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Freedom, Legality, and the Rule of Law

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FREEDOM, LEGALITY, AND THE RULE OF LAW

By

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Abstract

There are numerous interactions between the rule of law and the concept of freedom, looking at Fuller’s eight principles of legality, the positive and negative theories of liberty, coercive and empowering laws, and the formal and substantive rules of law. Adherence to the rules of formal legality promote freedom by creating stability and predictability in the law, on which the people can then rely to plan their behaviors around the law – this is freedom under the law. Coercive laws can actually promote negative liberty up to pulling people out of a Hobbesian state of nature, and then thereafter can be seen to decrease negative liberty by restricting the behaviors that a person can perform without receiving a sanction. Empowering laws promote negative freedom by creating new legal abilities which the people can perform. Positive freedom can be enhanced by the law when it prohibits negative behaviors and promotes positive behaviors. Finally, the content of the law can be used to either promote or suppress individual freedom.
**Introduction**

“The end of law is not to abolish or restrain, but to preserve and enlarge freedom. For in all the states of created beings capable of law, where there is no law, there is no freedom.”

- John Locke

Despite its seeming simplicity, this quote from Locke’s classic *Second Treatise of Government* encompasses a wide range of complex and multi-faceted issues for the student of liberty. Freedom is a concept familiar to nearly everyone in the world, and everyone has experienced it to some degree. The relationship between law and liberty, while not likely familiar to the lay individual, has been examined, discussed, dissected and analyzed by philosophers, lawyers, judges, economists and politicians for centuries. Despite the amount of scholarly attention these disciplines have given to this topic, the conversation is far from over.

This article examines this complex relationship from the theory that the law consists of coercive and empowering laws, and that the rule of law can be seen as a merely formal concept, without regard to the content of laws, or as a substantive concept in which the substance of the laws are part of the validating conditions of law. By viewing negative and positive freedom with respect the law and the rule of law, we can see how laws can diminish or enhance the freedoms of people living in a regime.

**On the Nature of the Law and the Rule of Law**

The concept of law is often theoretically divided along the lines of natural law versus legal positivism. This dichotomy carries over to writings on the concept of the "rule of law,"

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which are frequently classified as either formal theories or substantive theories, although most versions of these theories rarely fall into line so neatly. The purpose of this section is to discuss the concept of the rule of law from both formal and substantive perspectives, relying on the abundance of quality scholarly attention this topic has received recently.

1. Coercive and Empowering Laws as a Means for Classifying the Law.

Hart famously divided his analysis of the concept of law into primary laws and secondary laws, the latter being the mechanisms for creating, changing or repealing the former. This distinction is useful for understanding the concept, especially compared to Austin’s command theory. However, in the context of freedom, this distinction hides a difference among laws that is pertinent to the interplay of law and freedom. In order to see the difference, we must look at laws as either (1) coercive laws or (2) empowering laws, or some discernable combination of the two.

Coercive laws are akin to what Austin called “commands backed by sanctions.” These laws can be formally defined as following the form “If A, then B,” where A is the behavior that the law seeks to prohibit, and B is the sanction that follows performance of A. These laws, either explicitly or with some minor rearranging of their elements, can be understood to state “If any person performs some action A, the sanction B shall be imposed.” These are behaviors and

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5 Hart (1961), chapter 5.


7 Id.
sanctions designed by the regime to compel compliance by the people in certain forms of acceptable behavior by prohibiting others.

For example, the prohibition of murder in most if not all societies around the world will generally follow the form, “If any person performs the action of murder, then the sanction of imprisonment or death shall be imposed.” The exact form of the law is unimportant, and changing it to the “If A, then B” form allows us to see the similarity among all coercive laws. The legal regime prohibits murder among the people by threatening the imposition of imprisonment or death. Assuming a high correlation between the language of this law and its enforcement (which we will discuss below as one of the principles of formal legality), the imposition of these sanctions would deter most people from committing murder, whether or not they also have non-legal moral prohibitions on murder.

Empowering laws are those that affirmatively give people rights, immunities, powers, claims, and privileges. They also take the form of “If A, then B” where A is seen as the conditions of validity, which, if met, then confer a legal recognition or protection of B. A and B can also be seen as short hand for a number of conditions or rights, such as $A = A_1$ and $A_2$ and $A_3, \ldots A_n$ and $B = B_1$ and $B_2$ and $B_3, \ldots B_n$. For example: if Bob wants to create a valid will, we can represent this as “If a person is over the age of eighteen years, of sound mind, not under duress, and makes a writing of his testate wishes, and gets said writing witnessed by three people, then the law confers legal validity on such person’s will.” Bob must meet the validating conditions of A in order to achieve the legal recognition in B.

Note that while both coercive laws and empowering laws can take the simple logical form of “If A, then B,” they differ greatly on their effect over the people. Coercive laws impose a penalty for certain behaviors that the regime wants to discourage. If you do A, then the penalty
B will follow. The implication, then, is that if you want to avoid B, you should not do A. However, empowering laws do not require people to do anything at all. No empowering laws require people to make a will – they only state that if Bob wishes to do so on his own accord (and not that he has to), he must follow the validating conditions. Thus, there is only one way in empowering laws to get from A to B, but there is no requirement to strive for B at all. One can simply not want to do B at all, and thus can ignore the validating conditions of A. Ignoring A in the context of coercive laws, however, will land the person in trouble with the legal regime.

Furthermore, some laws can be seen as a combination of both empowering laws and coercive laws. For example, there is no requirement that individual debtors in the United States file for personal bankruptcy (leaving aside the mechanism that creditors can force debtors into bankruptcy under certain circumstances). However, the bankruptcy laws exist so that individuals can stop creditors from attempting to collect on a debt or even completely erase their debt by following the rules of bankruptcy. These laws empower people by giving them the power to change the legal relationship between themselves and their creditors, despite the fact that the legal relationship previously existed under the laws of contract, or tort, or secured transactions or the Uniform Commercial Code, and so forth.

The bankruptcy code in the United States also contains some coercive elements as well. Once the debtor decides to undertake a bankruptcy, the debtor must truthfully disclose all assets and income to the court and the bankruptcy trustee and not commit fraud. The violation of this rule will result in fines, imprisonment, or other sanctions. Thus, there is no requirement that the debtor files a bankruptcy action at all, but if he does, he must follow the validating conditions of

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the empowering part of the bankruptcy and avoid the prohibited behaviors for the coercive part of the bankruptcy.

Hart’s classification of primary and secondary laws is not contrary to this classification of coercive and empowering laws, but can exist alongside it to provide another way to view the law. Primary rules will take the form of coercive laws, empowering laws, or a combination of the two, as shown above. These rules are those that fill the bankruptcy code, or the criminal code, or the probate code. Hart’s secondary rules are “meta-laws” in the way that they are laws about laws. These laws set forth the conditions through which laws are created, changed or repealed, which most closely resemble empowering laws in my analysis. In order for a law to be created, the bill must be created by one house or Congress, passed by a majority vote in both houses, and signed by the President. These are the validating conditions to creating a law. Failure to follow these validating conditions does not result in a bad law, or a voidable law, or an invalid law, but rather, it would not result in a law at all. In this context, we would say that the government has failed to pass a law. Congress is under no compunction to create laws at all (in a legal sense, not a moral sense), and if Congress fails to meet the validating conditions for passing a law, there is no sanction imposed. Thus, we can see that this classification system will better explain how the law is related to the concept of freedom, while also accounting for Hart’s concept of law.

2. The Rule of Law - Formal Necessary and Sufficient Conditions.

Before analyzing what is typically meant by use of the phrase, "the rule of law," it is important to address why this concept is so fundamentally important to the field of jurisprudence generally. Matthew Kramer has defined this concept as, "the set of conditions that obtain whenever any legal system exists and operates," and he has concluded that "[e]specially in any sizable society, the rule of law is indispensable for the preservation of public order and the
coordination of people's activities and the securing of individuals' liberties."\textsuperscript{10} Brian Tamanaha recognized that, "[t]he rule of law thus stands in the peculiar state of being the preeminent legitimating political idea in the world today, without agreement on precisely what it means."\textsuperscript{11} World leaders pay significant homage, whether sincerely or in name only, to respect for the rule of law.

This is perhaps where the agreement on the concept begins to diverge. Is the rule of law a merely formal concept, akin to how legal positivists would describe the concept of law itself, without any necessary relationship to the normative value of the content of the law? Or is the rule of law better seen coming from the lineage of natural law, which requires an evaluation of the substance of the laws themselves before making a determination that the "rule of law" is respected in a particular regime?

A strong starting point for an analysis of the rule of law is with famed natural law theorist Lon L. Fuller. Despite his noted debate with positivist H.L.A. Hart in the 1950's and the popularity of \textit{The Morality of Law}, Fuller sets forth a strong foundation for any legal system properly recognizable as encompassing the rule of law. Kramer has noted that Fuller’s “elaboration of the eight principles of legality is a permanent valuable contribution to legal philosophy, but some of his arguments in support or explication of his principles are confused or otherwise inadequate.”\textsuperscript{12} Thus, while his eight principles endure, and have been analyzed by numerous scholars, they may not endure for the reasons Fuller originally set forth. Regardless,

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this section is devoted to describing the necessary and sufficient conditions for the formal theory of the rule of law, that is, for a rule of law without a necessary normative component. Fuller’s eight principles are an adequate launching pad for this endeavor.

