⁶⁸ including protocols and individual contracts (much like the ideals of John Locke), to create communities that transcend national borders and traditional legal jurisdictions. Protocols are distinguished from codes by Vaidhyanathan because they are not imposed by hierarchical authorities but are reached by consensus.⁶⁹ For example, the standards for HTTP, HTML and CSS, the open access protocols for browsers as of the time of this writing, were reached by consensus through an organization (really a community of experts, an “epistemic community”), known as W3C.⁷⁰ If a Web

65. John Gerard Ruggie, *International Responses to Technology: Concepts and Trends*, 29 INT'L ORG. 557, 569 (1975).

66. *Id.* at 570.

67. VAIDHYANATHAN, *supra* note 36, at 188-92.

68. For use of term “private ordering,” see Margaret Jane Radin, *Regulation by Contract, Regulation by Machine*, 160 J. INST. & THEORETICAL ECON. 142 (2004).

69. VAIDHYANATHAN, *supra* note 36, at 16-21.

70. See W3C STANDARDS, <http://www.w3.org/standards/> (last visited Feb.

surfer uses these protocols correctly, Internet browsers will be able to interact with his or her Web documents—otherwise, he or she is excluded from participating on the Net, or rather of being part of the technical conversation that is part of the Net. The same is true in international law. If ambassadors fail to present certain credentials and follow protocols, no dialogue between nations can occur. One nation state does not have sovereignty over another simply because its ambassadors follow international protocols, nor has it exercised or threatened force to compel action of the other state; rather, by using protocols, states can participate in the international order. In the digital environment, protocols are distinguished from controls in that they, like law, dictate compliance. Harvard law professor Lawrence Lessig has authored at least two books pointing out the vulnerabilities of code to constrain behavior on the Net.⁷¹ *Net Delusions* author Evgeny Morozov makes similar claims.⁷² As Vaidhyanathan puts it, “if a protocol is a handshake, a control is a full nelson.”⁷³ The point is this: protocols provide an alternative to subjugation of controls whether embedded in computer code or in diplomatic communications of the sovereign.

What Vaidhyanathan has also observed, by taking anarchical communities seriously, is that creative and cultural efforts prosper in such environments as proffered by the Web; however, he also finds that the Web enables the negative aspects of anarchy, such as swarming to commit acts of violent protest at international events such as the 1999 WTO summit in Seattle—“smart mobs’ are still mobs.”⁷⁴ Instead, what Vaidhyanathan calls for is discussion within a framework of Cultural Democracy and Civic Republicanism, the former being

14, 2017).

71. See LAWRENCE LESSIG, *THE FUTURE OF IDEAS: THE FATE OF THE COMMONS IN A CONNECTED WORLD* (2001); LAWRENCE LESSIG, *CODE AND OTHER LAWS OF CYBERSPACE* (1999).

72. See EVGENY MOROZOV, *THE NET DELUSION: THE DARK SIDE OF INTERNET FREEDOM* (Public Affairs 2011).

73. VAIDHYANATHAN, *supra* note 36, at 33.

74. See *id.* at 188. Like the WTO protests in 2011, originators of the Occupy Wall Street Movement planned to use “swarming” techniques, particularly after the Zuccotti Park was cleared. See Mattathias Schwartz, *Pre-Occupied: The Origins and Future of Occupy Wall Street*, *THE NEW YORKER* (Nov. 28, 2011), <http://tinyurl.com/j7lpbme>.

a liberal environment permitting creative use and reuse of materials on the Internet, and the latter being a recognition of the responsibilities that go with citizenship and membership of any community.⁷⁵ For Vaidhyathan, it is about culture, and a fundamental belief that cultural development thrives in environments with liberal borrowing or imitation of what has become ensconced in intellectual property.

Another maven of cyberspace, Harvard Law Professor Lawrence Lessig, likewise makes the case for providing a liberal cultural environment on the Internet; Lessig argues for “remix culture.”⁷⁶ In carefully choreographed multimedia speeches broadcast over the Internet, Lessig argues that prior to radio, society enjoyed a “read-write” culture with respect to music. New tunes were passed from performer to audience, who, in turn, performed, modified, and passed along the work to others. Lessig quotes John Philips Souza for support that the “talking machines” had a negative effect on the development of culture, in particular music.⁷⁷ These “infernal machines” facilitated the movement toward a write-only culture, where the producers of music and programming were narrowly proscribed and centralized. Now, after the age of radio, phonograph records, and the eight-track tape recorder, an age when the public could only read (or listen) to what was given to it, the Internet has brought society back to the age of read-write culture. But, warns Lessig, this state of affairs is only the case because the code underlying the Net (Vaidhyathan would have used the word “protocol”) permits this to be so.⁷⁸

