The Rule of Law and Equality
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Abstract

This paper describes and defends a novel and distinctively egalitarian conception of the rule of law. Official behavior is to be governed by preexisting, public rules that do not draw irrelevant distinctions between the subjects of law. If these demands are satisfied, a state achieves vertical equality between officials and ordinary people and horizontal legal equality among ordinary people.

[The Hebrew God] prescribes laws for this king of theirs to observe, whereby he was forbidden to multiply to himself horses and wives, or to heap up riches: whence he might easily infer, that no power was put into his hands over others, but according to law, since even those actions of his life, which related only to himself, were under a law. He was commanded therefore to transcribe with his own hand all the precepts of the law, and having writ them out, to observe and keep them, that his mind might not be lifted up above his brethren.

* * *

Hitherto we have learned from the very text of God's own law, that a king ought to obey the laws, and not lift himself up above his brethren.

John Milton, *A Defence of the People of England*[1]

Introduction

In this paper, I present a novel account of the demands the rule of law makes of states and an explanation of why states ought to meet these demands. The method is coherentist: I reconcile our pretheoretical evaluations of rule of law institutions in real states, functional generalizations of those institutions, and an account of their moral worth.

The normative account focuses on the role of equality. The rule of law is morally valuable, I argue, because it is required for the state to treat subjects of law as equals ("the equality thesis"). Specifically, the rule of law fosters *vertical equality* between officials and non-

[1] Milton (1848, pp. 34-35).

officials and *horizontal equality* among non-officials. This contrasts with the conventional account, in which the rule of law is valuable because it promotes individual liberty.[2]

I further argue that states comply with the rule of law to the extent that they satisfy the following three conditions ("the three principles"):

> Regularity: Officials are reliably constrained to use the state's coercive power only when authorized by good faith and reasonable interpretations of preexisting, reasonably specific, legal rules.
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> Publicity: The rules on which officials rely to authorize coercion are available for subjects of law to learn; officials give an explanation, on reasonable demand, of their application of the rules to authorize coercion in individual cases; and officials offer those who are the objects of state coercion the opportunity to make arguments about the application of legal rules to their circumstances.
>
> Generality: Neither the rules under which officials exercise coercion nor officials' use of discretion under those rules make irrelevant distinctions between subjects of law; a distinction is irrelevant if it is not justifiable by public reasons, in Rawls's sense, to all concerned.

Each condition presupposes the satisfaction of those before it.[3] Regularity and publicity together lead to vertical equality. A state that has achieved them has achieved a weak version of

[2] Elsewhere, I critique the conventional liberty account of the rule of law. See chapter 2 of Gowder (2012a).

the rule of law: its officials cannot easily abuse their power, and individuals can be fairly secure in their legal rights against the state. Generality leads to horizontal equality. A state that has achieved it has achieved a strong version of the rule of law: in it, individuals are genuinely equal under the law.[4]

When states achieve vertical equality, their legal institutions guard against *hubris*, officials' use of their powers to claim certain kinds of superior status. They also guard against *terror*, the use of the state's power to cow individuals into submissiveness.

When states achieve horizontal equality, their legal institutions prevent *legal caste*, the state's support of hierarchies among individuals, particularly along ascriptive group lines. They also serve the obligation of *reciprocity* individuals have, to one another, to share alike the cost to produce the public good of law and order.

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[3] It is possible, however, to combine the partial satisfaction of a later principle with only a partial satisfaction of an earlier principle – for example, to have a state that is partly general, but excludes some discrete class of individuals from the protection of the laws, and hence is also only partly regular and public.

More generally, the rule of law is a continuum not a binary: states can satisfy it to a greater or lesser extent. It is a continuum along three dimensions. First, a state can satisfy some of the principles but not others. Second, a state can satisfy a principle to a greater or lesser extent. Third, a state can satisfy its principles with respect to some individuals but not others – it could, for example, comport with publicity, regularity, and generality with respect to the elites but not the masses.

[4] All three principles only directly apply to the immediate exercise of coercive force over subjects, that is, to the executive and judicial functions, not the legislative. Hence, legislators do not need, for example, to be able to give their reasons when enacting general laws. However, the three principles indirectly apply to legislation, by specifying characteristics that laws must have in order for it to be permissible for officials to carry out executive or judicial functions under their authority (e.g., they must be general, they must be available to citizens).

This argument for the moral value of the rule of law relies on the ecumenical core of the ideal of equality: if nothing else, those who value equality object to hierarchies of status and esteem, and demand that the state treat individuals with equal respect and take each of their interests into account.