As noted above, Fuller’s eight principles set forth his conditions for a legal system. These principles require, to some minimum degree, the following: (1) a generality in making rules, (2) laws that are made publicly known, (3) a ban on retroactive legislation, (4) laws that are comprehensible, (5) laws that are not contradictory, (6) laws that are not impossible to perform, (7) some measure of relative stability in the laws, such that constant changes are not being made, and (8) congruence between the rules as announced and their actual administration.13 A substantive failure in one or more of these criteria, for Fuller, results in something that cannot properly be called a “legal system.”14

In the most formal, thinnest concept of the rule of law, the law is seen as the formal mechanism by which the government performs its duties in society. Tamanaha calls this “rule by law” and it is meant to describe the condition where the government acts according to predetermined public rules as opposed to unfettered discretion.15 In addition to the minimum conditions Fuller set forth, it is also recognized that the law must apply according to its terms equally to all persons, regardless of wealth, social status, or power.16 Furthermore, Joseph Raz also recognized that the rule of law must be supported by certain social institutions, such as an

14 Id.
15 Tamanaha (2004), locations 1335-1341.
16 Id. at locations 1359-1378.
independent judiciary, fair and open hearings, and judicial review of legislative and administrative action.\textsuperscript{17}

The rule of law must contain certain proscriptive elements such that there are predetermined rules which the citizens, including the law-makers and law-enforcers, follow. In other words, to describe a “rule of law” in its most simplified, stripped down form, it is a rule of people by the government according to predetermined rules. As the hard positivist account of the concept of law recognizes, the law can be whatever the law-makers say it is. Thus, in a merely formal rule of law theory, the law is not seen as “good” or “bad,” and the legal system itself is not seen as “good” or “bad.” Rather, the system merely is, or it is not. Adding other requirements, such as the equal treatment of all persons according to the law, seems to be an additional normative criteria which is widely held as important by scholars, although I believe it is not a minimal necessary or sufficient condition for the basic category of “rule by law.” The rule of law can be said to be satisfied if the law is applied as written, even without a general normative requirement that it apply equally to everyone. If such a law only applied to part of the population according to its terms, and was enforced as written against that population, the “rule by law” would be satisfied.

An additional, somewhat “thicker” version of the formal concept of the rule of law, according to Tamanaha, is created by adding democracy to the equation.\textsuperscript{18} This remains a formal concept of the rule of law, in that the substance of the law itself is not taken into account when determining the law’s legitimacy. As with Hart’s Rule of Recognition, in this version of the theory the law is seen as valid when it is created by democratic means. This has the advantage

\textsuperscript{17} Id. at locations 1353-1359;

\textsuperscript{18} Id., at location 1441.
over the thinner rule of law in that, in the former even totalitarian systems with oppressive legal regimes, in which the citizenry has no input into the creation of the law, whereas in the latter, a necessary and sufficient condition for calling something “law” as such is that a democratic process is used to create law.

3. **The Rule of Law - Formal and Substantive Conditions.**

Numerous scholars have criticized the formal concept of the rule of law as lacking in substance. If the mandates of an evil dictator can be called law and enforced against the people in violation of some understanding of their “rights” or “liberties” or some other minimal standard of living, do we really want to say that such a system respects the rule of law? In this section, we will discuss those thicker, more substantive, theories of the rule of law.

Perhaps the most well-known is the “rights” concept of the rule of law advanced by Ronald Dworkin. Dworkin accepts the formal rule of law, but argues that in addition, the substance of those laws must capture the moral rights of the community.\(^{19}\) Dworkin believes that the moral background of the community decides the hard cases on which the mere rules seem to give conflicting answers or no answers.\(^{20}\) Judges must tap into this background of morality, not their own subjective morality, to decide hard cases.\(^{21}\)

Another substantive view of the rule of law, elucidated by Tamanaha and argued for, at length, by Kramer, is that the rule of law (or “Rule of Law”) is meant to refer to the formal rule


\(^{21}\) *Id.*
of law in a liberal democratic society. This goes beyond the mere formal rule of law, even the formal conception which includes an element of democracy. As Tamanaha recognizes, “[w]hile formal legality is the dominant understanding of the rule of law among legal theorists, this thick substantive rule of law, which includes formal legality, individual rights, and democracy, likely approximates the common sense of the rule of law in Western societies (assuming a common understanding exists).” Societies in which this Rule of Law exists work to strike a balance between the formal legality, each individual’s rights and liberties, and the principles of democracy. Respecting the Rule of Law means respecting these ideals.

The “thickest” substantive version of the rule of law described by Tamanaha is the “social welfare” concept, which “imposes on the government an affirmative duty to help make life better for people, to enhance their existence, including effectuating a measure of distributive justice.” This concept, perhaps best exemplified by the German Rechtsstaat (in theory if not in practice), requires the government to take affirmative steps, through the use of the law, to improve the lives of its citizens, presumably through social programs.

The substantive concepts of the rule of law go beyond the mere formal concepts and require, as part of the legal system, adherence to certain other principles that address the content of the laws themselves. A legal system, so properly called, must not only require the government to create formal rules and make those rules known to the citizens before enforcement/punishment can occur, but it must also use the machinery of the law to protect individual rights, the ideals of a liberal democracy, or some modicum of social welfare/justice.

22 Tamanaha (2004), at locations 1606-1636 (chapter 8).

23 Id.

24 Id.
The crux of the “rule of law” contains the concept of “rules” but it goes much beyond just understanding what rules are. Rules are found in numerous non-law situations. For example, the term “rule” can be properly used to describe the rules of a game, rules of etiquette, rules of morality/religion, and cultural customs. Rules, in the legal context, could reasonably mean statutes, court opinions (if applied generally enough, see below), administrative regulations, rules of civil/criminal procedure, rules of evidence, and more. However, the “rule of law” as a phrase is generally taken to mean something more general than these specific “rules of law”.

Generality is a key component of rules in general, and thus, the rule of law in particular. Generality forms the first criteria of Fuller’s eight ways to fail to make law. Its prominence and primacy is no fiat. Without generality, in rules of sport or the rules of law, decisions are made on an ad hoc (and often ex post facto) basis. No general rules would exist by which people can structure their behavior. Judges would hand out case specific decisions with no precedential value. Generality allows rules to be abstracted to multiple similar situations, regardless of the parties involved. While important, rules also have another key component - some mechanism of disapproval/enforcement/sanction for their violation.

As argued above, laws should be considered more than just the Austinian command backed by a sanction. Many laws, such as empowering laws, do not fit into this definition. However, all rules inherently have some mechanism to deal with their violation. Violation of rules of etiquette may entail nothing more than the disapproval of one’s social acquaintances for their violation. Violating rules of sport may result in a foul, loss of the game, ejection from the game, and so on. Violations of religious rules may result in being labeled as a “sinner” or “infidel,” which brings with it the disapproval of one’s fellow church members or everlasting damnation.
Laws, then, are general rules that are enforced by the law creating machine, the government or those acting with governmental authority. Violating criminal laws could result in arrest by the police, prosecution by the district attorney, a finding of guilty by the court or jury, and a sentence of jail time. Violating the laws of creating a valid will does not result in any of these actions, but the government will not uphold the will in court. Violating rules of law creation, amendment, or repeal will result in those actions not being deemed legal and therefore null. The legal regime, the government, makes these decisions, enforces the law, and imposes sanctions (in the contact of laws of prohibition) or recognizes the valid exercise of a power (for empowering laws).

Given these two fundamental characteristics of rules, and of law, must we stop here and decide that Fuller has gone too far in his description? No, the rule of law cannot exist on the concepts of generality and enforcement alone. In addition to these, the concept of possibility is of paramount importance. Possibility, in my view, encompasses several of Fuller’s criteria, including publication, prospectivity (in most cases), understandability, non-contradiction, and stability. The rule of law, to be properly so called, must include generality, possibility and enforcement.

For a person subjected to the law to be able to comply with the law, it must be possible that the person can perform the law. This not only includes physical possibility, but also logical possibility. It is nonsensical to create a “law” requiring a minimum speed of 400 mph on the highway or setting the date for the next election on the 7th Tuesday of February. However, it is also nonsensical to create a law prohibiting a person from engaging in a behavior which occurred four years ago, and punishing that person today for it. Fuller rightly calls this retroactivity, but it can be considered under the umbrella of possibility. It is clearly impossible to avoid a behavior
today that could be criminalized, and hence punished, in the future. One simply has no way of predicting the criminalization or avoiding the punishment.

Similarly, possibility covers Fuller’s other criteria. It is impossible to comply with a law which is not known (except merely by chance), so the law must be made known (which Fuller terms publication or promulgation). It is impossible to comply with a law that is written in a language that is fake, or foreign to the population, or which makes no sense (which Fuller terms understandability). It is impossible, and illogical, to simultaneously comply with laws that are contradictory. It is impossible to comply with unstable laws that are constantly changed. Fuller requires laws to be general, to be enforced, and to be possible in a myriad of ways. What about Raz’s additions?