The question of the modern era is whether the extremes—rule of the mob and oligarchy, or even autocracy—are

75. See VAIDHYANATHAN, *supra* note 36, at 188-92.

76. See LAWRENCE LESSIG, *REMIX: MAKING ART AND COMMERCE THRIVE IN THE HYBRID ECONOMY* (2008); LAWRENCE LESSIG, *FREE CULTURE: HOW BIG MEDIA USES TECHNOLOGY AND THE LAW TO LOCK DOWN CULTURE AND CONTROL CREATIVITY* (2004).

77. Lawrence Lessig, *Laws that Choke Creativity*, TED TALKS: IDEAS WORTH SPREADING (Mar. 2007), <http://tinyurl.com/as32o9>.

78. Tarleton Gillespie, *WIRED SHUT: COPYRIGHT AND THE SHAPE OF DIGITAL CULTURE* 189 (2007) (quoting LESSIG, *CODE AND OTHER LAWS OF CYBERSPACE*, *supra* note 71, at 43-44) (“[I]t is not hard for the government to take steps to alter, or supplement, the architecture of the Net. And it is those steps in turn that could make behavior of the net more regulable.”).

facilitated at the expense of democratic and republican forms of government. This article will review this issue, but at the same time, the question of Democracy and Republicanism is not the only mode for consideration of freedom—as already mentioned, the rule of law, and as yet to be mentioned human rights and social justice, need to be considered in the analysis.

In so far as autocracy goes, this is philosopher Martin Heidegger's nightmare. Heidegger had been a Nazi prior to World War II, but his philosophy in later years came to be informed by his experience; he expressed a deep distrust of the drive of all things, particularly technologies, toward a single will.⁷⁹ In a state of a single will, law may still exist, but it is reduced to that of other goods and commodities. It is simply "instrumental" to the single will. Such a state is known as autocratic "rule by law." In such a state, even people are reduced to be commodities and instrumentalities of the single will—this was Heidegger's nightmare.

In short, democratic institutions will be challenged by the Web. At the same time, the possibility for exerting one's voice in a broader range of institutions has increased. This is exactly the result Fuller sought in his context number 2—"the presence of some appropriate form of order that will carry the effects of individual decision over into the processes of society."⁸⁰ We will need to work hard to keep the democratic propensity alive and in line with Fuller's objectives for a free society.⁸¹ Fuller even criticizes Mill's essay on freedom for not recognizing the need for "arrangements" to facilitate choice: "Mill seemed strangely blind to the fact that in all significant areas of human action formal arrangements are required to make choice effective."⁸² We might see those "arrangements" as the "protocols" of the Web, the stateless institutions that dot

79. Paul D. Callister, *Law and Heidegger's Question Concerning Technology: Prolegomenon to Future Law Librarianship*, 99 LAW LIBR. J. 285, 286-90 (2007).

80. See *supra* note 16 and accompanying text.

81. See Gjelten, *supra* note 7 (arguing that the threat of a free and open society on the net to totalitarian regimes and their efforts to make the net less open).

82. Fuller, *supra* note 1, at 1312. "[Mill] generally retains . . . the notion that the forms of social order are a kind of unfortunate necessity and that freedom consists in their absence." *Id.* at 1312 n.3.

the landscape of the new international order, or institutions as old as the ballot box.

There is one other aspect of modality (2) that must be treated in this section: “by which [democratic and representative] arrangements the individual’s actions may from time to time be legitimately directed.”⁸³ The direction of the individual was important to Fuller. He justified it because, assuming democratic institutions, “we must draw the man whose freedom is in question into consultation; we must afford him some participation in the decisions that affect the practical significance of his freedom.”⁸⁴ It is natural to think of such participation in legislative function, but Fuller significantly includes judicial functions because litigants are included through their attorneys.⁸⁵ The role of law and institutions in effectuating individual choice is further addressed in the final section of this paper below.⁸⁶

Modality (3)—Individual Rights

We live in an age when a single philosophy has challenged, and in large measure rejected, the notion that rights can exist apart from commands or legislative political action (which includes constitutional ratification and amendment) in the form of some higher law or moral principle. This philosophy is called legal positivism, and it has been embraced by much liberal thinking. Certain luminaries like John Austin, Jeremy Bentham,⁸⁷ and H.L.A. Hart propounded a theory that explained all rights, including those articulated by courts, as “convention,” “command,”⁸⁸ or “enacted by existing political authority.”⁸⁹ “It would never be sufficient to point out that so-and-so is the morally legitimate authority, that people have

83. *See supra* text accompanying notes 17-18.

