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The Imperfections of the Rule of Law

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THE IMPERFECTIONS OF THE RULE OF LAW

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JOHN Attanasio has been a friend for some thirty-five years, and it is because of my friendship with him that I first began to write about matters connected with the rule of law, the subject of this symposium in his honor. Some twenty years ago, Attanasio, who was then the Dean of St. Louis University School of Law, invited me to present a lecture on historical matters I was researching. During my visit, I became acquainted with several of Dean Attanasio's colleagues, who invited me several years later to help commemorate the fiftieth anniversary of *Brown v. Board of Education.*[1] My commemorative lecture, which was later published,[2] first led me to focus on the subject of the rule of law.

The concept of the rule of law, as I understand it, has an amorphous, slippery quality. In part, that is because the rule of law is not a single, unitary concept, but a cluster of overlapping ideas.[3] As Jeremy Waldron has written, the rule of law prohibits those in power from "[i]nterfering with the courts, jailing someone without legal justification, detaining people without any safeguards of due process, [or] manipulating the constitution for partisan advantage."[4] It also prohibits various other sinister practices that stand in the way of government by preexisting, just rules that give people notice of how they need to behave.[5]

This essay will not discuss all the evils that the rule of law strives to prevent. It will focus only on two of the rule of law's precepts. The first precept is that law must not be simply a series of shifting partisan commands ultimately enforced through coercion.[6] The law's rules must be promulgated in the name of the entire society and should further the interests of the community as a whole.[7] Law, especially constitutional law, must not be made or manipulated for partisan advantage—for the benefit of only a narrow, but empowered, interest group. The second precept is

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1. 347 U.S. 483 (1954).

2. William E. Nelson, Brown v. Board of Education *and the Jurisprudence of Legal Realism*, 48 ST. LOUIS U.L. J. 795 (2004).

3. *See* Jeremy Waldron, *The Concept and the Rule of Law*, 43 GA. L. REV. 1, 5 (2008).

4. *Id.*

5. *Id.* at 3–4.

6. William E. Nelson et al., *The Liberal Tradition of the Supreme Court Clerkship: Its Rise, Fall, and Reincarnation*, 62 VAND. L. REV. 1749, 1804 (2009).

7. *Id.* at 1806.

that the institutions of government must treat all individuals fairly and equally. Governmental institutions, including courts, cannot single out specially favored or disfavored people for special benefits or punishments that are not available to or imposed on everyone.[8] Particular people can be singled out for benefits and punishments only through proceedings conducted with due process of law on the basis of preexisting standards specified by law.

Ultimately, this essay contends these two precepts of the rule of law are in tension with each other. Part one of the essay will elaborate why the two are in tension. Parts two and three will suggest how those committed to the rule of law might seek to resolve the tension.

I. TWO VALUES IN TENSION

A. Law as Rule of and for the Entire Community

I have written extensively about one aspect of the rule of law—the concern that law not be made or manipulated for partisan advantage. More specifically, in writing about the nature of the judicial process in constitutional and other politically salient cases, I have argued that judges should not decide cases by choosing between politically contested policy perspectives, but should strive instead to resolve tough issues by applying preexisting law to facts.[9]

Of course, preexisting law will not resolve every case. At times, preexisting law is ambiguous and leaves judges with the option of channeling the law in more than one direction.[10] Judges must then choose the direction in which to guide the law.[11] At other times, preexisting law may provide a clear answer, but social conditions may have changed so much since the law was formulated that it no longer makes sense to apply it in customary ways.[12] Such cases again call for the exercise of judgment rather than strict application of preexisting rules.[13]

In my view, no one has described the essence of judicial duty more clearly than Justice Benjamin N. Cardozo. In an article I published a decade ago,[14] I quoted an excerpt from Justice Cardozo's pathbreaking book, *The Nature of the Judicial Process*.[15] According to Justice Cardozo, the duty of judges in cases that cannot be appropriately resolved through the strict application of precedent, is to keep law consistent with "the *mores*