Raz proposed that there must also be an independent judiciary, fair and open hearings, and judicial review of legislative and administrative action. While the first two can be seen as part of the concept of enforcement, I think the better interpretation is that these criteria are part of Hart’s secondary laws and my empowering laws. The independent nature of the judiciary allows it to act as a check on the legislature and administration, and therefore it allows for the appropriate creating and enforcing of the laws. The judiciary also functions to interpret and enforce the laws, and thus functions as a mechanism for Fuller’s consistent enforcement. However, aside from the exception of any enforcement mechanism that the court provides, none of these mechanisms is needed as a necessary or sufficient condition of the rule of law. Laws can be created and enforced without the need for judicial review or fair and open hearings, or without an independent judiciary. Laws can be enforced through administrative bodies, such as the worker’s compensation boards that exist in many states.
In the section that follows, the different instantiations of the content of coercive laws and empowering laws will be examined to analyze their differing effects on freedom. This will allow us to say that, first, all coercive laws reduce overall negative liberty to some extent, but that coercive laws prohibiting bank robbery reduce overall negative liberty more so than coercive laws prohibiting jaywalking (assuming the sanction for the former is greater than that for the latter). In other words, if I jaywalk and the police stop me for violating the law, I will likely only be detained a few minutes and given a ticket, which entails a small fine to pay. The effect of the sanction here on my liberty is relatively small. If I rob a bank and am caught, prosecuted and convicted, I would end up with a prison sentence of ten years or more. This has a greater effect on my liberty than does the sanction for jaywalking. The impact these laws have on society is also unequal. The sanction for violating the prohibition on jaywalking is relatively minor to me, and the benefit to society is to encourage people to not jaywalk, which can disrupt the flow of traffic or put the jaywalker (or drivers) in danger. The sanction for the violation of the prohibition on robbing banks is a sever curtailment of my freedom, and the effect on society is to strongly discourage people from robbing banks, which is a violent crime and can lead to the loss of property (the money held in the bank). If people cannot trust that the government has taken measures to protect their deposits in banks, then people will stop keeping money in banks, banks will have less money to loan customers, and then customers will have less money to buy cars, buy a home, or run their businesses. This has a major impact on the economy, which has a major impact on society. Not all restrictions on liberty are created equal. If we fail to make this distinction, we lose this important part of the analysis.
The Concept of Freedom

All freedom theories are not alike. In the lengthy literature regarding freedom, there is a pervasive dichotomy between negative and positive theories of freedom. Although these categories are not the only ones that can be imagined, they do provide a helpful basis for discussing the main issues addressed by writers on the subject of liberty.25

1. Negative Freedom

Negative liberty is the form of liberty advocated by Jeremy Bentham and John Stuart Mill, which ultimately holds that one is free in the absence of coercion.26 Because of the profound contemporary influence of his article on this subject, the contrast between negative and so-called positive theories of liberty can be examined mainly from the point of view of Isaiah Berlin. However, Berlin was clearly a liberal thinker, and thus, his highly-regarded “Two Concepts of Liberty” strongly favors a negative liberty worldview over positive liberty.

Negative liberty defines an individual’s personal realm of freedom by what is not present, namely, the coercion or interference by another person. As Berlin states, “I am normally said to be free to the degree to which no man or body of men interferes with my activity.”27 If a person wants to leave his house and walk to the neighborhood grocery store, go to his job, or perform any number of activities one would normally associate with having freedom over one’s own

25 There are two additional theories of freedom, which I believe can rightly be termed as derivative or combination theories, as they incorporate parts of positive and negative freedom. Republicanism has been described as essentially a negative theory in its own right, although it is usually contrasted with another negative theory, Liberalism. Furthermore, the triadic theory seeks to explain both negative and positive theories as essentially two sides of the same coin.


activities, such person would have his freedom restricted, according to the negative liberty theorist, by something or someone that interferes with this person’s will to perform some action. That, of course, is an over-simplified version of the theory, with the main distinctions among scholars relating to the nature of interference or coercion.

Subsequent negative liberty theorists use a different meaning of “interference” or “coercion.” According to Berlin, the more appropriate question is, “To coerce a man is to deprive him of freedom – freedom from what?” He goes on to describe this coercion as “the deliberate interference of other human beings within the area in which I could otherwise act.” 28 Coercion does not describe every disability or inability to achieve one’s goals 29 – I am not “unfree” to play professional basketball or run at 100 miles per hour, I am just physically unable. “You lack political liberty or freedom only if you are prevented from attaining a goal by human beings.” 30 “By being free in this sense I mean no being interfered with by others. The wider the area of non-interference the wider my freedom.” 31

Berlin recognizes that this “area of non-interference” could only be so wide before complete chaos erupts. In other words, it could not be unlimited, “because if it were, it would entail a state in which all men could boundlessly interfere with all other men; and this kind of ‘natural’ freedom would lead to social chaos in which men’s minimum needs would not be satisfied; or else the liberties of the weak would be suppressed by the strong.” 32 How do we

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28 Id., p. 169.
29 Id.
30 Id.
31 Id. at p. 170.
32 Id.
balance this inherently conflicted position – interference as a necessary evil? Berlin – and he ascribes this to French liberals Benjamin Constant and Alexis de Tocqueville, as well as English liberals Locke and Mill – states that “there ought to exist a certain minimum area of personal freedom which must on no account be violated.” The boundary of this “minimum area of personal freedom” is the subject of much consternation, and it is the hallmark of individual liberty that defines liberal freedom.

Perhaps one of the greatest contributions to the theory of negative liberty has come relatively recently by Matthew Kramer in his very carefully and austerely argued work, The Quality of Freedom. Like Ian Carter before him and Hillel Steiner before Carter, Kramer sets out a methodically constructed analytic theory of negative liberty with the goal of proposing a process by which the overall freedom of individuals can be measured and compared. Although the portion of his theory related to measuring freedom lies beyond the scope of my purposes here, it is important to look at Kramer’s view of negative liberty itself.

First, Kramer’s theory relies on two seemingly simple premises, appropriately terms the F (for freedom) and U (for unfreedom) Postulates. The F Postulate states, “A person is free to φ if and only if he is able to φ.” The U Postulate is slightly more complicated: “A person is unfree to φ if and only if the following two conditions obtain: (1) he would be able to φ in the absence of the second of these conditions, and (2) irrespective of whether he actually endeavors to φ, he is directly or indirectly prevented from φ-ing by some action(s) or some disposition(s)-

33 Id. at p. 171.
34 Kramer (2003).
35 Kramer (2003), p. 3.
36 Id.
to-perform-some-action(s) on the part of some other person(s).”37 The first four chapters of Kramer’s book are devoted to carefully articulating the intricate bundles of ideas bound up in these two postulates. Although not articulated as a formal postulate, there is also a third condition that figures prominently in Kramer’s theory – that is the condition of being “not free” which is wholly different from being “unfree.”

Perhaps the most important point made by Kramer, other than the fact that his analysis is purely non-normative throughout, is the distinction between specific freedoms and overall freedom. The majority of Kramer’s analysis is devoted to conceptually describing specific freedoms, in order to properly distinguish those from a person’s overall freedom, which comprises the last chapter of his book. Thus, to be free to φ is not to be free in an overall sense, but rather, to be free in the specific sense to undertake the specific action, become the specific thing, or exist in the specific state, that φ represents.

In the context of specific freedoms then, Kramer’s analysis focuses on the person’s ability to φ. Ability is key. If a person actually does φ, then the person was free to φ at the time the person did φ.38 However, the converse proposition is not necessarily true. A person is unfree to φ only if the tenants of the U Postulate are satisfied – if the person could otherwise be able to φ in the absence of some preventing condition caused by another person’s actions or disposition-to-perform-some-action. If the person is unable to φ, but the inability is not caused by some other person, then Kramer would say such person is merely unable, or not free, to φ. This distinction has been seen elsewhere in our analysis of negative liberty. If I am trapped in a room

37 Id.

38 Bear in mind that this “freedom” is not a normative freedom. If a person does actually φ, nothing is said as to whether, in a normative sense, the person is allowed or permitted to φ. Thus, a person can be free to shoot someone else if that person has the ability to do so, although certainly such action is not permitted.
and unable to leave because someone has locked the door, then I am unfree to leave. However, if I am trapped in a room because I suddenly suffered a stroke and unable to physically move my body to leave the room, then I am not “unfree,” but rather, I am “not free” to leave.

One interesting concept discussed by Kramer that bears repeating here is the effect that probability has on whether a person is free to φ. Fundamentally, a person either is free to φ, unfree to φ, or not free to φ. A person cannot be a little free to φ, or mostly free to φ – either that particular freedom exists or it does not. Kramer argues this point forcefully against the counterpoint that specific freedom can exist in a matter of degrees. To borrow one of Kramer’s examples, suppose 25 men are in a room, and one of them is my twin brother.39 I cannot see the men, but yet I am assured that there is a 4% chance that any one of the men are in fact my brother. Does this mean that each man is 4% my brother? Clearly not. Each man either is or is not my brother. Let us further assume that I know my twin brother has blue eyes, and that ten of the men in the room have blue eyes.40 Thus, out of these blue-eyed men, there is a 10% chance that any of them is my twin brother. Again, this clearly does not mean that each is 10% my brother – each one either is or is not my brother 100%.

The significance of this point is this – specific freedom is an all or nothing event. It is either present, or it is absent. With regard to overall liberty, however, it may be entirely appropriate to describe a person has having a greater freedom than someone else, because in that sense a person’s specific freedoms are tabulated (in a manner proscribed by Kramer) to lead to a measurement of overall freedom. Thus, if a person possesses or lacks certain specific freedoms,


40 Id. at p. 176.
that person’s overall freedom may be greater or less, *tout court*. However, the specific freedom itself is neither greater nor less – it just is or is not.

2. **Positive Liberty**

Theories of positive freedom tend to be more varied than the negative theories, if for no other reason than they describe freedom in terms of the presence (as opposed to the absence) of various conditions of freedom. Although there is much similarity among the theories, the diversity that does exist can be attributed to what, exactly, each requires to define freedom. For the Ancient Greeks and Romans, freedom was seen as active participation in the city-state, or *polis*. People were free if they were not slaves, and free men were given the rights (if not the explicit duties) to participate in the conduct of the government. To Jean-Jacques Rousseau, and many subsequent theorists whom he has greatly influenced, people are born with a certain amount of freedom, or “natural liberty.” In order to more greatly guarantee their personal survival, people form social associations with each other, which Rousseau describes as, “all, being born free and equal, alienate their liberty only for their own advantage.”