84. Fuller, *supra* note 1, at 1315.

85. *Id.*

86. *See infra* text accompanying note 105.

87. *See* John Finnis, *Natural Law: The Classical Tradition*, in *THE OXFORD HANDBOOK OF JURISPRUDENCE AND PHILOSOPHY OF LAW* 9 (Jules Coleman & Scott Shapiro eds. 2002).

88. *Id.*

89. *Legal positivism*, BLACK’S LAW DICTIONARY (7th ed. 1999).

inalienable rights, that certain texts are sacred, or that a given interpretive methodology produces the best results from the perspective of public policy.”⁹⁰ Essentially, there was no higher moral authority or natural law to which one could appeal as a source of freedom. Regardless of such thinking, a well-regarded legal philosopher and critic of legal positivism, Ronald Dworkin, maintained the primacy of individual rights, in among other works, of *Taking Rights Seriously*. For Dworkin, certain political rights trump the power of other legislated acts:

So a claim of political right is a claim to a trump over the general welfare for the account of a particular individual . . . We emphasize the special injustice of torture, for example, when we speak of a right against torture, because we claim that torture would be wrong even if it were in the general interest. But it is appropriate to speak of a right not to be tortured even when torture would serve only private or illegitimate interests. Torture in this latter case is wrong *a fortiori*.⁹¹

Assuming a perfectly democratic society, a legal right should exist against torture without having to legislate it—at least the argument is so strong that it is the burden of anyone (Jack Bauer from the hit show *24* included) to demonstrate that this is not the case.

It is policy that has given us “enhanced interrogation techniques,” but Dworkin’s trumps are rooted in principle rather than policy:

I call a ‘principle’ a standard that is to be observed, not because it will advance or secure an economic, political, or social situation deemed desirable, but because it is a requirement of justice or fairness or some other dimension of

90. SHAPIRO, *supra* note 17, at 102.

91. RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 431 (Bloomsbury Publishing, 2013).

morality. Thus the standard that automobile accidents are to be decreased is a policy, and the standard that no man may profit by his own wrong a principle.⁹²

Policies express the will of the majority and are utilitarian in nature, smacking of the “general welfare.” They are the backbone of positivism. The dilemma for rooting individual rights in principle (meaning something other than the expressed policies of the majority) is that it directly challenges democratic fiat and raises many questions about how such principles are to be discerned and who is qualified to do so? It gives rise to the issue of judges “making law.” What is to limit the will of the majority being overturned? Grounding rights in principles and natural law is exactly what Jeremy Bentham referred to as “nonsense upon stilts,”⁹³ but that is precisely what Dworkin does in his attack on positivism. The success of Dworkin’s attack rests on *a fortiori* cases such as the rule against torture—ironically, a not unheard-of dilemma in modern times with the American government’s use of waterboarding against terrorists. For positivists, a government’s actions speak louder than moral principles.

For us, the question is more subtle: are we any less free if our society rejects the idea of rights based upon moral principles rather than legislative, judicial, or executive fiat? Perhaps it is the case that checks on power, the essential element of rule of law, is more potent when grounded in principle because they are less likely to be changed by the operation of legislative, judicial, and executive processes; however, such principles must be interpreted by such processes, and these interpretations may change over time. In any case, for Fuller’s concept of freedom, the absence of “nullifying restraints” is imperative.⁹⁴ Whether based upon principle or legislative, judicial, or executive fiat, the important thing is that rights operate as trumps on unmitigated power.

92. *Id.* at 39.

93. Ross Harrison, *Jeremy Bentham*, in *THE OXFORD COMPANION TO PHILOSOPHY* 87 (Ted Honderich ed., 1995).

94. *See supra* text accompanying note 16.