8. *Waldron*, *supra* note 3.
9. *See* Nelson et al., *supra* note 6, at 1804–1811.
10. *See* Ronald Dworkin, Law's Empire 255–56 (1986).
11. *See id.* at 256.
12. *See* Benjamin N. Cardozo, The Nature of the Judicial Process 65–67, 94–97 (1921).
13. *See id.* at 66–67.
14. Nelson, *supra* note 2.
15. *See generally*, Alexander M. Bickel, The Least Dangerous Branch : The Supreme Court at the Bar of Politics (1962); Henry M. Hart, Jr. and Albert M. Sacks, The Legal Process: Basic Problems in the Making and Applications of Law (William N. Eskridge, Jr. and Philip P. Frickey eds. 1994).

of the community," with its "ethics or . . . social sense of justice, whether formulated in creed or system, or immanent in the common mind."[16]

Justice Cardozo was clear that the "standard" for judges . . . "must be an objective one."[17] Judges were not "free to substitute their own ideas of reason and justice for those of the men and women whom they serve."[18] They were not "commissioned to set aside existing rules at pleasure in favor of any other set of rules which they may hold to be expedient or wise."[19] When judges were "called upon to say how far existing rules [were] to be extended or restricted," their duty was to "let the welfare of society fix the path, its direction and its distance."[20]

In an article published in the past year,[21] I expanded on Justice Cardozo's understanding and argued that judges should incorporate into American law the recognized core values of the shared political culture of the American people.[22] I further argued that judges could find these core values not only in formal sources, such as the text of the 1787 Constitution, subsequent amendments, and Supreme Court precedents, but in less formal sources as well.[23]

More specifically, I urged that there have been three special periods in American history associated with the nation's three greatest wars—the Revolution, the Civil War, and World War II—during which the core values were elaborated.[24] These three wars created the material conditions and moral ideals under which the United States exists today:[25]

> The Revolution, for example, created our political independence against a background ideal that all people are created equal with liberty to pursue happiness. The Civil War and Reconstruction, in turn, created a unified nation out of merely confederated states—a nation ruled by the majority, but one in which majorities are required to accept divergent minorities no matter how strongly they dislike them or disagree with their views. World War II then gave the United States global hegemony [on the basis] of ideals that all nations should enjoy political independence, that majorities should govern through democratic processes but at the same time [treat minorities justly,] and that all citizens of a nation should possess equal liberty to pursue happiness without regard to ethnicity, religion, or race.
>
> Judges, [I maintained], rightly incorporated the ideals of the three wars into the law and thereby transformed the ideals into [an ele-

16. Nelson, *supra* note 2, at 801.
17. *Id.*
18. *Id.*
19. As, for example, by suspending the writ of habeas corpus. *See* MICHAEL S. PAULSEN, THE MOST DANGEROUS BRANCH: EXECUTIVE POWER TO SAY WHAT THE LAW IS, 83 GEO. L.J. 217, 278-79 (1997).
20. *Id.*
21. William E. Nelson, *A Response: The Impact of War on Justice in the History of American Law*, 89 CHI.-KENT L. REV. 1109 (2014).
22. *Id.* at 1121.
23. *Id*.
24. *Id.* at 1122.
25. *Id.*

ment] of America's Constitution.[26]

Of course, judges also have a duty to keep the law and the Constitution attuned to changing social realities of a more meager sort. Judges must, that is, have recourse to emerging societal values in determining the law and the Constitution's meaning. The "common law," as I have noted, always has grown and changed and must continue to grow and change "to meet the demands of society."[27] The same is true for the Constitution.[28]