The equality rationale for the rule of law is a minority position in all of the academic disciplines concerned with it.[5] In philosophy and in law, there is an almost universal consensus that the rule of law is morally valuable in virtue of its role in protecting individual liberty.[6] In political science and in economics, the value claims are not on the surface, but much of the literature carries the implicit supposition that the rule of law is valuable for its role in economic development, i.e., for welfarist or utilitarian reasons.[7] Both views overlook, I argue, something essential for understanding the importance of the rule of law.[8]

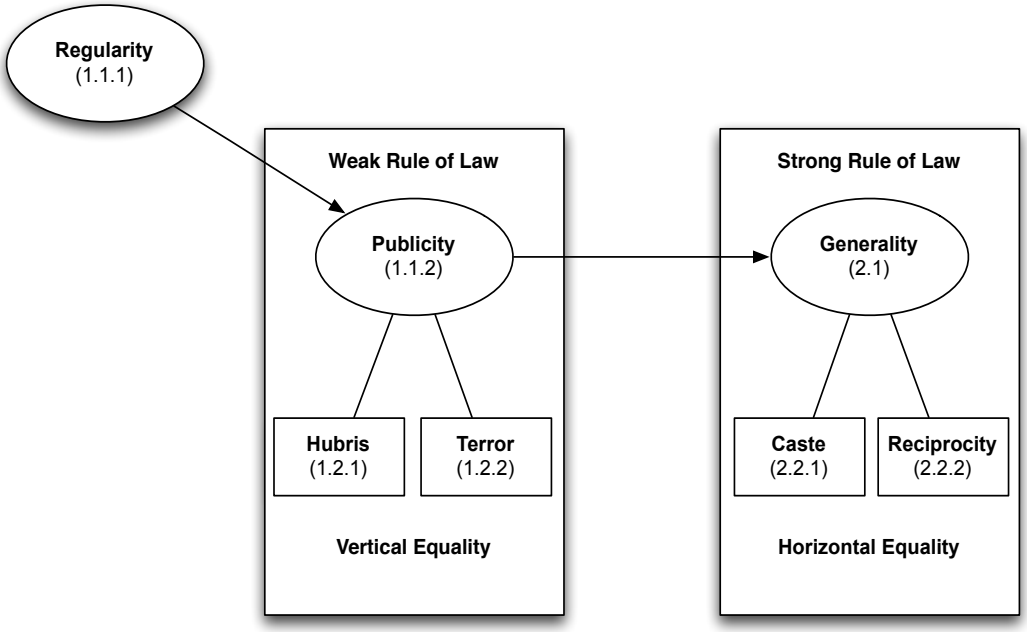
For convenience, the following diagram summarizes the organization of this argument (the numbers in parentheses refer to sections of the main body of this paper).

[5] Allan (1998, 2001), Dyzenhaus (2010a), and West (2003) each connect the rule of law to equality, but in each case only by adopting a thick conception of the rule of law, closely intertwined with other political values (particularly democracy, and particularly Allan). I aim to offer an account of the egalitarian value of the rule of law that does not sacrifice the traditional thin conception of what the rule of law is, a conception that keeps it distinct from other political values (for the reasons given by Summers (1993) and Raz (1979)).

[6] The most prominent advocates of the liberty thesis include Hayek (1960), Rawls (1999a), Raz (1979), and Scalia (1989). This idea remains dominant today. See, e.g., Krygier (2011, pp. 75-81).

[7] Haggard, MacIntre & Tiede (2008) review the literature on the rule of law and economic development.

[8] By contrast, there is no consensus about what the rule of law actually demands. See Waldron (2002), Tamanaha (2004, ch. 7-8), Radin (1989), and Fallon (1997), all of whom discuss the widespread dissensus.



I must note here that, in the interests of space, this paper does not lay very much methodological groundwork. Elsewhere, I consider preliminary questions such as whether the rule of law is thin and formal or thick and substantive.[9] Before moving into the main argument, however, we must pause to note four significant features of this account.

First, the rule of law has institutional and evaluative components. To see what I mean, compare an idea like democracy to an idea like justice. Justice covers a multitude of normative principles and concrete social practices; there are innumerable uses of the term that bear at most a family resemblance to one another. One's favored conception of justice might be instantiated in anything from a tax-and-transfer system of redistribution to a society ruled by Platonic guardians. By contrast, while there are numerous theories of democracy, they all occupy pretty much the same territory: all have *something* to do with will or opinion aggregation, hearing minority views, removing disobedient officials, and so forth. The rule of law is more like democracy than justice:

[9] Gowder (2012a, chapter 1). Briefly, the answer is 'thin and formal.' In the absence of an argument here, the argument given by Summers (1993) will quite suffice.

it has a relatively concrete set of practical extensions. This has important methodological implications: it suggests a coherentist account of the rule of law that draws together normative ideas about the value it serves and observations about the real-world social practices that we ordinarily associate with it.[10]

Second, this account of the rule of law presupposes a positivist conception of what law is, in the school of Hart, Raz, Coleman, Kramer, etc. (I take no position on whether this positivism is inclusive or exclusive). Consequently, I deny that a state, to possess law, must comply with the rule of law (beyond the minimal sense necessary to issue effective commands). Obviously, I cannot mount a serious defense of positivism here, but it is worth briefly noting that the claim that the concept of law necessarily implies the rule of law principle of generality seems to me to be subject to the fatal objection that it poorly describes the way that people interact with wicked legal systems.[11] In particular, it gives a poor account of the idea of civil disobedience; essential to the concept of civil disobedience is that one is disobeying a legally valid, but unjust law and consciously accepting the punishment in order to highlight that injustice. If civil disobedience is to occupy a distinct category from resisting naked force, and, most strikingly, if we are to accurately describe the acts of those who used civil disobedience to resist apartheid legal systems, from Martin Luther King, Jr. and Rosa Parks to Nelson Mandela, we must accept that radically non-general law, which violates the rule of law, counts as law nonetheless.[12]

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[10] I defend this approach to institutional values like the rule of law and democracy elsewhere (Gowder 2012a, chapter 1).