Modality (4)—Social Justice

The modalities of freedom would not be complete without contemplating John Rawls' work on social justice. Nor is there a better guarantee of the last part of our definition—"that the general welfare or social justice is sufficiently observed that the exercise of fundamental rights and privileges is meaningful, but not suppressed by attempts to serve the general welfare or social justice"—than the lexical ordering of rights introduced by Rawls.⁹⁵ The modern liberal framework for discussing individual rights has been through the lens of social justice as described by John Rawls and a host of legal scholars who have engaged his theories.⁹⁶

Rawls is most noted for his consideration of justice as fairness and his separate treatment of basic liberties (freedoms to vote, hold office, of conscience, etc.) and social values (income, opportunity, and wealth). In his original formulation of the principle of basic liberties, "each person is to have an equal right to the most extensive total system of equal basic liberties compatible with a similar system of liberty for all."⁹⁷ Before social values or "goods" could be considered, basic liberties had to be equal. Under his theory, it would not be just to restrict basic liberties even if it meant that a more equitable distribution of social values could be achieved. He referred to this as a "lexical ordering," meaning that individual access to equal liberties had to be satisfied prior to any consideration of social welfare.⁹⁸

95. See *supra* text accompanying note 18 (specifically, definitional element (4)).

96. The significance of Rawls' work is hard to overstate:

John Rawls's *A Theory of Justice* is a modern classic and its impact on contemporary legal thinking has been profound. One indicator of the work's influence is the staggering number of law review articles citing *A Theory of Justice*. Another measure is its frequent citation in opinions of American courts—a phenomenon that is unduplicated by any other twentieth-century work of political philosophy.

Lawrence B. Solum, *Situating Political Liberalism*, 69 CHI.-KENT L. REV. 549, 550-51 (1994) (citing JOHN RAWLS, *A THEORY OF JUSTICE* (1971)).

97. RAWLS, *supra* note 96, at 302.

98. *Id.*

For instance, suppose there were two groups of people, A and B, and that it were possible to quantify their basic liberties and their material benefits in society. Possible scenarios for the division of liberties and benefits might look like the following:⁹⁹

TABLE 1

	Alternative Structures of Liberties/Social Goods		
Citizen Group	I (Group A/B)	II (Group A/B)	III (Group A/B)
Group A	10/10	9/25	10/15
Group B	10/10	11/50	10/20

Even though structure II maximizes social goods for both groups (25 for A and 50 for B), it is unacceptable because basic liberties are unequal (group A only gets 9 while group B gets 11). Equality among basic liberties (as represented by the first value, before the slash) has to be achieved first before maximization of social goods can be considered. In this instance, structure III is the superior and morally just arrangement. To illustrate further, suppose there were a class at an elementary school for which some of the parents paid tuition and some, due to indigent circumstances, did not. Suppose further that all of the children were allowed to run for and vote for various class offices—class president, hall monitor, newspaper editor, etc., but that due to budget limitations, packages of Crayola had to be divided up differently. Students from families who did not pay tuition got a pack of ten Crayolas for the year, but students from families who paid full tuition would get the box with thirty Crayolas. For Rawls, this is a just arrangement. It preserves incentives to pay tuition—your child gets a bigger box of Crayolas—but still preserves

99. See FRANK LOVETT, RAWLS'S 'A THEORY OF JUSTICE' 46, fig. 3.1 (2011).

fundamental liberties—running and voting for class office—as equal. If, on the other hand, the school had decided to hand out equal boxes of Crayola (say, boxes of twenty Crayolas each) to every child, regardless of whether his or her parent paid tuition, but incentivize the payment of tuition by restricting running for office to children of tuition-paying parents, the arrangement would fail Rawls’ basic test because running for office is a political right (assuming that value is to be inculcated in grade school) is lexically prior to the division of Crayolas as resources.

Now for purposes of this article, what is interesting is whether we are talking about the division, not of Crayolas, but of the allocation of library books or time on the Internet (e.g., non-tuition paying students can check out one book per week and have no Internet access, but full tuition students can check out as many books as they want and are entitled to one hour per day on the Internet). Where books and the Internet fall in Rawls’ formulation—as fundamental liberties or social goods—is important because the former is lexically prior, meaning it must be satisfied first with equal distributions, and the latter permits differences in allocations. Consequently, how we think about books and information media (whether they should be treated as lexically prior or as secondary) is critical in determining whether access and availability of such media in society is just and fair—i.e., a prerequisite for freedom.¹⁰⁰

Rawls’ theory can turn freedom (particularly “freedom to”) on its head by exalting as the first lexical imperative “freedom from” values. If the first lexical imperative is freedom from hunger or freedom from fear, and other freedoms, like freedom to speak, play a secondary role in the lexicon, Rawls’ system creates a society that may not satisfy the other elements of this article’s definition or Fuller’s framework. Certain rights, like freedom of assembly and worship and freedom of speech, may