What is vital, however, for purposes of the rule of law is this: While judges are free to incorporate a society's core political values into its law, and while they have a duty to keep the law abreast of social change, they must proceed carefully.[29] The judges must make certain that law is not simply a series of shifting partisan commands enforced through coercion, but is promulgated in the name of the entire society and furthers the interests of the community as a whole.[30] Law must not be made or manipulated for partisan advantage—for the benefit of only a narrow, empowered interest group.[31] Thus, judges need to listen to what they hear from all elements of the political spectrum. They need to proceed in a slow, minimalist fashion, and they need the humility to recognize that only future historical hindsight will reveal for certain whether, in modifying the law, they actually captured the direction of social change or merely furthered the interests of a narrow political faction.[32]

One way for judges to insure that they modify the law only gradually and after full deliberation is by recourse to the avoidance devices of the legal process school, as articulated by Justice Felix Frankfurter and by Professors Henry Hart, Albert Sacks, and Alexander Bickel, among others.[33] For purposes of this essay, however, I want to focus on a second approach: judges can limit the change they bring to the law by deciding cases, wherever possible, on factual, rather than legal grounds.

A case, *United States ex rel. Elksnis v. Gilligan*,[34] which arose before Judge Edward Weinfeld of the Southern District of New York when I was his law clerk, illustrates how judges can avoid changing law by deciding cases on factual rather than legal grounds. Elksnis, who had been convicted of homicide on a guilty plea, sought federal habeas corpus on the ground his plea before a New York State Supreme Court judge was con-

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26. *Id*. at 1122–24.

27. Nelson, *supra* note 2, at 805.

28. *See* DAVID A. STRAUSS, THE LIVING CONSTITUTION 51–97 (2010); Shirley S. Abrahamson, *The Living Constitution: A View from the Bench*, *in* THE UNITED STATES CONSTITUTION: ITS BIRTH, GROWTH, AND INFLUENCE IN ASIA 91 (Joseph Barton Starr ed., 1988).

29. Nelson, *supra* note 21, at 1124.

30. Nelson et al., *supra* note 6, at 1804.

31. *Id.*

32. Nelson, *supra* note 21, at 1124.

33. *See generally* ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS (2d ed., 1986); HENRY M. HART, JR. & ALBERT M. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994).

34. 256 F. Supp. 244 (S.D.N.Y. 1966).

stitutionally invalid.[35] His lawyer advanced two legal arguments in support of the claimed invalidity.[36] First, counsel argued that the guilty plea was taken in violation of Elksnis's constitutional rights because the judge had participated in the bargaining discussions that ultimately induced the defendant to plead guilty.[37] Second, counsel argued that the guilty plea was constitutionally infirm because the judge had promised Elksnis a sentence of ten years, but that after Elksnis pleaded guilty, the judge imposed a sentence of twenty years on the basis of a claim that he had been presented with new facts.[38] A ruling by Weinfeld in favor of Elksnis on either of these grounds would at the time have made new law in the Southern District—either a rule that a judge could not, even on the discovery of new facts, impose a higher sentence than the one he had promised during plea bargaining discussions or a rule that judges could not participate at all in the bargaining process. Weinfeld, however, was not prepared to rest his judgment voiding Elksnis's conviction on either new rule.[39]

Weinfeld relied instead on two-decade-old Supreme Court cases that held a guilty plea was invalid if it was not knowingly made.[40] Upon close examination of the transcript of the plea's entry, Weinfeld discovered that, when Elksnis was asked whether he had killed his common-law wife, he responded that when she attacked him with a knife, he blacked out and that when he woke up, the knife had blood on it and his wife was dead; so, he concluded, he must have killed her.[41] Weinfeld noted that Elksnis's plea, on its face, raised two defenses that Elksnis continued to assert at the time he entered his plea—temporary insanity and self-defense.[42] A plea made in the face of continued assertion of possible defenses was not, accordingly to Weinfeld, knowingly made as required by the old Supreme Court cases on which he was relying.[43]