[11] I have an extended discussion of this point in Gowder (2012a, chapter 1).

[12] Allan's (2001, ch. 4) account of civil disobedience as a rejection of the disobeyed law's status as law is not convincing. The civil disobedient asserts that it is the *law* that is failing, not merely that someone has usurped legal forms to commit unjust acts, a stance that King, in the letter from Birmingham jail, described as follows: "One who breaks an unjust law must do it openly, lovingly… and with a willingness to accept the penalty. I submit that an individual who breaks a law that conscience tells him is unjust, and willingly

Third, the rule of law is a regulative principle for *states*, when they exercise their power over individuals. It does not regulate the private use of coercion or violence.[13] Particularly, it does not give us a reason to object to anarchy, nor does it oblige non-officials to obey the law.[14] While there are many regulative principles for both private and state violence, the unique significance of state violence generates a unique principle, the rule of law, to guard against its abuse.[15]

States are distinguished from all other entities by their expressive and practical significance. By "expressive significance," I refer to the facts identified by Weber and Raz: states ordinarily claim a monopoly over the legitimate use of violence in their territories, and ordinarily

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accepts the penalty by staying in jail to arouse the conscience of the community over its injustice, is in reality expressing the highest respect for law." (King 2009, pp. 631) (Concededly, King also endorses Augustine's claim that an unjust law is no law at all, suggesting perhaps that his view on the matter was not wholly consistent.)

As an example of civil disobedience, King aptly cites Socrates. In this vein it would be remiss to fail to note that Plato has Socrates defiantly declaring in *Apology* that he will continue to teach even should the jury command otherwise, but in *Crito* that he is nonetheless bound *by respect for the law* to submit to that same jury's punishment. This is the proper attitude of a civil disobedient: Socrates admits the jury's authority to say what the law is, implicitly, in *Crito*; in *Apology* it follows that Socrates was threatening to disobey something that he must have acknowledged as an authoritative legal command.

[13] I use "coercion," "power" and "violence" interchangeably throughout; the state's coercive power is always backed up by the use or threat of violence.

[14] Fallon (1997, pp. 8) discusses the opposite view.

[15] In addition to the argument in the text, note also that the proposition that ordinary people have an obligation to obey the law is extremely controversial (generally, see Edmundson 1999). The normative robustness criterion, to be described in a moment, consequently counsels against attaching it to the rule of law.

claim that those in the territory are obliged to obey their commands.[16] With that, they typically forbid individuals from resisting the force that they wield; often they also claim to be acting in the name of the citizenry as a whole or some constitutive social, national, or ethnic group.[17]

By "practical significance," I refer to the fact identified by Hobbes: states have overwhelming force within their territories. In ordinary political life, in a modern state, it's impossible or staggeringly costly for individuals to resist its power; moreover, there's ordinarily no external power to which individuals can turn to protect them from it.

These features make state power different in kind from the private use of force. Its expressive significance confers upon it more morally relevant dimensions than private power: if a mugger assaults you on the street, she doesn't claim you're obliged to quietly submit to her violence, or that it's done in your name. The state does. Its practical significance makes it more fearsome and influential: you might have a chance to fight back against the mugger, or at least call upon the state to defend you. There's no one to defend you from the state.

Finally, I claim that my account of the rule of law and its moral value is factually and normatively robust. By "factually robust," I mean that the arguments offered do not depend on strong assumptions about facts about social arrangements, human motivations, or the like that differ from society to society. This is a weaker criterion than necessary truth: the arguments might not be true in every possible social world, but they are true for a plausible range of reasonably common social worlds. By "normatively robust," I mean that these arguments are, as far as possible, non-sectarian. They are meant to be acceptable without taking on overly controversial normative commitments.

The robustness criteria respond to concerns with the scientific and the political usefulness of a conception of the rule of law. First, a conception of the rule of law ought to be compatible

[16] See Raz's (1979, pp. 30) argument that the law necessarily claims its authority is legitimate.

[17] This last idea is drawn from Nagel (2005).

with a social scientific explanation of its appearance in societies characterized by different political institutions and ethical ideals. Thus, we ought not to say that the rule of law responds to institutions and motivations that have appeared in few rule of law societies, or to values their citizens have rejected.