100. While the right to information is not expressed in the United States Constitution, it is more than the aspiration of librarians and is expressed under Article 19 of the Universal Declaration of Human Rights, which provides “[e]veryone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers” G.A. Res. 217A (III), *supra* note 20, at art. 19 (emphasis added), <http://www.un.org/en/universal-declaration-human-rights/>.

no longer serve as effective trumps under the third modality for freedom if lexical prioritization is not arranged with them as the highest priority.¹⁰¹ Nor, under the first modality, will there be the “thin theory” protection of like-people generally treated alike under the law—one can imagine a situation of equality of “freedom from” hunger, but not “freedom to” speak.¹⁰² The role of hunger in relation to fundamental rights is not to be lightly cast aside. The International Declaration of Human Rights provides in Article 3 for the “right to life.”¹⁰³ Argument can be made that “freedom from” starvation flows from it. The point is Rawls’ lexical prioritization has to have resolved the hierarchy of rights and values and that resolution must comport with the overall definition of freedom, particularly modality (3) on rights as trumps. In other words, there has to be congruity between the modalities. Nonetheless, there is room for considerations of social justice—of opportunity and oppression—but with Rawls’ lexical prioritization demanding a hierarchy of rights, Fuller advocating the ascendancy of “freedom to” values, and Dworkin requiring rights to operate as trumps on government action, even at the expense of social welfare. Hence the formulation of modality (4) of the definition, “the general welfare or social justice is sufficiently observed that the exercise of fundamental rights and privileges is meaningful, but such rights and privileges are not suppressed by attempts to serve general welfare or social justice.”¹⁰⁴

101. See *supra* notes 82-86.

102. See *supra* note 42 and accompanying text.

103. See *supra* note 20. Article 1 also bears upon the question providing that humans are “equal in dignity,” something that poverty denies.

104. See text accompanying *supra* note 18.

Law as Social Planning—The Institutional Imperative for Freedom

My cousin returned from two years as a missionary in the Dominican Republic. He described the rules of the road as “you don’t want to hit me, and I don’t want to hit you, so let’s make a deal.”¹⁰⁵ More correctly, my cousin was describing the absence of rules of the road, and the phenomenon that occurs in this absence is constant negotiation. The problem is that a state of constant negotiations is inefficient. Per a recent book, *Legality*, by Scott Shapiro,¹⁰⁶ what should result is a kind of social planning that produces laws or rules of the road, and which reduces the inefficiencies of constantly negotiating what side of the road to drive on, who has to yield to whom, what to do at a crossing, how fast to drive, etc. Now, in all likelihood these rules do exist in the Dominican Republic, but they are ignored in favor of private negotiation. Further shedding light on the sad condition, my cousin reports instead of stopping at stop signs that cars honk twice while proceeding directly through the intersection, that police frequently try to flag down motorists to solicit bribes, and that motorists routinely ignore such commands. A preference to avoiding corrupt police can be easily understood, but the question remains why Dominicans seem to prefer private negotiations to traffic rules established by the state—rules which should be favored under Shapiro’s thesis.

Before exploring plausible answers to that question, we need to understand a great deal more about Scott Shapiro’s contributions in *Legality*. His theory represents a form of positivism that might be called “Plan Positivism,” which he combines with planning theory—really a theory that legal activity is an activity of social planning.¹⁰⁷ Shapiro develops a narrative of a wonderful community springing out of a cooking club, evolving into a business, going public on the stock market, selling out their interests, buying an island, and rapidly

105. Conversation with James Barton Callister after return from mission to the Dominican Republic in the 1990s.

106. SHAPIRO, *supra* note 17.

107. *Id.* at 178, 195.

evolving a sophisticated government through “nested planning” on what becomes known as “Cook’s Island.” In Shapiro’s narrative, government is not an evil necessity resulting from bad men—the contention made by the likes of James Madison, Thomas Hobbes, and David Hume,¹⁰⁸ but rather Shapiro’s island develops in a happier atmosphere with planning powers being delegated, because it is simply more efficient to delegate planning authority than to have an environment of constant bargaining and consensus forming activity:

[I]t is extremely costly and risky for people to solve their social problems by themselves, via improvisation, spontaneous ordering, or private agreements, or communally, via consensus or personalized forms of hierarchy. Legal systems, by contrast, are able to respond to this great demand for norms at a reasonable price. Because hierarchical, impersonal and shared nature of legal planning, legal systems are agile, durable, and capable of reducing planning costs to such a degree that social problems can be solved in an efficient manner.¹⁰⁹

In other words, even in a society of all good actors, legal systems (and presumably the rule of law) would arise because it is just not efficient to keep negotiating how order is to be maintained. Shapiro’s narrative and theory run on the necessity of efficiency. This is what Fuller calls for when he identifies in his framework of freedom the need for the “presence of some appropriate form of order that will carry the effects of individual decision over into the process of society.”¹¹⁰ Law and social planning also legitimize the second half of modality (2), concerning “by which arrangements the individual’s actions may from time to time be legitimately directed.”¹¹¹

108. *See id.* at 173-74.