In short, when he decided *Elksnis v. Gilligan*, Weinfeld could have behaved politically and tried to force New York courts to alter the way they processed criminal cases. He could have ordered New York's trial judges to alter their practice of participating in plea bargaining discussions—an order that, if affirmed by the Second Circuit Court of Appeals, would have transformed New York's criminal procedure. He could have ruled that, once a judge promised to give a particular sentence, the judge was bound by that promise, no matter what new facts subsequently emerged. Although such a ruling would have had a lesser impact on New York practice, it still would have had a substantial impact by making judges

35. *Id.* at 246.
36. *Id.* at 246–47.
37. *Id.*
38. *Id.*
39. *Id.* at 257.
40. *See* Von Moltke v. Gillies, 332 U.S. 708, 734 (1948); Smith v. O'Grady, 312 U.S. 329, 334 (1941).
41. *See id.* at 256–57.
42. *Id.* at 255–56.
43. *See id.*

hesitant to offer explicit deals, and thereby making it more difficult to finalize plea bargains.

But Weinfeld eschewed a political role; he had no interest in striving to resolve potentially contentious issues of policy about how best to administer New York State's criminal justice system. He functioned entirely within the rule of law. He used essentially legal process techniques of avoidance of contentious issues and based the legal portion of his opinion on old, unambiguous Supreme Court precedents. He then found facts enabling him to decide the case before him on the basis of those precedents.

B. Favoring or Disfavoring Particular Individuals

The second precept of the rule of law noted above is that institutions of government must treat all people fairly and equally; governmental institutions, including courts, cannot single out specially favored or disfavored individuals for special benefits or punishments that are not available to or imposed on everyone. Thus, it seems easy to conclude that a society is not adhering to the rule of law if opponents of the regime in power are accused, found guilty, and either imprisoned or executed for offenses they did not commit, or, if cronies of those in power who commit crimes either are never accused or, if accused, are exonerated. The same can be said in regard to specially favored or disfavored groups. It is clear that Jews in Nazi Germany were not protected by the rule of law. Likewise, police officers who are not given traffic tickets for violations they commit when off-duty, or who get such tickets dismissed when they appear in court, are not being held accountable under the rule of law.

A variety of methods exist for getting individuals and groups out from under the mantle of the rule of law. Those who possess executive power in government might direct the detention of some disfavored person and order the judiciary not to review—indeed, to completely ignore—that detention.[44] Similarly, the legislature or the executive could confer some special privilege on an individual, and then deny standing to litigants seeking to bring a judicial challenge to the exercise of that privilege.[45] Alternatively, a legislative leader or executive official might permit judicial review of a detention of a disfavored person or a grant of some special privilege to a favored one, but then coercively direct judges how to decide cases brought before them.[46]

There is an even more subtle way for a regime seeking to discriminate in favor of or against particular individuals or groups to undermine the rule of law. It is fact-finding. Indeed, courts can engage in discrimination, even unintentionally, in the process of finding facts.[47] Fact-finding often

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44. As, for example, by suspending the writ of habeas corpus. *See* Michael S. Paulsen, *The Most Dangerous Branch: Executive Power to Say What the Law Is*, 83 Geo. L.J. 217, 278–79 (1994).

45. *Cf.* Commonwealh of Mass. v. Mellon, 262 U.S. 447, 487 (1923).

46. *Id.*

47. *See* Fed. R. Evid. 609.

depends on judgments about the credibility of litigants and their witnesses. These judgments of credibility, in turn, sometimes depend not on a judge's or jury's observation of people who testify, but on preexisting judgments about whether certain categories of people are reliable and believable.[48] For example, American courts permit impeachment of a witness's credibility by allowing admission into evidence of at least some sorts of prior criminal records.[49]

Categorical judgments inevitably affect fact-finders' views about credibility. Suppose, for example, that a judge believes that police officers frequently lie or at the very least embellish facts they actually observed in order to obtain convictions of defendants they arrested and continue to believe are guilty. We might call such a judge prejudiced; she has prejudged evidence she will hear before she has heard it, and she will likely find a defendant not guilty. A different judge, in contrast, might think police officers are reliable and might believe that defendants and witnesses who testify on their behalf routinely lie in an effort to keep defendants from serving time in jail; this judge also is prejudiced, although his prejudices are different, most likely resulting in a judgment of guilty. Note how a president, a governor, or someone else who nominates judges for elevation to the bench can tilt the criminal justice system in a pro-prosecution or pro-defendant direction by the appointments he or she makes to sit on courts. And, arguably, both judges who pass upon the credibility of witnesses on the basis of prejudgments of the sort noted above and officials who nominate judges for the bench to tilt the criminal system either one way or the other are being less than fully faithful to the rule of law.