Second, an account of the rule of law ought to be able to motivate citizens and officials to act in accordance with it in the real world. Explaining the moral value of the rule of law is a political task as well as a justificatory one. Not everyone supports the rule of law, and political leaders may think they have good reason to ignore its constraints in the pursuit of their vision of the public good.[18] Those who think that the rule of law generates normative obligations should be able to offer their arguments to those leaders. For those arguments to be persuasive, they should not appeal to sectarian values that may not be shared by those addressed, and they should be applicable across the broad range of human societies in which we may wish to offer them.

The criterion of normative robustness is most clearly met in the account of the weak version of the rule of law. I offer a defense of the weak version that does not depend on sectarian political or moral ideals, but instead on a fairly weak conception of equality which can be the object of broad acceptance across societies and across lines of political and moral conviction. Because the strong version of the rule of law is significantly more demanding, it draws on somewhat less universal ideas in political morality, however, those ideas are still relatively minimal, and do not require the endorsement of strong comprehensive moral or political doctrines.[19]

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[18] Among academics, many, including Horowitz (1977), reject the rule of law (see also Massaro (1989)). Gross (2003) makes a case for abandoning legal rules in moments of crisis.

[19] In terms of the formal/substantive distinction often deployed by lawyers, the weak version of the rule of law is purely formal; the strong version incorporates a substantive ideal of equality because, as I show, there can be no formal way to pick out general from non-general laws.

Moreover, I aim to offer an account of the rule of law that can begin to heal the breach between the social science and policy literature and the political philosophy/theory and law literature. There is an active social scientific literature about, e.g., the economic effects of the rule of law, but it is difficult to find a consistent concept of the rule of law in that literature, and what can be discerned is often very different from how normative theorists conceive of the concept.[20] For example, the World Bank's "governance indicator" for the rule of law combines data about, among other things, the strength of intellectual property protection, how much crime there is, the prevalence of illegal donations to political parties, how quickly disputes get resolved, and "access to water for agriculture."[21] Similarly, the World Justice Project's rule of law index concatenates variables about the control of crime, religious freedom, labor rights, freedom of opinion, absence of corruption, and informal justice with more conventional rule of law ideas like public laws and government powers specified by law.[22]

By way of armchair diagnosis, I suspect the disconnection is attributable to the fact that the standard normative theory accounts of the concept of the rule of law are quite abstract and difficult to connect to observable phenomena of the sorts that can be tested by social scientists, yet simultaneously extensive and demanding, generating lengthy laundry lists of requirements states must satisfy.[23] Moreover, the rule of law is sometimes (in minority views) taken to entail or depend on other normative and institutional concepts, such as democracy or particular patterns of individual rights.[24] Finally, it is often not obvious how to conceive of differences in the degree to which states satisfy the rule of law, and some theorists go so far as to deny that achievement of

[20] Ohnesorge (2007) discusses the inconsistent treatment of the rule of law in the social science literature.

[21] Index specification online at [http://info.worldbank.org/governance/wgi/pdf/rl.pdf].

[22] Index specification online at [http://worldjusticeproject.org/?q=rule-of-law-index/dimensions].

[23] For the most extreme case, Walker (1988, pp. 24-41) gives twelve requirements described over seventeen pages of text.

[24] For example, Allan (2001), Dworkin (1986).

the rule of law can be a matter of degree.[25] Each of those features makes it difficult for social scientists to generate testable hypotheses in which the rule of law is either a dependent or independent variable, and thus naturally leads them to turn to other ways of conceiving the idea. Of course, it might be that the correct account of the rule of law has these properties, in which case the appropriate response would just be to say, "so much the worse for the social scientists"; I shall attempt to show that this is not the case.[26]

These last three points – about positivism, the lack of an individual obligation to obey the law, and the aspiration toward normative and factual robustness – distinguish this account from a school of thought (call it liberal-democratic constitutionalism) with which it otherwise bears close affinities. Allan and Dyzenhaus, the leading scholars of liberal-democratic constitutionalism, both find inspiration in Fuller and Dworkin to offer accounts of the rule of law with a close resemblance to my own in the extent of their substantive demands.[27] But both do so in the course of an explicit rejection of positivism in which the egalitarian demands of the rule of law are interpretations of the ambitions of the enterprise of law itself and of its claims to the allegiance of members of a political community. Allan, whose account otherwise is closest to my own, suggests that the rule of law's moral value is derived from the political culture of the liberal democracies in which it is found, and may not exist in other states.[28] Because they find these values immanent in the political culture of rule of law states, the liberal constitutionalists do not give an account of the worth of the egalitarian rule of law independent of the common-law western liberal democracies (although their accounts might offer some critical resources to those in other states). My account may be seen as a generalization of liberal-democratic

[25] For example, Allan (2001).

[26] This, note, is another reason to adopt a coherentist account of the rule of law that derives the abstract description of the rule of law from observable institutions in rule of law states.

[27] Allan (1998, 2001), Dyzenhaus (2010).