109. *Id.* at 172.

110. Fuller, *supra* note 1, at 1314.

111. *See supra* notes 17-18 and accompanying text.

Returning to the Dominican Republic and the constant negotiation while performing the task of driving—the “you don’t want to hit me, and I don’t want to hit you, so let’s make a deal— the question arises: why do individuals who have such chaotic traffic reject any scheme of rules of the road and prefer a situation of constant negotiation? The answer may be cultural or as simple as frustration with a lack of resources. The Dominican Republic has about 519 people per kilometer of road, compared to forty-nine people in the United States. It also has four times the number of traffic deaths per 100,000 people. The following table is illustrative:¹¹²

TABLE 2

<i>Country</i>	Population per KM of Road	Population per KM of Paved Road	Population per Square KM of Land	Traffic Deaths per 100,000 inhabitants
Bahamas	117.42	204.51	31.87	13.7
Cuba	181.77	370.96	100.73	7.8
<i>Dominican Republic</i>	<i>518.63</i>	<i>1,035.21</i>	<i>211.50</i>	<i>41.7</i>
Netherlands	120.64	Unavailable	495.83	3.9
United States	48.67	72.38	34.56	10.4

Something is wrong with the Dominican Republic. While it is true that it is a very densely populated country, this alone does not account for the fact that Dominicans prefer bargaining while driving instead of conforming to established laws

112. See THE WORLD FACTBOOK, <http://tinyurl.com/h9xdl2h> (last updated Nov. 4, 2013); see also Wikipedia, *List of countries by traffic-related death rate*, <http://tinyurl.com/h2surkj> (last visited Nov. 25, 2013) (based upon WHO, GLOBAL STATUS REPORT ON SAFETY 2013, at <http://tinyurl.com/eza7qbj>).

dictating rules of passage and yielding while driving on Dominican roads. The Netherlands have more than twice the population density, and, having lived there for a year, I can attest that they have a very good traffic system, one governed by law and order. The fact that really stands out is that Dominican Republic simply does not have enough roads, particularly paved roads, to support its large populations. This may result from poor planning, lack of resources to build the roads, or most likely a combination of the two factors. Astonishingly, the effect is not only measured in traffic congestion and deaths, but in a whole scale abandonment of following the basic rules of the road. Indeed, we might even conjecture that based upon Shapiro's theory, the Dominican Republic suffers from a lack of the rule of law. Interestingly, a World Bank Report, amalgamating various indices and measures of the rule of law, places the Dominican republic in the range of 30% (see Figure 3), whereas The Bahamas have declined from the high 80s to the 70% range in the last decade (see Figure 4 below).¹¹³

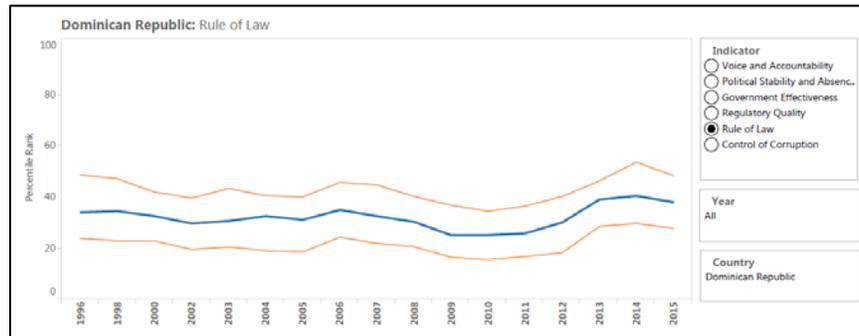


FIGURE 3—WORLD BANK RULE OF LAW AGGREGATE INDICATOR: DOMINICAN REPUBLIC

113. The rule of law statistics were generated from the World Wide Governance Indicators, Interactive Data Access, at <http://tinyurl.com/ox6pocp> (select “Country Data View,” “Rule of Law,” “All Years” and compare “Dominican Republic” and “Bahamas, The”). Copies of the download report are on file with the author.