Prejudice can get even worse. Suppose an American judge in the 1930s believed in the old shibboleth that Jews were dishonest, followed unethical business practices, and were responsible for the nation's economic difficulties.[50] A Jewish litigant appearing before such a judge would have about as much chance of having his or her case determined by neutral, impartial rules of law as a Jew in Nazi Germany.

Of course, the legal system can attempt to circumvent judicial prejudice by developing legal rules that strive to prevent it. The most important set of rules developed by the common law system confers the power to find facts on juries instead of judges.[51] Two sorts of difficulties exist, however, in connection with jury fact-finding. The main difficulty is that jurors may suffer from the same prejudices as judges–prejudice often infects the entire society. The difficulty faced by African-Americans in the late-nineteenth- and early-twentieth-century South, for instance, was not the prejudice of judges, but the racism of the entire white community. Simi-

48. *Id.*
49. *Id.*
50. For analysis of the existence of such Antisemitism, *see* LEONARD DINNERSTEIN, ANTISEMITISM IN AMERICA 107, 119–120 (1994).
51. William E. Nelson, *Political Decision Making by Informed Juries*, 55 WM. & MARY L. REV. 1149, 1153 (2014).

larly, in the United States today, a young Muslim male accused of terrorism might prefer to have his case decided by a judge, rather than face the difficulty of establishing his innocence before a likely prejudiced jury.

The second difficulty with jury fact-finding is that the law often limits juror discretion in ways that induce juries to reach decisions desired by judges or other powerful lawmakers.[52] Jurors receive instructions from judges and are directed to follow them; while it is unclear whether jurors understand instructions in detail, they may often obtain a general, albeit perhaps erroneous, sense of how their judge believes the case should be decided. In addition, key facts about cases often are withheld from juries. In criminal cases, for example, juries typically are asked to render verdicts without knowledge of the sentences to which their verdicts will lead, with the result that the prejudices of sentencing authorities, whether in favor of harshness or leniency, are given effect without the intermediation of an impartial, fact-finding jury.[53]

In short, when prejudice rears itself in the process of fact-finding, adherence to the rule of law is at risk. Jews and other immigrants in 1930s America were victimized.[54] African-Americans were kept in subordination for centuries. Japanese-Americans were placed in internment camps during World War II. The prison at Guantanamo remains open today.

C. Lawmaking and Fact-Finding in Tension

So far this essay has examined two threats to the aspiration of the rule of law that cases be decided impartially on the basis of known, preexisting rules. The first threat comes from judges who decide cases not by recourse to precedent, but by creating novel legal doctrines to resolve politically contested issues. The second threat comes from fact-finders who decide cases in pursuit of either the orders of political authorities or the prejudices of their communities. The legal system can counter the first threat by requiring strict adherence to precedent, by directing judges to avoid addressing contested political issues whenever possible, and ultimately by understanding its function to be the resolution of individual disputes on the basis of facts. The system can counter the second threat by limiting the discretion of fact-finders. Unfortunately, however, rules limiting fact-finders' discretion will often point them in the direction of reaching politically desired results.