[28] Allan (2001, pp. 23-4, 62-7).

constitutionalism to include non-liberal non-democracies, a relaxation of its attachment to anti-positivism and dependence on the notion that citizens are obliged to obey the law, and a fleshing out of the details of its moral value with an account that does not depend on liberal notions of rational consent to the obligations imposed by law.

Finally, I offer a note of clarification. Throughout this paper, I speak of "subjects of law," or, more informally, "individuals" as those whose equal standing the rule of law protects. Sometimes, I say "non-officials" to highlight the distinction between ordinary individuals and those who wield official power. By all of these terms, I mean those whom the state claims the authority to command. This category is not limited to those who count as members of the political community ("citizens"), and includes, e.g., aliens stopped at the border, transients incidentally in the territory, and those whom the state has disenfranchised or enslaved. (Put differently, the legal community is broader than the political community.) I cannot here reach any conclusions about the scope of the protections of the rule of law as applied to aliens found outside the territory (e.g., in military conflicts). Also, by the use of the term "individuals," I do not mean to deny that groups, corporate entities, etc. can claim the protection of the rule of law; this question too is beyond the scope of the present analysis.

With that, the stage is set for the argument proper. In section 1, I defend the weak version of the rule of law and its egalitarian basis. In section 2, I defend the strong version of the rule of law and its egalitarian basis.

1. The Weak Version of the Rule of Law: Regularity, Publicity, and Vertical Equality.

In this section, I defend the principles of regularity and publicity, and the conception of equality that they serve. They respond to our experience, throughout history, of societies in which the rule of law catastrophically fails – societies such as Haiti under the Duvaliers, or the Soviet Union, in which individuals live in constant fear of officials and officials behave arrogantly toward non-officials. First, I will elaborate publicity and regularity, their scope, and

how they are derived from the specific practices of rule of law states. Then I will show that publicity and regularity are necessary to free states from hubris and terror, and sufficient to, at least, greatly circumscribe them.

1.1. The Weak Version of the Rule of Law in Two Principles

1.1.1. Regularity

If the rule of law means anything, it must mean that those who control the power of the state may not use it whenever and however they want, bound only by their untrammeled whims – their power must be bound by law in some meaningful sense. I express this fundamental idea in the principle of regularity, which is therefore the minimum condition for a state to have even a rudimentary version of the rule of law. A state satisfies it if officials are reliably constrained to use the state's coercive power only when authorized by good faith and reasonable interpretations of preexisting, reasonably specific, rules.[29]

Regularity defines the line between states that control official violence and those that are run at the will of executive officials, or in which soldiers and police use violence willy-nilly against individuals who have something they want or who anger them. Because this is the most fundamental function of the rule of law, most conceptions contain something like it. Ordinarily, however, it is expressed in terms of a requirement that the law be predictable. In a moment I will argue against predictability-centered conceptions of the rule of law, but, first, some more detail about the meaning and appeal of regularity.

Another way to express the ambition of the principle of regularity is that it requires the state's coercive power be exercised *impersonally*. Regularity is violated when officials are

[29] It makes no difference whether we say that officials ought to be bound by "rules" or by "legal rules." We ought to count those social rules that constrain state power or authorize its use as legal rules (for rule of law purposes) regardless of the form in which they appear.

permitted to treat the power with which they're entrusted as part of their personal endowments, suitable for use in their private relations with members of the community; it's respected when they are constrained to treat their power as the instrument of an agency relationship between themselves and the state, usable only for the purposes and under the conditions given by the terms of their legal authority.[30]

In section 1.2.2, I will argue that regularity and publicity together protect individuals from being subjected to official terror – from the specter of officials with open-ended threats who can use their power to make individuals live in fear and behave submissively.[31] That is the essential point of regularity. Unless official coercion is rule-bound, officials will be able to use their power to revenge themselves against their enemies, to expropriate property, and to extort deferential treatment from the population at large – to behave like the Tonton Macoutes or the KGB.[32]

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[30] This idea goes back to Aristotle (2008, 3.16), who asserts that equality demands that those who govern be "only guardians and ministers of the law." It makes a contemporary appearance in North, Wallis & Weingast (2009), who argue that the rule of law is one facet of an impersonal social order in which institutional roles are separate from personal identities.

[31] By "open-ended threat" or "open threat," I just mean a capacity to do harm to a citizen that an official can use substantially at her whim.

[32] The reader may note that I have not separately specified many of the classic requirements of the rule of law, such as the requirements that the laws are capable of being followed, that they are free from internal contradiction, that they are relatively stable, etc. Fuller's list (1969, pp. 39) is canonical. Finnis (1980, pp. 270) offers another influential list. The items on Fuller's list are mostly implications of the principle of regularity. A law that is impossible to follow, or contradictory, for example, will give officials open-ended threats to punish whomever they want. Unstable laws are only objectionable on rule of law grounds if their instability confers unconstrained power on officials; they may, of course, be objectionable on other grounds (such as their deleterious effect on welfare).