42 *Id.* at locations 152-154.
instead of individual strength which may be overcome by someone stronger.\textsuperscript{43} Furthermore, somewhat paradoxically, Rousseau envisions that the social compact can even be enforced against those who refuse to obey the general will:

In order then that the social compact may not be an empty formula, it tacitly includes the undertaking, which alone can give force to the rest, that whoever refuses to obey the general will shall be compelled to do so by the whole body. This means nothing less than that he will be forced to be free; for this is the condition which, by giving each citizen to his country, secures him against all personal dependence.\textsuperscript{44}

How can Rousseau force someone into a social compact that such person has not freely chosen? The answer is clear. The people, being the authors of the law (since all power emanates from their consent) have the right to enact legislation to change human nature for the better. As Rousseau states, the legislators are capable “of changing human nature, of transforming each individual, who is by himself a complete and solitary whole, into part of a greater whole from which he in a manner receives his life and being,” and “of altering man’s constitution for the purpose of strengthening it; and of substituting a partial and moral existence for the physical and independent existence nature has conferred on us all.”\textsuperscript{45} As long as this “legislation for your own good” is approved by a majority vote, the general will prevails.\textsuperscript{46} The general will is infallible – “...the general will is always right and tends to the public advantage.”\textsuperscript{47}

After Isaiah Berlin’s damning criticism of the positive liberty theory in his famous 1958 essay, numerous writers rose to the defense of “positive” liberty by articulating theories that

\textsuperscript{43} \textit{Id.} at locations 346-366.

\textsuperscript{44} \textit{Id.} at locations 196-199.

\textsuperscript{45} \textit{Id.} at locations 453-457.

\textsuperscript{46} \textit{Id.} at locations 472-475.

\textsuperscript{47} \textit{Id.} at locations 301-304.
focused on the concept that liberty was more than an absence of constraints, it was in reality (in whole or part) the presence of certain other conditions. Hannah Arendt forcefully argued that freedom is “the raison d’être of politics.” For Arendt, “Freedom as related to politics is not a phenomenon of the will…Rather it is…the freedom to call something into being which did not exist before, which was not given, not even as an object of cognition or imagination, and which therefore strictly speaking could not be known.” In other words, to Arendt, freedom is a performance or action:

Freedom or its opposite appear in the world whenever such principles are actualized; the appearance of freedom, like the manifestation of principles, coincides with the performing act. Men are free – as distinguished from their possessing the gift for freedom – as long as they act, neither before nor after; for to be free and to act are the same.

Thus, freedom is action or performance (Arendt’s “virtuosity”), and politics is the forum in which men act and freedom appears. Thus, Arendt’s theory of freedom as follows: Freedom is not seen in the negative sense, as the absence of restriction, but rather, in a positive sense as the action of man in the realm of politics. In order to be free, man must perform his actions, which, statistically speaking, are highly improbable. However, man, through his coming into existence in the universe (as a highly improbable event), must continue to create new beginnings with his actions, which is the only way to be free of “automatic processes” of the universe that work against freedom.

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49 Id. at 32.

50 Id. at 33.
Charles Taylor introduces the ideas of the “opportunity-concept” and the “exercise-concept.” Negative liberty is described as an “opportunity-concept” because, by removing restrictions, the agent has the opportunity to act freely according to his will. Positive liberty, by contrast, is an “exercise-concept” because in order to be free, the agent must actually do something, some act, instead of just having the opportunity (or the potential) to do so.51 Taylor draws the path from negative liberty to positive liberty as follows:

Indeed, one can represent the path from the negative to the positive conceptions of freedom as consisting of two steps: the first moves us from a notion of freedom as doing what one wants to a notion which discriminates motivations and equates freedom with doing what we really want, or obeying our real will, or truly directing our lives. The second step introduces some doctrine purporting to show that we cannot do what we really want, or follow our real will, outside a society of a certain canonical form, incorporating true self-government.52

In other words, positive liberty recognizes that among the different restrictions or obstacles that a person can face when trying to do what they want, there is an element of evaluation or discrimination by the agent. Not all restrictions are equal. The agent makes evaluative choices between restrictions because “some restrictions are more serious than others, some are utterly trivial.”53 Taylor takes negative liberty to task over the lack of an element of valuing different desires. People weigh and value all of their desires differently:

This means that we experience some of our desires and goals as intrinsically more significant than others: some passing comfort is less important than the fulfillment of our life-time vocation, our *amour proper* is less important than a love relationship; while we experience some others as bad, not just


52 *Id.* at 148.

53 *Id.* at 150.
comparatively, but absolutely: we desire not to be moved by spite, or some childish desire to impress at all costs.  

With these general comments regarding the law in mind, it is imperative to turn to an analysis of the rule of law in the context of negative and positive freedom.

**Freedom and the Formal Rule of Law**

As shown above, the rule of law can be seen to exist along a continuum from the most formal versions with no normative component, to the most substantive versions with a complex normative component. This discussion will examine the requirements of formal legality, which form the basis of all theories of the rule of law, and then examine how negative freedom relates to individual rights and social welfare theories of the rule of law.

There is one final point that bears emphasis before turning to the individual components of the rule of law. In analyzing each of these, it is important to ask the purpose behind them, and in turn, the purpose behind the rule of law itself. What is the purpose of the rule of law? In other words, what is the purpose of having a set of rules given the status as law, that are subject to enforcement by the state? Economists, most notably Friedrich Hayek, state the answer to this question is certainty. The rule of law gives the people certainty in their behaviors, the behaviors of others, the behaviors of their government, and the behavior of the economy. With certainty comes planning. If I am relatively certain that my contracts will be enforced, that my personal safety and the safety of my property will be protected by the state, then I am more likely to enter into economic arrangements.

Even if I am not an explicit economic actor, the certainty that the rule of law provides is the foundation for society to exist. Protection of life allows people to travel outside of their homes. Protection of property allows people to have the confidence to meaningfully invest in

54 *Id.* at 152.
their property, cultivate land, purchase equipment, build things. Legal recognition and protection of marriage encourages people to get married, which stabilizes the family unit. Traffic codes solve a coordination problem in the transportation industry, building codes give confidence in the safety of structures, government laws/regulations provide confidence in the safety of medications. Without some level of certainty, social and economic development would be likely too risky to occur.

Furthermore, certainty entails the ability to plan. With relative certainty in life, safety, property, contracts, etc, people are able to plan their lives. I am able to maintain gainful employment, buy groceries, keep my money in banks, own a home, own a car, and travel freely, safe in the knowledge that my activities, as long as they are in keeping with the law, will be protected. I can keep money in the bank for my children’s college tuition and have confidence that it will be there years from now when I need it. I am confident that the police will not harass me, or shake me down for money, or take unlawful action against me because someone else paid them to do so. I do not have to travel in a fully armed group in order to ensure each other’s mutual safety and protection. The law protects my actions in the confines of the law, and because of that protection, I can plan a life of freedom within the law.

1. **Generality**

The first principle of legality requires that the laws be general in nature. This principle essentially holds that the law, to be rightly so called law, must be written and applied generally to the people in the jurisdiction. This does not preclude the creation and enforcement of rather specific laws, as long as those laws apply generally to the entire people, or a specific subset of the people. Laws are general, whereas court orders are specific directives to a particular person. In other words, the requirement of generality in the rule of law should be contrasted with ad hoc
court orders that only apply to specific people in specific fact scenarios. How does this principle of generality affect the specific or overall freedoms of the people?

Coercive laws can be seen as detrimental to negative liberty in that every instance of coercion which prevents a behavior renders a person unfree to then perform that behavior. In a fundamental sense, then, we can view coercive laws as reducing the amount of specific freedoms a person has. However, this does not give us very much useful information because we must look at the effect that each law could have on a person’s overall freedom. The content of the laws, as shown above, could require a severe coercive act (death) for violation of the law, or a relatively minor or nominal coercive act (small fine). A prohibition on murder, under penalty of death or life imprisonment, promotes the safety of all people in the community by imposing harsh coercion for a violation of this prohibition. People are now unfree to commit murder, which is a particular unfreedom. However, this unfreedom now gives the people more specific freedoms and hence overall freedom, because now people who would otherwise stay at home guarding their family with firearms from the ever present threat of murder can now leave their homes and engage in numerous activities they could not before. More coercive laws result in more specific unfreedoms directly as a result of the specific behaviors prohibited or described by such laws. However, to understand the broader effect such laws have on a person’s overall freedom, we must look at the content of the laws, which can be seen to implicitly increase the amount of other specific freedoms a person has.

Empowering laws that provide rights or empower people to take certain actions must also meet the generality requirement of the rule of law. These laws do not impose a sanction or coercion for noncompliance, they create validating conditions for actions that the people are empowered, but not require, to perform. Similar to coercive laws, if a court order allowed me
the right to vote, or establish a corporation, or create a valid will, that would not be a “law” because it is specific only to me. To be a law, it must apply generally to the entire class of people or some generalized subset. Thus, the voting law would give the right to vote to all people over the age of eighteen years who are United States citizens and are not convicted felons. This is a general class of people.

Does this generality increase or decrease the negative freedom of the persons affected? As shown above, it depends on how such laws will be used. In other words, freedom for the negative liberty theories requires that a person possess the “ability” to undertake a behavior. Empowering laws create these abilities as legal abilities. Without an empowering law, such as the legal recognition of the creation of a will or a contract, the people are not “unfree” but rather are merely unable/“not free” to do so. Without a law setting the validity conditions of creation of wills, a person is legally unable to make a will in the same manner that such person is physically unable to run at 100 mph unassisted. These laws make people “able” to perform such behavior. If the law is general in application, more people will be able to perform these behaviors, and therefore, freedom is increased under the negative liberty theory.