These two efforts to preserve the rule of law ultimately are in tension. The law can attempt to limit political lawmaking on the part of judges by directing them to decide cases through the application of established law to facts. But judges and juries then can find facts in response to political direction or community prejudice. The legal system can respond through statutes or judge-made doctrines that limit fact-finders' discretion, but

52. *Id.* at 1163–64.
53. *See id.* at 1156–66.
54. *See* William E. Nelson, The Legalist Reformation: Law, Politics, and Ideology in New York, 1920-1980, 15–18 (2000).

those rules will almost inevitably point toward politically desired outcomes. Can the system ever fully attain the goal of the rule of law—that cases be resolved impartially on the basis of known, preexisting rules?

Full attainment of the goal is probably impossible. Precedent sometimes is ambiguous, and when it is, judges either must craft new law, probably in the face of political conflict, or restructure the issues of a case in a manner that makes precedent clear and puts the pressure of decision-making on the facts. If they craft new law, judges are likely to engage in political decision-making. But, if they restructure issues so as to resolve cases by fact-finding, they may well give effect to their own, or some other factfinders', prejudices.

What should judges do in the face of ambiguity and tension? Should they violate their duty to apply preexisting law and instead make new law? Or should they leave old, but perhaps ambiguous, law in place, and put all the weight of decision-making on fact-finding with all the risks that facts may be found prejudicially?

II. RESOLVING THE TENSION

A strong reason exists for judges not to make new law by resolving political controversy, even when precedent is ambiguous. The reason is that new law will impact not only the case then pending before a judge, but hundreds or thousands of other cases as well. The Supreme Court's decision in *Roe v. Wade*,[55] for example, has affected millions of women in the four decades since it was handed down. Deciding a troublesome case narrowly on the basis of its special facts sharply reduces the impact of the judiciary's failure to follow the rule of law.[56]

An equally strong reason exists, however, for not deciding troublesome cases narrowly on their facts. A judge who decides cases narrowly will rarely attract public scrutiny, and a line of narrowly decided cases can sometimes change the law without the public being aware of what has happened.[57] *Roe v. Wade*, for instance, was a broad decision, and its very breadth galvanized opponents to begin their campaign to have it overruled or at least narrowed.[58] If the Court had decided *Roe* and subsequent abortion cases more narrowly, the law might well be what it is now, and opposition to the Court and its ruling might have been less vociferous. That might have been good for the Court. But, if one thinks that the pro-choice/debate should be decided by the people, a narrower decision in *Roe* would not have been good for the nation.

Thus, we can draw a first, tentative conclusion: to the extent that judges want to resolve a contested policy issue surreptitiously without generating public scrutiny and debate, the judges should avoid a broad proclamation

55. 410 U.S. 113 (1973).
56. *Nelson*, *supra* note 21, at 1120–22.
57. *Id.*
58. *See* N.E.H. Hull & Peter C. Hoffer, Roe v. Wade: The Abortion Rights Controversy in American History 180–193 (2001).

of new law in a single opinion, and instead issue a series of narrow, fact-centered judgments that will reach the judges' desired result gradually over time. The public may remain unaware of how the law is changing over a line of fact-sensitive cases, and even if people become aware, they may find it difficult to identify the precise time at which and the precise judgment to which to object. In sum, I think judges are more likely to attain the political policy results they desire with incremental fact-finding than with a broad declaration of new law. But cases so designed to accomplish a political result do not preserve and protect the rule of law, nor are litigants against whose interest facts are found for a political end likely to conclude that they received justice under the rule of law.

There are other factors to consider, however, before making a more final judgment. The political convictions of judges are a second such factor.[59] As the following thought experiment suggests, however, these convictions play out differently in different sort of cases.

Consider first, criminal cases. Assume a judge was in a position to issue a broad judgment overruling the exclusionary rule of *Mapp v. Ohio*.[60] What I will define as a conservative judge might vote to overrule *Mapp*, while a liberal judge might vote to adhere to the decision or even expand its scope. Assuming these judges in fact voted as I have just said, what implications would their votes have for the rule of law? How would two such judges react if, instead of passing judgment on the broad legal issue, they were to decide a line of cases narrowly, each on a factual basis? I expect a conservative judge would find the testimony of most police officers credible, would doubt the credibility of most defendants, and would find most searches lawful. I expect a liberal judge would have the opposite reaction. Assuming my expectations are correct, what implications do these expectations have for the rule of law?