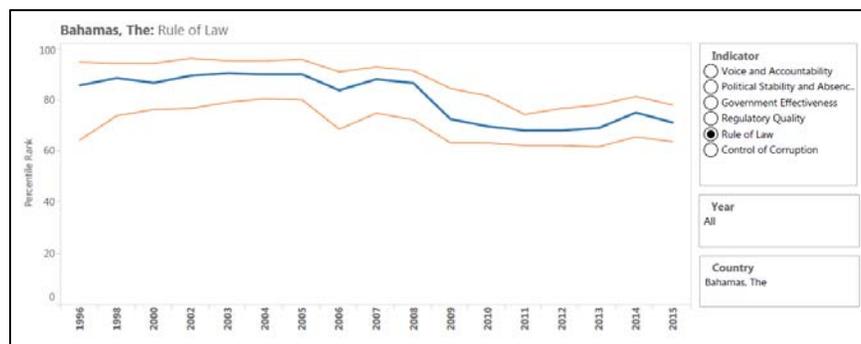


FIGURE 4—WORLD BANK RULE OF LAW AGGREGATE INDICATOR: THE BAHAMAS

The United States has maintained a score in the low 90s.¹¹⁴ Shapiro’s thesis that law is a planning activity designed to more efficiently transact what individuals do on a day-to-day is consistent for the Dominican Republic (where adherence to such planning appears to be non-extant or severely limited) and other aggregate measures of the rule of law showing a breakdown of rule of law in the Dominican Republic by no less a prestigious institution than the World Bank.

Returning to Shapiro’s planning thesis—that law can be described as a kind of planning activity—one has to wonder about the stark contrast of idealistic, non-Hobbesian community in Shapiro’s narrative (perhaps best represented on the chart of the Bahamas) and whatever is going on in the Dominican Republic that makes it such a dangerous place to drive. Can it all be explained by the reputed preference of Dominican’s to “make a deal” while driving, rather than adhering to any system of formal traffic laws? Perhaps the Dominican’s state of affairs can be reduced to some sort of failure in planning, as evidenced by the sheer congestion of the roadways (e.g., five times as many people per mile of paved roads as the Bahamas). Also important is the failure to adhere to such planning as evidenced by the Dominicans driving

114. The rule of law statistics were generated from the World Wide Governance Indicators, Interactive Data Access, at <http://tinyurl.com/ox6pocp> (select “Country Data View,” “Rule of Law,” “All Years” and select “United States”). Copies of the download report are on file with the author.

behaviors (constant negotiations, honking, instead of stopping, at stop signs, and waiving off police commands).

Not all planning or even social planning, according to Shapiro's thesis, is legal activity, nor is all activity that produces norms legal activity. Simply planning roadways is not legal activity. However, activity is legal activity if it "(1) produces norms that are supposed to settle, and purport to settle, questions about how to act; (2) dispose addressees to obey; and (3) is purposive, that is, has the function of producing norms."¹¹⁵ In the Dominican Republic, assuming there had been efforts to plan traffic laws, what is missing is element (2), the dispositive element: "All legal philosophers agree that legal systems exist only if they are generally efficacious, that is, they are normally obeyed."¹¹⁶ In the Dominican Republic, the fundamental element of efficacy of traffic law is missing. This translates not simply into a suggestion of failed legal activity following Shapiro's theory, but based upon our earlier discussion of the elements of thin theory, the final element is missing—the law must be accepted by a majority of those affected.¹¹⁷ It is not, in the words of Fuller, a "congenial environment of rules and decisions."¹¹⁸

Furthermore, legal planning imposes certain characteristics, such that, as quoted above, "[b]ecause hierarchical, impersonal and shared nature of social planning, legal systems are agile, durable, and capable of reducing planning costs to such a degree that social problems can be solved in an efficient manner."¹¹⁹ This is relevant to this article's concept of freedom. As discussed above, it is only through relationships that freedom is actualized. Those relationships include the citizenship, community, and the establishment of officials and institutions that can effectively regulate the affairs we so often take for granted and which occur so regularly in common life. Otherwise, life would be full of constant negotiation and transacting business for the most

115. SHAPIRO, *supra* note 17, at 201.

116. *Id.* at 202.

117. *See supra* note 45 (with reference to the final, enumerated bullet point).