Numerous standard practices of rule of law societies serve the principle of regularity.[33] Rule of law societies tend to forbid vague laws. They tend to use tools like the independent judiciary, appellate review, and the jury trial to impose checks on officials' actually conforming their behavior to rules. They tend to require that the law be prospective and forbid bills of attainder. Each of these practices helps to protect individuals from living in fear of open-ended threats from unconstrained officials. For example, regularity forbids vague laws because officials can manipulate them to punish individuals whenever they want. Similarly, regularity forbids retroactive laws and bills of attainder because they can be enacted to retaliate against individuals who cross officials.[34]

Typically, rule of law scholars have said that these practices respond to a demand of "predictability." On this account, states must enable individuals to predict the legal effect of their actions.[35] The very idea that official behavior must be bound by rules is said to respond to this demand. I reject this position. Contrary to the conventional account, it's an essential principle of the rule of law on its own merit that officials be bound by rules.

We should abandon the notion that predictability is central to the rule of law for several reasons. First, enabling individuals to predict the impact of state power on their lives is less important than containing that power in general. The typical claim is that predictability matters because it protects individual liberty – because individuals can avoid state coercion if they know the conditions under which it will befall them, and thus can more effectively make plans to

[33] Of course, not all rule of law societies have all of these features, and certainly do not instantiate them in the same way (compare, e.g., the different versions of the jury trial in classical Athens and the U.S.). The three principles are functional generalizations from the practices of a variety of rule of law societies.

[34] The principle of "legality" in criminal law, incorporating a prohibition against retroactive judicial legislation, a prohibition against vague law, and a rule of strict construction of statutes against the state (Jeffries 1985) can be seen as a way to implement the principle of regularity in the criminal domain.

[35] See, e.g., Hayek (1960), Rawls (1999a), Raz (1979), Scalia (1989).

pursue complex ends. But Waldron has, I think, conclusively refuted this argument by noting that human choices are full of uncertainty.[36] Markets shift. Natural disasters strike. People break their promises. There's no obvious reason that the risk that our choices could bring catastrophe from the state should make it more difficult to plan our lives than the risk that our choices could bring catastrophe from the economy, or from nature.[37]

Moreover, our ordinary judgments of what official behavior comports with the rule of law do not perfectly track the notion of predictability, because predictability is an epistemic notion, dependent on contingent social facts that can become unhinged from the formal properties of official conduct that ordinarily guide our rule of law judgments. For example, we ordinarily think that retroactive legislation always violates the rule of law. But retroactive legislation is not always unpredictable. Imagine a society in which there's a habit of passing retroactive criminal legislation, and all the politicians are denouncing a presently legal narcotic. The citizenry can confidently predict that if they use the drug now, they're likely to be punished later, and can change their behavior accordingly. The predictability conception of the rule of law would lead us to erroneously approve of the retroactive drug law. The regularity conception forbids all retroactive laws, predictable or otherwise, because officials have open-ended threats in a society that permits retroactive legislation. A citizen might be able to reliably guess that, if she angers Caligula, he'll enact a retroactive law against her, but that threat nonetheless forces her into a

[36] Waldron (2012).

[37] Waldron also points out that markets allow people to make plans in the face of legal risk by pricing it. Lately, Waldron (2012, 2011a, 2011b) has made a sustained, and largely accurate, attack on the overemphasis of predictability in the rule of law literature.

subservient position. She doesn't dare cross Caligula, because she knows that, no matter the state of the law or her behavior, he'll always have the capacity to punish her.[38]

Similarly, there can be regular but unpredictable uses of official power. These are exemplified by the power of eminent domain. A citizen may not be able to predict that her house will be condemned to build a freeway overpass – from the citizen's perspective, a condemnation order might feel a lot like a bill of attainder, as if the local authority has just decided to pick on her. Yet we typically see eminent domain in states that satisfy the rule of law, and do not criticize the power on rule of law grounds. We accept eminent domain, I submit, where there are sufficient restrictions to prevent officials from abusing it to generate open-ended threats against non-officials. For example, U.S. law requires that property be taken only for a public purpose and with just compensation, with these standards scrutinized by independent judges; these provisions are sufficient to bring the power within the rule of law.

These examples suggest that we should see predictability as, at most, imperfect evidence of regularity. Because they are substantially correlated, the principle of regularity does help address some of our concerns about unpredictable official coercion. Part of the reason that unconstrained power is so terrorizing is because it often, though not always, is unpredictable: psychologically, an injury is more fearsome when it is unpredictable.[39] But the examples just given show that relying on predictability alone would generate both type I and type II errors: some kinds of power are irregular and terrorizing even when predictable; others are regular and not terrorizing even when unpredictable.

[38] For similar reasons, regularity grounds our standard objection to obscure laws that don't track social norms, such as laws against fornication. Because everyone engages in the forbidden behavior, such laws confer upon officials the open-ended threat to punish whomever they want.

[39] Armfield (2006), Grillon (2002, pp. 966) and references therein.