If I was correct in Part I of this essay that broad judgments that overrule prior decisions and resolve contested issues of public policy violate the rule of law, then a conservative vote to overrule *Mapp* would constitute a violation of the rule of law. On the other hand, a liberal vote to adhere to *Mapp* (though not a vote to expand it) would be consistent with the rule of law.

A conservative who found facts against defendants on a case-by-case basis would also be suspected of violating the rule of law; because criminal defendants are statistically more likely than police to be people of color, a judge who consistently disbelieves the testimony of defendants would be suspected of racial prejudice. As I argued in Part I, it does not matter for purposes of the rule of law whether the political executive herself victimizes members of a disfavored group such as people of color, whether private citizens injure disfavored individuals while legal authorities look the other way and fail to provide protection, or whether the political executive appoints judges whom she knows will carry out dis-

59. *Nelson*, *supra* note 6, at 1804.
60. 367 U.S. 643, 655 (1961).

criminatory policies. When a disfavored individual or class loses rights by any of these means, the rule of law is violated.[61]

In contrast, a liberal judge who disbelieves police officers and finds facts against the prosecution arguably is not violating the rule of law. The argument here is that the rule of law protects citizens, but does not protect government. A police officer suffers no loss of legal rights or other formal legal loss when a judge does not believe him, and government is the maker of law, not the object for the protection of which the law is made. Of course, the public has an interest in criminal law enforcement, but that interest is political and societal in nature. The public loses no legal rights and suffers no other formal legal loss when a defendant is acquitted of a criminal charge. Therefore, the argument goes, anti-government prejudice resulting in acquittals in criminal cases does not violate the rule of law.

Now let us turn, in contrast, to regulatory cases. Assume that a judge was in a position to issue a broad judgment, holding that Congress could delegate no power to the executive branch to issue rules interpreting and enforcing statutory mandates. What I will define as a conservative judge might vote to change existing law in this radical fashion, while a liberal judge might vote to adhere to current practice. Because it would violate constitutional norms of separation of powers and look like a judicial usurpation of power, a conservative vote to transform existing law might appear as a violation of the rule of law. Of course, a liberal vote to adhere to current law would be consistent with the rule of law.

How should we evaluate these conservative and liberal judges if, instead of passing judgment on the broad legal issue, they were to decide a line of cases narrowly, each on a factual basis, to reach their desired result? What should we think of a conservative judge who, on a case-by-case basis, found every delegation he reviewed in excess of congressional power, or of a liberal who found every delegation within the scope of that power. If, as I argued above, government and its officials are not within the scope of the rule of law's protection, the conservative judge would not be violating the rule of law. The liberal judge, however, might be. She might be discriminating against a class of people—business people—who might at the time be victims of the regime in power.[62]

What I have said so far should make clear what I think about the rule of law in civil cases, in which one private party sues another. Any judge, conservative or liberal, who writes an opinion producing dramatic change in legal doctrine in such cases arguably is violating the rule of law. Likewise, a judge who tries to achieve change by stealth—through fact-finding on a case-by-case basis—might be violating the rule of law if the individu-

61. *Waldron*, *supra* note 3, at 3–4.

62. For examples of political attacks on businessmen from the 1890s into the 1930s and the sense of businessmen that they were being victimized, *see* RICHARD HOFSTADTER, THE AGE OF REFORM: FROM BRYAN TO F.D.R. 64–67, 932–34 (1955); ARTHUR M. SCHLESINGER, JR., THE POLITICS OF UPHEAVAL: THE AGE OF ROOSEVELT 271–74, 333, 395, 500–02, 631–32 (1960).

als who lose rights by the gradual change in doctrine are members of some victimized class.