How does generality play into positive liberty theory? As mentioned above, generality in the realm of coercive laws requires that the laws apply to a class of people, in contrast with specific orders, which only apply to particular people and fact scenarios. Analyzing this relationship using a content-free version of law, such as “If A, then B” is difficult. The law itself can aid the individual in planning his or her life by being able to predict the behavior or government officials and others in the regime. By following those laws, even very restrictive laws, people in the regime can then plan their lives around the law, and presumably then plan their lives to be fulfilled as much as the law will allow.
This shows the bigger problem with positive freedom. If we take Taylor’s theory that we are free when we are acting in accordance with our “true” or “highest” self, it is difficult to draw any content-free conclusions between prohibitive laws and positive freedom. Again, content is key. The content of those prohibitive laws can either be restrictive of behaviors such as murder, or restrictive of generally valued behavior, such as freedom of speech. If the content of the laws is in accordance with our “true” desires and goals, then those laws would increase the amount of positive liberty that people possess. If the content of the laws restricts such “true” desires and goals, such laws will diminish the positive liberty of the people.

The relationship of positive liberty and empowering laws is easier to discern than that with coercive laws. Laws empowering the people to take actions to achieve some legal recognition of a right encompass precisely those rights that the regime wants the population to have. In other words, those rights granted to the people would either be things that are neutral in their application or would better the person exercising such rights. These rights could include such things as voting, making a will, entering into a contract, and would likely not include negative “rights” such as the right to steal, kill or harm another person. Assuming this to be the case, the creation of empowering laws increases the measure of positive liberty that the people in the regime would have. Furthermore, the principle of generality would also increase the positive liberty of the people because as the laws allow more rights, create more powers, or include more people, the overall freedom of people to take advantage of the laws would increase.

Thus, we can see that the concept of generality in the rule of law has a complicated relationship with the concept of positive freedom. It may work in favor of freedom by setting forth the general rules by which the people can plan their behavior in society, thereby allowing them to have the knowledge that they are free to perform a wide range of behaviors that are not
prohibited by the law. Additionally, generality in both the coercive laws and the empowering laws increases the positive freedom of the people by creating general guidelines for people to avoid trouble and work towards their goals in life, to achieve their “true” selves.

2. **Possibility**

   As discussed previously, Fuller includes the concept of “possibility” as separate from other conditions, such as promulgation, prospectivity, understandability, non-contradiction and stability. My position herein is that all of these are different facets of the concept of possibility, and therefore they will be discussed in that light.

   (a) Promulgation.

   Legality requires that the laws be promulgated, or made known to the people over whom they will be imposed. If the goal of a legal system is to resolve coordination problems of a complex society and to allow the people to plan their behaviors according to the rules, it is intuitive and obvious that the laws must be made known to the people. However, as Kramer rightly points out, this condition must be satisfied above some (high) threshold level, but it would be impossible to satisfy it completely for every person. Publication of the law does not mean that every person will still be able to access it: the people could be illiterate, or could not get to the library where the law books are kept, or do not have access to online versions of the laws. Furthermore, because most legal systems are complex, “legal experts” such as lawyers, judges and administrators, to whom the people can turn to for advice on the law, may satisfy the requirement of promulgation as long as these experts have access to the laws and the people have access to the experts.

   What is the relationship between negative freedom and the requirement that the law be promulgated? While the requirement of generality has a nuanced relationship with liberty,
varying depending on the form and content of the laws considered, the relationship between the requirement of promulgation and freedom is relatively straight-forward. For the sake of this section, assume that laws can exist whether promulgated or not. Thus, laws exist in a legal regime, but have not been made known to the people on whom they are imposed. In this limited sense, then, it seems that requiring promulgation of the laws would not affect the negative liberty of the people at all. The same behaviors can be prohibited by the law regardless of whether such laws are made known to the public. However, the burden that this the lack of promulgation creates for the citizens further reduces the amount of negative liberty the people enjoy. We can see this by referring back to the purpose of the rule of law.

In a society where laws are created and enforced, but whose existence and content remain unknown (or poorly known) to the people, the people cannot plan their behaviors to avoid the sanctions. It would be as if the people were in involved in a game, with penalties for the wrong behavior, and without knowing the rules. Perhaps some people can learn the rules by trial and error, but that can be an expensive proposition if the penalty for acting wrongly is imprisonment. People may feel afraid to undertake any but the most known “safe” behaviors for fear of violating an unknown law. Thus, the people will likely reduce the number of behaviors that they may otherwise engage in for fear of there being a relevant prohibitive law outlawing it. It is the fear of sanction, not the certainty of it, which causes this. As promulgation increases, people can better plan their behaviors without fearing the imposition of some seemingly random sanction. The outcome would be known, to a large extent if not perfectly, and therefore people can act accordingly.

Conversely, when examining the effect of promulgation of empowering laws on the negative liberty of the people, we can see that negative liberty would be increased by their
promulgation. Empowering laws create rights for the people that, if the validating conditions are met, create legally valid rights or powers. As shown above, because these empowering laws create new legal abilities for the people, the people have increased the number of freedoms they enjoy. However, as with coercive laws, empowering laws exist whether the people know about them or not (again, theoretically). Should these new legal abilities count towards freedom if the people are unaware they exist? Even though the abilities may exist in such a situation, it would be nearly impossible for the people to take advantage of such laws if they were unaware of them. Taylor described negative liberty as an “opportunity concept” in contrast to positive liberty as an “exercise concept.” Even if the people do not actually exercise the rights given in empowering laws, they still possess those rights. However, since the people do not know such laws exist, they do not have the “opportunity” to exercise their rights in accordance with such laws. They do not have to actually exercise those rights, but it seems plausible that there must be some minimal level of knowledge that such rights exist to even claim that the people have the opportunity to follow those laws. Without promulgation, the people are denied knowledge of the opportunity, and without knowledge of the opportunity, the people are denied the opportunity itself.

The effect that promulgation (or lack thereof) has on the relationship between positive liberty and coercive laws is similar to the effect described above with negative liberty. In the case of coercive laws, the law will impose a sanction on a person for violating the law. Without knowing what behaviors the laws prohibit, people will likely reduce all of their behaviors to only the safest ones – those which they have learned in the past will not result in a sanction by the government. Since positive law requires people to take certain actions to fulfill their higher order desires in accordance with their “true” selves, if the people do not know which actions will
result in the imposition of a sanction, they will not pursue those actions which they are not certain will result in sanctions.

In order to maximize positive liberty, people must be able to take actions to work towards realizing their goals. If the threat of sanction looms large, people will always be under the fear of wrongly acting, and they will curtail their behavior accordingly. Therefore, laws that are prohibitive of behaviors, which operate under the possibility of imposition of sanctions, should be promulgated in a manner which the people can access them in order to plan their lives and fulfill their desires in a manner consistent with the law.

Because empowering laws grant rights to the people to be used to better their lives, promulgation is necessary for people to learn of these rights. Empowering laws can add to positive liberty by creating rights or powers in the people which, if the validity conditions are satisfied, will be legally recognized and enforced by the government. If the people never learn of these rights and powers, they will not be able to exercise them, and they will not be able to augment their positive liberty by doing so. Promulgation of empowering laws is necessary for positive freedom.

(b) Prospectivity.

Prospectivity also fosters the ability of the people to plan their behaviors according to the law. Creating laws that act retrospectively to make unlawful behaviors that, at the time they were performed, lawful, punishes people who are then powerless to change their behavior to avoid the sanction. This results in people being punished arbitrarily because they never know what behaviors they perform today will be illegal tomorrow.

Overall negative liberty increases as the number of behaviors that a person is able to do are not restricted by the government. As each restriction is removed, the person gains additional
individual negative liberties. Paradoxically, retroactive laws do not inhibit behavior on the part of the citizen. At the time such behaviors are performed, they are not the subject of coercive laws that impose sanctions. Thus, the government is not preventing anyone from performing the behavior that at time $T_1$ is lawful, even though at some later time, $T_2$, the behavior is deemed unlawful going back to time $T_1$. While the law may be able to time travel, the person performing the behavior cannot. Therefore, there is no restriction on the person’s behavior, and the person is free to perform the behavior at $T_1$. Furthermore, unless there is some method whereby the people can predict which behaviors will be retroactively sanctioned at or before $T_1$ to allow them to avoid the behavior entirely at $T_1$, they will not even be able to curb their behavior at $T_1$ accordingly.

With respect to promulgation, I stated that if people are unaware of the laws before they perform prohibited behavior and before sanctions are imposed, they will curb all of their behavior down to the safest behaviors they have discovered. In other words, without knowledge of the laws, the people would be afraid to do things they have not done before. With respect to retroactive laws, however, they may not be retroactively punished for their behaviors for days, weeks, months or years. They may be able to perform a particular behavior fifty times before it is suddenly made illegal, and therefore they may not curb that behavior at all.

There is also another side to retroactive laws. Although retroactive laws can be used to make legal actions illegal, they can also be used to make illegal actions retroactively legal. This common practice occurred in Nazi Germany. In this manner, the regime can take whatever actions it wishes to against the people, as long as it then creates a law retroactively allowing it to do so. This can be used to protect the regime itself or protect any of the government officials. However, from the people’s viewpoint, the regime will be seen as taking whatever arbitrary
actions it wishes regardless of the law. The regime may feel it is justified because of the newly minted law authorizing its action, but the people will lose confidence in the regime and the rule of law.