118. *See supra* note 16 and accompanying text.

119. *See supra* note 109 and accompanying text.

common of events, driving, disposing of trash, establishing what rights go with property, etc. In a sense, we are freer in a complex world because legal activity has interposed itself to take over the mundane.

Summary

Freedom does not mean the absence of restrictions. It is not summed up in the Constitution or its Bill of Rights. It is a complex concept best viewed in different modalities: Rule of Law, Democracy and Representative Government, Individual Rights and Social Welfare. In considering these modalities, this article has also considered the framework for freedom tendered by Lon Fuller and attempted to answer his question: “How can the freedom of human beings be affected or advanced by social arrangement, that is, by laws, customs, institutions, or other forms of social order that can be changed or preserved by purposive human actions?”¹²⁰ Consequently, this article has not contented itself with discussion of restraints and their absence but has always kept institutions, including law as an institution, in mind.

Returning to the definition of freedom, rule of law is perhaps foremost in its modalities because it considers the checks on power as creating the space necessary for free choice. Even before the Bill of Rights was enacted, the Constitution contained checks and balances to limit power. Long before the American Constitution, the Magna Carta limited the power of the English monarch in relation to the noble classes and “free men.”¹²¹ Per the “thin theory” rule of law, a list of basic elements, such as procedures for making rules, access to law, and no ex post facto laws, are used as evidence of rule of law.¹²²

Also with respect to rule of law, states may be represented

120. Fuller, *supra* note 1, at 1309.

121. See JOHN H. LANGBEIN, RENÉE LETTOW LERNER, & BRUCE P. SMITH, HISTORY OF THE COMMON LAW: THE DEVELOPMENT OF ANGLO-AMERICAN LEGAL INSTITUTIONS 123-24 (2009). “No free man shall be arrested or imprisoned or disseised or outlawed or exiled or in any way victimized, neither will we attack him or send anyone to attack him, except by the lawful judgment of his peers or by the law of the land.” *Id.* at 125.

122. See *supra* note 45 and accompanying text.

as existing on a plane, with Rule of Law being one of the cardinal points, and Rule of Mob, Rule of Power, and Rule of Will. Rule by Law is a counterfeit of Rule of Law. Certain exchanges occur where by states give into certain checks on power in exchange for legitimacy. Furthermore, power holders trade identity in exchange for loyalty. It is within this plane formed by the cardinal points that freedoms are permitted and restricted by the realities of power or the absence thereof.

Democracy and representative government will be important considerations in many of the information milieu, but our current digital age has created particular challenges in that the Net enhances the power of both oligarchs and anarchists. The trick is how to balance the powers of the Net—on the one hand to continue the creativity that has been unleashed by allowing users to remix and publish their own content, and on the other to restrict the abuses of copyright law and “swarming”—the phenomenon whereby mob activity is coordinated by the Web. The challenge is how to preserve a liberal democratic scheme that will promote creativity and instill a sense of civic republicanism that will promote a kind of citizenship or netizenship (the essence of freedom) on the Net.

As the last modality, law and social justice has been considered. There are so called positive freedoms—freedoms that can occur only because there are sufficient resources and opportunity. The leading theorist in the field for the last fifty years has been John Rawls. Rawls argues for a Pareto optimization; however, before social values or “goods” could be considered, basic liberties had to be equal.¹²³ The fundamental question remains as to what those basic liberties should be and how information environments affect outcomes under the theory. For instance, how would a potential right to information (such as under article 19 of the Universal Declaration of Human Rights)¹²⁴ be treated under Rawls’ theory?

This article has also given consideration to a new theory from Scott Shapiro arguing that law is a type of social planning involving officials that purports to settle questions about how

123. See *supra* note 97 and accompanying text.

124. G.A. Res. 217A (III), *supra* note 20, at art. 19.

to act, that disposes obedience from citizens and subjects, and that is purposive in producing norms.¹²⁵ This new theory most closely aligns to the rule of law modality, and in particular thin theory, as discussed above. What is important is that the most recent jurisprudential theorist has described a theory that aligns with the rule of law modality, regardless of whether we accept or reject positivism. The point being that rule of law may be foremost among the considerations when contemplating freedom in relation to jurisprudence and law.

In the end, what does freedom mean? It means citizenship. It posits relationships rather than restraints, and it orders them in ways harmonious to both society and the individual. May humanity's aspirations for freedom burn long and bright, regardless of milieu, as defined by information technologies and other challenges.

125. *See supra* note 115 and accompanying text.