In the next section, I will describe the principle of publicity, which covers much of the territory associated with predictability in other conceptions of the rule of law. First, I'll consider some objections that might be advanced to the principle of regularity.

The reader may understandably hesitate at the fairly vague requirement that the rules be "reasonably specific." Unfortunately, this is a feature of the normative terrain. More specific rules leave officials less discretion in applying them, but there is no perfect specificity: all rules must leave officials some discretion, because no text can perfectly specify all situations to which it will apply.[40] For want of a plausible formal way to specify how much that discretion must be constrained, I turn to context-dependent and pragmatic judgments to pick out the rules that are too open-ended.

We can give some content to reasonable specificity by appealing to the goals of the principle of regularity. A given power may pose more or less of a risk of generating open-ended threats; we can often determine how serious this risk is, and thus how much control is required for a particular power, with intuition and common sense. For example, as previously discussed, we ordinarily think that the scrutiny of independent judges over the power of eminent domain in the U.S. is sufficient to render it consistent with the rule of law despite its only being constrained by vague standards like public purposes and just compensation. By contrast, a state whose police arrested individuals under the similarly vague standard “whenever it is just” would confer open-ended threats on those police to an unacceptable degree. We evaluate these cases differently, I submit, because the power to arrest is much easier to abuse: it's fairly easy for an individual officer to deploy, and causes a serious short-term harm to the one arrested. By contrast, eminent domain is typically carried out by cumbersome elected or administrative bodies, and requires further lengthy bureaucratic process before anyone is actually removed from the condemned

[40] Macedo (1994) cogently argues that this is a necessary property of general rules.

property. The greater immediate harm the arrest power can cause gives officials who wield it more potential for open-ended threats, and thus gives us good reason to keep it on a tighter leash.

This understanding of the principle of regularity helps clear up another odd feature of the preexisting scholarly discussion of the rule of law. Classical rule of law theorists such as Hayek and Dicey have objected to the existence of administrative agencies and administrative law on two grounds: first, that administrators were entrusted with excessive discretionary power over individuals, and second, that they were not subject to the ordinary law and ordinary courts. On the account of the rule of law developed in this paper, however, we cannot just condemn administrative law wholesale. Rather, we must consider on a case-by-case basis how much discretion a given administrative body has, and the extent to which that discretion leads to the potential for open-ended threats against individuals. Some administrative agencies will fail this test, and rightly so. For example, a welfare agency whose employees are empowered to deprive those receiving public assistance of benefits based on, e.g., officials' judgments of recipients' moral character will obviously generate severe open threats against those recipients. On the other hand, an agency that administers benefits pursuant to a statutorily specified formula, and whose decisions are reviewable in the courts, would not be objectionable. Nor are specialized administrative agencies, like those that exist in the contemporary United States, which have rulemaking functions – the rule of law does not forbid the legislature from allocating its responsibilities to some other body, though it does require that administrative rules be enforced consistent with the principles of regularity and publicity.

Further difficulty arises from the fact all rules are open to different interpretations. It would be too demanding to insist that officials only ever use coercive power pursuant to accurate interpretations of the rules, for officials can make reasonable mistakes in applying them, and we do not ordinarily think that a state in which officials make mistakes offends the rule of law on

those grounds.[41] At the same time, it is too undemanding to adopt a fully subjective standard, which would permit unreasonable interpretations of law. Separately, it seems too demanding to say that officials be *only motivated* by the rules: certain kinds of reasons can fairly guide officials' choices within the domain permitted by preexisting rules; a police officer, for example, may decide that drunk driving is a particularly dangerous crime and spend more of his efforts catching drunk drivers and less catching speeders without offending the rule of law.

I propose to resolve these difficulties by saying that officials must follow the rules in good faith. By this, I mean that they must act as if they take the rules as generating reasons to act in compliance with them and forbidding their violation (the rule of law does not propose to examine the psychological motivations of officials, just their behavior). This forbids uses of power that officials ought to know the rules do not permit – it would be bad faith for the officer of the previous paragraph to decide that driving in the rain is too dangerous, and arrest people for that – while permitting officials to use reasons fairly implied by the law (like the greater dangerousness of drunk driving than speeding) to guide their application of the rules within the domain of discretion the law gives them.[42] It also forbids unreasonable interpretations of the rules yet accommodates the inevitable disagreement.[43]

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[41] List (2006, pp. 209) claims that "the rule of law" means that if it is the law that P, then P is factually the case in a relevant set of socially possible worlds, where a larger such set means we have a stronger rule of law. That definition erroneously counts good-faith mistakes against a state's satisfying the rule of law.

[42] Burton (1992) has given the most complete account of good faith judging. On his account, to judge in good faith in the face of legal indeterminacy or discretion is to weigh the legal reasons – the considerations given by legal sources, rather than by personal interests and beliefs independent of legal sources – in coming to a decision.

The principle of regularity requires judges as well as other officials to engage in such a weighing process whenever they are faced with a discretionary decision. Among the legal reasons they may consider are those considerations of policy or value that can be reasonably seen as underlying the grant of discretion.