Empowering laws pose a different problem for retroactivity. Since empowering laws give legal validity to certain behaviors performed in certain ways, the person performing such behaviors likely would not do so if, under the state of the law at T₁, the behavior was not allowed by the regime. For example, people would not perform the validity conditions to make an effective will if, under the current law, there is no procedure to make an effective will. People would not perform the behavior hoping that at some arbitrary time in the future, such actions would be given retroactive legal validity by the regime. If there is no mechanism to give legal validity to those behaviors before such behaviors were performed, the people would not perform them to begin with.

The real problem for empowering laws is when a law is retroactively given effect that renders a power or right invalid. In this situation, a person has met the validity conditions enacted into law at time T₁ for the behavior he or she wishes to have legal recognition by the regime, such as making a will, entering into a contract, or casting a vote. At sometime later then, at T₂, the regime then retroactively either repeals the empowering law or enacts additional or different validity conditions which the person at T₁ did not meet and could not have anticipated. Thus, at T₂, which could be weeks, months or years after T₁, the behavior the person engages in is no longer legally recognized as valid, and is further deemed invalid for the period from T₁ to T₂. This is especially problematic if, during that interim time period, the person has relied on the will or the contract in conducting his or her affairs, all of which is made undone by the retroactive legislation.
This type of retroactive legislation suppresses economic activity by adding a large amount of insecurity into the economic market. People who begin businesses, enter into contracts, buy or lease property, and the like, do so because they expect that the laws in place at the time they enter into those arrangements will remain in place to protect their property and economic rights. If a business enters into a valid lawful contract at time $T_1$, and invests capital and labor into performing the contract, the business expects to obtain the benefits it is due under the contract. If the government at time $T_2$ makes the contract illegal or void, thus disrupting the duties and obligations owed under the contract, businesses will soon be wary of investing any money or entering into any contracts for fear that the same will continue to happen in the future.

If retroactive legislation removes powers granted previously by empowering laws, those acting under the contracts are rendered unfree according to negative liberty theory. This is different that being not free by having their legal rights taken away. In other words, we may be tempted to think of this as the government removing abilities, such that the people are only not free to act under the contract because their legal ability has been removed. This is incorrect, however. Above, when discussing the effect of promulgation on the negative liberty associated with empowering laws, we saw that making people aware of their powers and rights makes those people aware of their legal abilities under the law, which increases their negative liberty. Under the problem of retroactive legislation, the government has already enacted these empowering laws, thus giving people these freedoms, and then acts again by taking them away. Legally, the government may act to make the laws as if they had never existed at all, but in practical reality, its action takes away a legal ability of the people to act, which renders the people unfree.

What is the connection to positive liberty? In order for people to increase their positive liberty, they must be able to undertake certain behaviors that are in accordance with their “true”
selves or “higher order” desires, and avoid those behaviors that interfere with such. In order to do this, as stated earlier, the people must be able to plan their behaviors in accordance with the prevailing laws so as to avoid fines or imprisonment, which would likely not be in any person’s “higher order” desires. Retroactive coercive laws remove this ability to plan behavior because at the time they are undertaken, the behaviors are legal. Only later are they made illegal. Therefore, people cannot avoid illegal (and thus “bad”) behaviors when at the time the behaviors are performed, there is no indication that they will become illegal.

Retroactive coercive laws, if abundant enough, can also be a sign of an unstable legal system or government. These laws severely disrupt the people’s ability to prospectively plan their lives and take action in accordance with freedom because they are always in danger of arbitrarily losing that freedom, with no ability to predict when that will occur. This haunting specter of retroactivity hangs over the people, whom must always be on guard or live in fear of it occurring. What actions should they avoid? There is no way to know. Only with prospectively coercive laws can allow the people to plan their lives in such a manner that they can maximize their liberty without tripping across the law and incurring a sanction.

As stated above, retroactivity can influence empowering laws in two respects: (1) either by counting as valid actions taken in the past for the recognition of some present right (not likely), or (2) the retroactive invalidation of a right that was previously attained. Whether the person has entered into a contract that is later called void, or has created a will or trust which are later deemed invalid, the ability of a person to pursue their goals and plan their life becomes nearly impossible when the plans they make are no longer recognized by the regime, and therefore the plans are given no legal effect.
Prospectivity is required to a high degree in any efficient or functional legal system. The goal of a legal system, and the laws therein, is to allow the people a good amount of predictability in society, both in predicting the actions of their fellow citizens and in predicting the actions of the police, courts, and administrators. Retroactive laws destroy this predictability. Retroactive punishment or invalidation of rights serves no benefit to the people, even if it does to the individual leaders of the regime.

(c) Understandability.

Similar to the concept of promulgation, the people must understand the law in order to obey coercive laws and avoid sanctions. Although negative liberty is increased as the coercive laws - either in number, content, or application – decrease, the people cannot follow the laws if the laws are not understandable. The understandability of the laws is analogous to the promulgation of the laws – in both cases the people must know what is expected of them in order to plan their lives accordingly to avoid sanctions. Incomprehensible laws not only fail to provide the people with this ability to predict and plan, they will also instill a feeling by the people that the government is incompetent and arbitrary.

Additionally, it may be difficult, if not impossible, for the regime to make the laws understandable to all of the people over whom the laws are imposed. In a modern western liberal democracy, the menagerie of laws needed for the society to function can be very complex. If the people are not legally trained, as would likely be the case, its probable that the people would not understand the majority of the laws. Thus, the principle of understandability can be satisfied if the legal experts in society can reasonably understand the laws, and the people have reasonable access to the legal experts for advice on what the laws mean.
Empowering laws create new legal abilities, which are then a form of negative liberty. However, as with the concept of promulgation, the people cannot have these new legal abilities without knowing about them, or knowing how to exercise them. This is not to classify negative liberty as an exercise concept, but rather, whether the people take advantage of the empowering laws or not, their existence, and understanding by the people, create the abilities. Therefore, if the people do not understand the rights created by the empowering laws, or do not understand how to exercise such rights, they cannot reasonably said to possess such rights.

Understandability is crucial to the rule of law, and it contributes substantially to the negative freedom that the people enjoy. The ability to understand coercive laws allows people to plan their lives around the law so that they can live while avoiding sanctions. Furthermore, the ability to understand empowering laws creates new freedoms by allowing people to know what new legal abilities they have and how to exercise them.

In order for the people to plan their lives to maximize their higher order desires and achieve their goals, it is imperative that the people understand the laws. Generality and promulgation will mean nothing if the laws promulgated to the people are incomprehensible – either from being nonsensical, or more likely, from being overly complex. Failure to understand the prohibitive laws will result sanctions being imposed for reasons unknown to the people. Failure to understand, either directly or indirectly means a failure to be able to plan one’s life around the law.

The practical problem posed by understandability was raised above in the section on negative liberty – in any reasonably complex society (certainly in all western liberal democracies) there is a certain high level of complexity inherent in the law. For an average person trying to maximize positive freedom, it would be nearly impossible to understand all of
the laws in society without devoting a substantial amount of one’s time learning the law. Thus, the understandability criteria can be met by the reasonable availability of legal experts in society who can understand the law and inform the average person when needed. This will allow the people to maximize their freedom in their own ways without devoting their lives to the law, while still having a resource to assist in any legal questions that arise.

Since empowering laws give legal rights, the people must understand the laws to take advantage of their rights. Failure to understand the rights or powers granted in the law, or a failure to understand the validating conditions of the law will result in the people being unable to take advantage of the rights such laws offer. This will result in a failure of the people to use these empowering laws to achieve their true selves or higher order desires. Again, as the laws become inevitably complex, it may be impossible for the average person to take advantage of the laws without the assistance of legal experts.

(d) Non-Contradiction.

Even if the laws are general, are promulgated, are understandable, and are prospective in nature, if the laws contradict or conflict with each other, the people will not know how to act in accordance with the laws. In essence, laws that are truly contradictory and require a person to both perform an action and refrain from performing the same action will result in mass confusion and arbitrary sanctions being imposed without any ability of the people to avoid them. In other words, if the law requires a person to perform some action X or face a penalty, or refrain from performing some action X, or face a penalty, then the person cannot avoid the penalty.
In a system of numerous complex laws, it is possible that contradictory laws may arise purely by accident without any ill will or gross incompetence of the regime. Most regimes have mechanisms which allow them to resolve these conflicts. For example, in the United States, if a federal law conflicts with a state law on the same issue, the federal law is enforced by the principle of preemption. If two laws in the same jurisdiction conflict with each other, courts typically enforce the law more recently enacted, reasoning that the legislature must have meant to de facto repeal the older law in favor of the newer. Allowing contradictory laws to stand in a jurisdiction creates problems of enforcement and possibility of performance, which severely disrupts the rule of law.

With respect to negative liberty, the people will gain freedom as the amount of coercive laws decrease. However, if the law requires that a person do X or face a penalty and also do not-X or face a penalty, then the action actually performed by the person will not matter. In either scenario, the law is violated and the person is subject to a sanction. This destroys the ability of the people to structure their lives around the laws, and to behave in such a manner that does not result in a sanction against them. As stated above, when the people are unaware of the laws, they will curb their behavior in a manner to avoid acting in any but the safest ways, to avoid the possibility of sanctions for behaviors that are unknowingly prohibited by the government. In the case of contradictory laws, the people cannot even reduce their behaviors to avoid sanctions because the laws are known to them and impose a sanction regardless of their behavior.

Since empowering laws create new legal abilities in the people, which increase their negative liberty, empowering laws that are contradictory pose a special problem for negative liberty. Empowering laws bring into being legal rights that did not exist previously, and set forth the validating conditions in which such rights will be recognized by the regime. In order to have
contradictory empowering laws, the right brought into being or the validating conditions must be structured in such a way as to be mutually exclusive. In other words, it is not contradictory for the law to require two witnesses to the valid creation of a will, and also require three witnesses. Wills created under the first law will not be valid under the second, but laws created under the second will be valid under both.