The above thought experiment brings us to a third factor that needs to be considered in deciding when judicial action violates the rule of law. This factor is discrimination. I think we can conclude with confidence that Jews in Nazi Germany were denied the protection of the rule of law whether they were dragged into concentration camps by executive authorities, victimized by mobs when police failed to protect them, or lost cases in court because judges consistently deemed their testimony not to be credible. I think we can conclude with equal confidence that Catholic priests accused of pedophilia in the United States today, and church authorities accused of covering up their alleged crimes are, in contrast, receiving the protection of the rule of law, even when judges and juries consistently render judgments against them.

Not everyone who loses litigation in a court of law is a victim of a failure to honor the rule of law. Only individuals who face discrimination in court because they are members of groups against which a polity and society systematically discriminate may be said to have been denied the protection of the rule of law. In a polity in which at least some individuals are governed and some disputes resolved by law, discrimination becomes the standard by which to determine whether a particular individual has been deprived of the rule of law. Because they were victims of discrimination, we can comfortably conclude that Jews in Nazi Germany did not receive the protection of the rule of law. Because Roman Catholic clergy are not victims of discrimination in the twenty-first century United States, we can comfortably conclude that legal proceedings against alleged pedophile priests are conducted under the rule of law. What is beyond the scope of this article is a detailed analysis of what constitutes discrimination of a sort that would raise questions about the applicability of the rule of law.

III. CONCLUSION

This essay began with the argument that judges who, instead of following precedent, use cases as vehicles for resolving contested issues of social policy, violate the rule of law. The essay then noted that, even when precedent seems ambiguous, judges can often avoid addressing policy issues by deciding cases on their facts. Finally, the essay recognized that factual decision-making can also violate the rule of law when a decision fails to protect the legal rights of individuals who are victims of societal discrimination.

When should a judge decide to resolve a case by proclaiming a broad, new principle of law, and when should she decide instead to craft a narrow, factually oriented opinion leading to the same result? I see no clear answer to this question. Obviously, a judge should begin by assessing the risk of fact-finding discrimination. In a society in which pernicious discrimination does not exist, or in cases in which all litigants are individuals

or entities not potentially subject to such discrimination, a judge should turn to fact-finding rather than broad opinion-writing as a means to preserve the rule of law. However, in contexts in which discrimination is pervasive and deep, a judge must be more careful. She must work hard to insure that litigants receive a fair trial. She must try not to let the prejudices of the community infect her own thinking, difficult as that may be. If others—for instance, jurors—participate in the decision-making process, the judge should work to include members of any potentially victimized litigant's community in that process. It is vital, for example, that African-Americans have a fair opportunity to be selected for juries that try other African-Americans accused of crime.[63]

Nevertheless, no matter how hard a judge strives to insure fair fact-finding, recourse to fact-finding may not insure that the rule of law can be maintained. Then, a judge needs to consider disposing of a case through a ruling of law, perhaps with a broad opinion publicly attempting to resolve a contested issue of policy. Decision of a case on a broad ground has a further advantage. Judges should be publicly accountable for the judgments they render. A broad opinion resolving a policy issue is more likely than a narrow opinion to receive public attention, thereby rendering a judge accountable. A broad opinion, however, may not resolve the policy issue; rather, as in *Roe v. Wade*, it may exacerbate social conflict and increase public divisiveness. In the face of such divisiveness, a judge perhaps should adjudicate narrowly any particular case, the decision of which can not be avoided; a narrow decision may avoid the escalation of conflict and thereby preserve whatever social cohesion the polity may still possess.

In the end, judges need to make pragmatic judgments about whether to decide cases on broad legal grounds or remand them for narrow fact-finding. They need to make pragmatic guesses about whether politicized decision-making or prejudiced fact-finding constitutes the greater threat to maintenance of the rule of law. The rule of law is an ideal that judges and other officials should strive to uphold, but in a less than ideal society, it cannot be upheld perfectly.

63. *See* Batson v. Kentucky, 476 U.S. 79 (1986).