Therefore, in order for empowering laws to be contradictory, the laws would have to bring into existence a right, such as creating a will, and also affirmatively declare that no such right exists under the law. This would be a strange occurrence. Similarly, if the law required a writing, and also stated that no writing was necessary, then written wills would satisfy both criteria. Contradictory criteria would be to require that wills be written, and also to require that wills never be written. Again, this would be strange legislation. Even if contradictory legislation in the realm of empowering laws would pose no practical problems for the people, it would make the legal regime seem incompetent, which instills a feeling of contempt for the government in the people.

In order to maximize positive liberty, the people must be able to structure their lives in such a way as to avoid sanctions and to take advantage of rights, which allows people to plan their lives in a manner they believe will maximize freedom in accordance with their highest goals. Contradictory laws destroy this ability because the mechanism to avoid sanctions is non-existent. If laws require a person to do some action A and also refrain from performing A, both of which carry a sanction if violated, then the person in this legal regime is stuck with a sanction no matter what. Unavoidable sanctions breed dissention in society because the people are helpless to avoid the sanction, and therefore they believe that the regime is determined to
sanction them no matter what. A regime in this position is enforcing contradictory laws wither through incompetence or malice, neither of which support the citizen in maximizing freedom.

Similarly, the people cannot structure their lives to fulfill their goals and maximize positive liberty by taking advantage of empowering laws unless the laws are not contradictory. If there is ambiguity in the law, such that empowering laws seem contradictory, the people will be hesitant to take advantage of such laws until the ambiguity is removed and there is some certainty that the powers people wish to use will be given effect. As shown above in the discussion on negative liberty, it would be conceptually difficult to have truly contradictory empowering laws, but the injection of uncertainly into the use of the empowering laws can detract for the desire of the people to take advantage of and rely on such laws to promote freedom.

(e) Stability.

Finally, stability in the law is another form of “possibility” in that the citizenry cannot comply with laws that are changing so frequently as to be unknown at any given time. Stability in the law requires that the law must remain relatively stable over time, without too many or too frequent changes. Constant changes in the law acts to deprive the citizens the ability to predict the requirements imposed by the law from day to day, and if frequent enough, this causes the people to not know the most current version of the law at all. On the contrary, though, stability must exist to a certain high threshold, but it cannot exist perfectly. Every legal system must include some mechanism for the repeal, amendment or enactment of laws. Failure of the law to adapt to a changing society will eventually lead to a law that is no longer relevant or applicable to many current problems. Changes are important, but it is only when the changes in the law
become so numerous or occur with such frequency that they begin to destroy the legal system itself.

The problem of instability in the law is practically similar to the problem of the lack of promulgation or the lack of understandability. If the law is going to create prohibitions on certain actions, followed by a sanction for noncompliance, then the law has to be stable enough for the people to learn and understand the law and plan their future behavior accordingly. Constant changes in the law lead to people not knowing the law with any certainty, and thus either the law is not understandable or is not possible to perform. Furthermore, if the regime is constantly changing the law, imposing sanctions for some things, and removing sanctions for others, the entire regime will seem unstable, not just the law. In some respects, the problem of instability is a larger problem than understandability or promulgation, both of which can be alleviated through the use of legal experts. If the law itself is constantly changing, even legal experts, including courts and administrators charged with resolving conflicts, will not adequately know what the law is. People acting on what they believe is the law will result in sanctions being imposed for behaviors that people thought were legal, but have become legal. Thus, uncertainty and instability will reign.

Furthermore, if the empowering laws change so much that the people cannot take advantage of them, then they never really gain the rights contemplated by those laws. Empowering laws can come into existence (create new rights) or go out of existence (extinguish rights). They can change in their material terms, which change the rights of the people, or the validating conditions can change. Any changes in these rights effects a change in the negative liberty of the people because these legal abilities can change with such frequency that the people are unaware of the change or cannot comply with the change. This leads back to the problem of
promulgation or understanding, where the people do not understand their rights, and therefore cannot exercise them. While negative liberty does not require the people to exercise rights in order to be considered free, it does require that the people possess ability. If the laws change so much that the people do not know of their rights, then they have no legal ability, and thus, they are deprived of the negative liberty associated with those legal abilities.

Finally, if the people have knowledge of their legal abilities, but the law changes to remove legal recognition from the rights associated with those empowering laws, then the government has removed a legal ability that the people once had, which results in an unfreedom (the government interfering with the legal ability the citizen possessed). Instability in the laws would result in people not being able to take advantage of their negative liberty or in people being stripped of the liberty (associated with those empowering laws) altogether.

Stability in the law requires that the laws must not be enacted, modified or repealed with such frequency that it drastically impairs the citizens’ ability to know, understand, and plan their lives around the law. Again, as Kramer has argued, some instability (for lack of a better concept) is desired in the law because in every legal regime, the law must be responsive to changing social realities. However, if the changes in the law occur with sufficient frequency that even if the people can understand the law, and the law is possible to perform, the people cannot rely on the law or plan their lives accordingly if there is a very real chance that the law will change tomorrow. Additionally, frequently changing laws may seem to the people to be a sign of an incompetent legal regime, who cannot establish a stable legal system, but instead, feels the need to constantly change and rearrange the law. Stability in the law breeds stability in the regime.

In order for people to use empowering laws to maximize their positive freedom, the people must be able to know the laws and rely on the laws to continue in existence in order to
protect their given rights. Frequent changes in the empowering laws results in people not being able to take advantage of the powers such laws grant, or having such powers taken away. In addition to being stripped of rights, a climate of uncertainty will create a citizenry that will not try to take advantage of these laws at all, despite their content. Without government recognition of the rights given by empowering laws, the laws are pointless. Thus, without stability in the law, people cannot pursue their goals with the assistance of the empowering laws.

3. Enforced as Written

The final principle of legality requires that there be some high level of congruence between how the laws are written and how they are in fact enforced. If the goal of a legal system is to manage the coordination problems of a complex society and allow the people some ability to predict the actions of others (other citizens and the government officials), then the people must be able to rely on the fact that the laws will be enforced according to their terms. A large chasm between the letter of the law and the enforcement of the law is damaging to the rule of law because it damages this predictability. Laws can be inconsistently enforced in a number of manners. Laws can be consistently under-enforced, even to the point that the citizenry begins to question whether the laws are actually still laws at all. For example, if the regime has a law on its books that has not been enforced in ten, twenty, or fifty years, the people would rely on this fact of under-enforcement. Furthermore, the law could be consistently enforced at random, so that from day to day the people would not know whether the law would be enforced. This uncertainty is damaging to the rule of law and the legal regime.

Negative liberty can be affected in numerous ways due to the laws not being enforced as written. If the laws are very oppressive, and the police and courts do not enforce them to the extent of their oppression, then liberty can actually be increased by the government not
oppressing the people as much as the law would allow. Conversely, if the government enforces the laws in a more oppressive manner than the law is written, the negative liberty of the people will decrease. Additionally, if the laws are enforced in an inconsistent and unpredictable manner, then the people will have not or limited ability to predict the actions of officials and will constantly live under the threat of the government using the laws, properly or not, to oppress them.

Consistency in enforcement is important to the negative liberty of the people, especially regarding coercive laws, because people must be able to predict the behavior of government officials in order to plan their lives accordingly. Even in a regime where oppressive laws are under-enforced, people may rely on that lack of enforcement and then be surprised in the event that the government begins regular enforcement. The people in such a regime cannot safely rely on the under-enforcement of coercive laws. If the law is arbitrarily enforced, the people must conduct themselves in such a manner as if the law were being consistently enforced, in order to adequately plan for the law. However, inconsistent enforcement will lead the people to lose respect for the regime because the lack of consistent enforcement can be viewed as institutional incompetency. If the government wishes to no longer enforce the laws, then the laws should change. If the government cannot change the laws but can fail to enforce them, the entire rule of law is undermined.

Lack of consistent enforcement can negatively affect the freedom created by empowering laws. If the powers/abilities granted to the people in empowering laws are not enforced, then the people’s negative freedom associated with these abilities will be diminished or lost. People will not enter into contracts, create wills, or use other legal procedures if they are never sure what they are doing (which may be in accordance with the written law) will actually be given legal
effect by the regime. The ability to predict the actions of others, including other parties to contracts or government officials charged with enforcing such contracts, is crucial. Inconsistency in enforcement detracts from the predictability that the rule of law gives the people.

Furthermore, if the government fails to enforce laws that recognize legal abilities of the people, then the practical effect is that the people do not have those legal abilities. The point of empowering laws is to give legal recognition to the rights of the people if certain validating conditions are met. If there is no recognition, even if the validating conditions are met, then there is no point in satisfying the validating conditions. The lack of enforcement destroys the legal abilities associated with empowering laws, and therefore destroys the negative liberty associated with those laws.

Positive liberty is also diminished by the lack of predictability associated with the problem of enforcing laws as written. If the people can never be sure how the laws will be put into action, they cannot avoid coercive laws, or their sanctions, and therefore they cannot structure their lives around such laws. Laws can be either enforced regularly, or not at all for some time period, or enforced in a seemingly random or arbitrary manner. In any of the scenarios, people would be well advised to follow the dictates of the law to avoid sanction, but if the law has a long history of non-enforcement, the people may begin to rely on that non-enforcement in planning their lives. Thus, while the people are seeking to maximize positive liberty in this regime, they must either follow the letter of the law, or fail to do so at their own risk, no matter how small they perceive that risk to be.

Again, as show above in numerous sections, a failure to properly enforce the laws can lead to a dissention in the legal regime. Inconsistent enforcement of coercive laws can be seen as
stemming from an incompetent regime, who may be enforcing the laws in an arbitrary manner. If the people cannot count on the fact that coercive laws will actually be enforced, they will not be able to plan their lives under the law. Even if one person follows the letter of the law to be safe, others may be willing to violate the law, knowing that there is a small chance that it will actually be enforced. If such laws are the type that protects property or the safety of the individual, law-abiding citizens may be afraid to participate in society for fear of being assaulted, robbed or murdered. Clearly, in a regime like this, it would be difficult for people to plan their lives to maximize freedom. Inconsistent enforcement damages the individual’s ability to predict the actions of the government or others in society.

Finally, people must have some certainty or predictability in how empowering laws will be upheld or enforced in order to use those laws to increase positive liberty. Creating wills, entering into contracts, or establishing corporations are only desirable for those wishing to do those activities when they can count on a stable government that will enforce their rights under the law. If a regime fails to enforce property rights, or fails to hold people to contracts, the citizens will not be willing to go through the trouble to undertake these activities in the first place. Thus, the empowering laws cannot be used to promote positive freedom if the government fails to uphold its fundamental duty to the people – the legal recognition and protection of their rights under the law.

**Freedom and the Substantive Rule of Law**

Recall that the substantive rule of law (often stylized in capitals as the “Rule of Law,” to set it apart from the formal lowercase “rule of law”) includes some normative measure by which to judge the law, in addition to the merely formal rule of law addressed above. These theories require us to look to something outside of the law to determine whether the law (or legal system)
is adhering to the Rule of Law. This is a normative analysis. In both cases, even if all of the formal elements of legality are satisfied, the laws/legal system will be considered in violation of the Rule of Law if the laws fail to meet the normative criteria set forth by the theory.

1. **Individual Rights Theory**

The individual rights theory holds that a proper Rule of Law must include a respect and protection for the individual rights of its citizens. A regime will violate the Rule of Law to the extent that it uses the formal rule of law to oppress the people’s individual rights. The most well-known is the “rights” concept of the rule of law advanced by Ronald Dworkin. Dworkin accepts the formal rule of law, but argues that in addition, the substance of those laws must capture the moral rights of the community. The law must recognize and protect these individual rights.

Since coercive laws tend to decrease negative liberty (in the overall sense) by restricting the number of behaviors open to the person, a regime adhering to an individual rights version of the Rule of Law must only create coercive laws that do not interfere with the individual rights of the people, such as the rights to freedom of speech, freedom to assemble, and freedom to practice religion. In dictatorial regimes, including some theocratic polities, the government (either explicitly or subversively) suppresses dissent by banning criticism of the regime. Protests, rebellious writings, and other “subversive” exhibitions of individual rights are quelled in protection of the regime. Coercion suppressing individual rights violates the individual rights version of the Rule of Law. On the other hand, coercive laws can impose sanctions for actions that violate the individual rights of the people. An example of this law would be civil rights laws

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which typically provide for both private causes of action and government causes of action against a party that violates the civil rights of others.

Furthermore, negative liberty can be increased by the enactment of empowering laws, as such laws create new abilities in the people. With respect to an individual rights theory, a regime will adhere to this Rule of Law if it enacts empowering laws that confer or recognize individual rights in the people (as in the U.S. Constitution’s Bill of Rights) and then protect the exercise of those rights. By granting people protection from searches and seizures, giving them a right to due process of law, and so forth, a regime will protect the rights of the people and adhere to the Rule of Law. Failure to enact or protect these rights oppresses the people and violates this Rule of Law. Bear in mind, however, that an increase in empowering laws may correlate with a decrease in the negative liberty experienced by others. For example, if a law such as the Statute of Frauds requires certain contracts to be in writing, I am no longer able to enter into merely oral contracts whose subject matter is covered by the statute (or I do so at my own peril).

Positive liberty requires the person to fulfill his or her higher order desires, and as shown above, the use of coercive laws can aid a person to fulfill these desires by coercing the person to avoid behaviors that block this positive liberty. A regime will adhere to the individual rights version of the Rule of Law if such coercive laws restrict undesirable behaviors, and by corollary assumption, promote desirable behaviors. If the regime promotes individual rights, such that it can claim adherence to this Rule of Law, it must give the people the opportunity to exercise these rights. This relationship, however, assumes that the behaviors prohibited actually work against positive liberty.

It is very possible that promoting positive liberty through individual rights can work against the rights of some. This is the common philosophical problem of freedom versus rights.
If I have a high degree of individual rights relative to others, and if the law changes the status of such people to increase the rights possessed by others and decreases my rights accordingly, then I am losing out on the rights I once had. The question may then become, do I ever have a right to have greater legal protections of my rights than others have? That question raises an interesting issue, but unfortunately, it is beyond the scope of this article. It suffices to say that in a state of unequal rights, rights are made equal by increasing the rights of some and/or decreasing the rights of others.

Additionally, empowering laws create powers or rights in the people, and if such powers are in line with the higher order desires of the people, such powers promote positive liberty. Individual rights promote positive liberty because such rights practically support the person in his or her goals and protect the person from oppressive or excessive interference from other people and the government. The trade-off here is that if a person previously had an unfair advantage in society, such as in the college admissions process, and the law now levels the playing field by promoting the advantages of others, then the person with the previously unfair advantage may see this advantage disappear, and as a result, find it harder to satisfy his or her higher order desires. Again, the question of whether anyone should have a right to have an unfair advantage of others can be raised.

2. Social Welfare

The social welfare version of the Rule of Law is a “thicker” or more substantive version than the individual rights theory. In order to adhere to this version of the Rule of Law, a regime must not only adhere to the formal rule of law and protect individual rights, but must also affirmatively promote the goals of a social welfare ideology. This theory “imposes on the government an affirmative duty to help make life better for people, to enhance their existence,
including effectuating a measure of distributive justice."\textsuperscript{56}  This version of the Rule of Law requires the government to take affirmative steps, through the use of the law, to improve the lives of its citizens, presumably through social programs.

How can the use of coercive laws promote negative liberty in a social welfare Rule of Law? Clearly, laws prohibiting murder, assault, and theft promote social welfare by protecting the person and his or her property. Furthermore, coercive laws can create sanctions for actions that work against social welfare. For example, laws imposing sanctions for failure to pay taxes (assuming such tax revenue goes toward social welfare programs) and laws sanctioning behaviors that keep people from social welfare programs would be within the concept of this Rule of Law. However, these coercive laws, like most coercive laws, restrict the negative freedom of the individual to the extent that the individual can no longer perform those behaviors that are now prohibited.

The clearer relationship between this Rule of Law and negative freedom is indicated by looking to empowering laws. The regime can create numerous laws that promote social welfare, such as free universal health care for all citizens, an income redistribution scheme based on the use of the tax code to promote social welfare goals, food benefits, free education, and so on. These programs create new abilities for the people by making these programs available to everyone, and therefore, the people now have new abilities, which is the hallmark of negative freedom. There is a definite trade-off, however. Again, the freedoms gained by redistributing income are offset (and it is unknown whether in whole or merely in part) by the reduction in individual freedom to spend one’s income however one chooses. Furthermore, to the extent that these programs are mandatory, they restrict the negative freedom of those who do not wish to

\textsuperscript{56} Id.
participate. Social welfare seeks to promote the overall freedom of society often at the expense of individual freedom.

Coercive laws can also promote positive liberty in a social welfare system. Since positive liberty occurs when the individual realizes (or works towards) his higher goals and desires, laws that sanction behaviors that interfere with socially undesirable behaviors promote such liberty. However, as with negative liberty, there is a definite trade off when legislating for positive liberty. While positive liberty is promoted when social welfare programs give people the opportunity to follow their higher order desires, such programs can also restrict the positive liberty of others. If one person is using his money to further his higher order goals (perhaps, maybe, to own his own successful business), then a redistribution of his money into social welfare programs may promote liberty in those people who benefit from the programs, but it will also reduce this businessman’s ability to own a successful business if his money is being redistributed. Because social welfare seeks to better the people as a whole, sometimes to the detriment of the individual, the freedom gained by all is freedom lost by some.

Thus, coercive and empowering laws can be used to increase or decrease the amount of liberty (either positive or negative) that a person has, depending on the content of the laws and the purpose behind them. Empowering laws confer on people powers to take actions that will be recognized as legally valid by the government. Laws to promote education, health, and social welfare can give people the powers to perform actions that lead to these things. Laws can also negatively impact social welfare and/or individual rights by failing to give people these powers or by creating and enforcing sanctions for people engaging in these activities (such as the education of girls in Taliban-controlled Afghanistan). If we accept a social welfare or rights based version of the Rule of Law, then we must be able to understand how the laws affect social
welfare and rights, and be willing to state that the Rule of Law is broken if it fails to meet these
criteria.

Conclusions

Adherence to the rules of formal legality promote freedom by creating stability and
predictability in the law, which the people can then rely on to plan their behaviors around the law
– this is freedom under the law. Coercive laws can actually promote negative liberty up to
pulling people out of a Hobbesian state of nature, and then thereafter can be seen to decrease
negative liberty by restricting the behaviors that a person can perform without receiving a
sanction. Empowering laws promote negative freedom by creating new legal abilities which the
people can perform. Positive freedom can be enhanced by the law when it prohibits negative
behaviors and promotes positive behaviors. Finally, the content of the law can be used to either
promote or suppress individual freedom. Thus, there is a complex relationship between freedom
and the rule of law, which, when studied carefully, can be used to learn how the law affects
freedom.