In practice, this is perhaps a worryingly ambiguous criterion. However, the principle of publicity, to be addressed next, will help draw some boundaries around the idea of good faith. It will be seen in the course of discussing that principle that officials must be able to explain how their uses of power are permitted by the rules, and those explanations must be able to survive exposure to counterarguments offered by those over whom power is to be exercised. In a context in which officials listen to those counterarguments and take them seriously, as required by the principle of publicity, they will be unable to sustain exercises of power that are premised on unreasonable or arbitrary interpretations of the rules.

Thus, the police officer, deciding whether to focus on catching speeders or drunk drivers, may reason that he was given the power to arrest both categories of lawbreakers in order to promote public safety, and may consequently consider that goal in exercising his discretion. If officials are constrained to act in good faith in this sense, they do not have open threats – they might be able to reach more than one outcome, but they will not be able to reach outcomes that are only explainable as exercises of unfettered will.

[43] Some rule of law skeptics make far too much of the room for disagreement in the law. For example, Hasnas (1995) denies that there is such a thing as the rule of law on the grounds that the law is so indeterminate that any result can be justified in any case. His indeterminacy claim is grossly overstated. If nothing else, there are some clearly incorrect legal rulings. For a trivial example, a judge may not resolve a property dispute by ordering the disputed asset transferred to himself. For a general argument against the claim that the law is radically indeterminate, see Kramer (2007, pp. 17-38).

Kramer also cogently argues that there is some legal indeterminacy in borderline cases. My account can handle this fact: so long as officials are constrained by some combination of law and other methods of social control such that they don't have open threats against individuals, the law is regular despite indeterminacy on the margins. There may be multiple permissible legal results in a given case without any of them being exploitable by officials to terrorize ordinary people. By contrast, indeterminacy is a serious problem for versions of the rule of law that include a demand that subjects of law be able to predict the legal effect of their actions.

One might have the opposite worry, that regularity is too rigid. Some scholars, most notably Dworkin, deny that law is primarily a matter of specific rules.[44] Instead, according to Dworkin, much of our legal practice involves the application of "principles" – normative standards that are to be weighed against one another in reaching decisions, and that require the extensive use of case-by-case judgment. If regularity forbids principles, it may forbid all realistic legal systems and, contrary to the methodological requirements discussed in the introduction, fail to give an account of actual rule of law societies.[45]

Regular legal systems may contain principles. What matters for regularity is that officials be constrained, not how they are constrained. Officials might be constrained by strict de jure rules, where their failure to do so subjects them to legal, social, or political sanction, or they might be constrained by looser de jure rules – open-ended principles leaving them a substantial amount of discretion – where that discretion is itself constrained by "unwritten" standards that fill out the content of the rules, by social norms that sanction officials for abusing their discretion, by political competition, by checks and balances from other officials, or by something else. Where the written rules constrain less, other tools must take up the slack to constrain more.[46]

1.1.2. Publicity

The principle of publicity requires that the rules under which officials use power be in the form of laws that are accessible to non-officials. It presupposes that there are such (effective) rules, that is, that regularity is satisfied to a significant extent. Specifically, publicity requires that

[44] Dworkin (1967).

[45] Waldron (2011a) has further objected to conceptions of the rule of law that require rigid rules on the grounds that they are inconsistent with thoughtful, reflective governance.

[46] In order to satisfy the principle of publicity, non-officials must be able to know and make use of these other sources of constraint: they must, for example, be able to offer unwritten extensions to de jure rules as arguments in court, or deploy social and political institutions to sanction judges for abusing their discretion.

a) the laws that authorize official coercion be available for non-officials to learn (i.e., not secret or unreasonably obscure); b) officials explain, on demand, their application of the law to authorize coercion in an individual case, where that law itself must meet the principle of regularity (i.e., must be preexisting and reasonably specific); and c) officials offer those whom they coerce some opportunity to participate in the application of legal rules to their circumstances, i.e., by having an opportunity to make arguments for a particular interpretation of those rules.[47] (The third requirement depends on the second: if officials do not say how the rules authorize their behavior, individuals will find it much more difficult to dispute official decisions.)

The principle of publicity is essentially a reason-giving requirement. Officials must be prepared to give, on demand, the reasons for their uses of coercion over individual citizens (that is, when carrying out enforcement/implementation or adjudication functions), and those reasons must be statements of how the law, correctly interpreted and applied, permits their actions.

By "on demand," I mean that officials are to offer reasonable explanations if so requested by those over whom they exercise their powers. I don't mean that they must do so immediately, but explanations must be available in the ordinary course of business. What counts as a reasonable explanation depends on the circumstances: from a police officer to an individual found standing over a corpse with a smoking gun, "you're under arrest for murder" quite suffices; a judge exercising discretion in a complex and controversy-ridden area of law ought to go into detail. In general, explanations should be sufficient to a) signal that the official isn't just exercising power because she wants to do so, and b) give the person over whom power is exercised enough of an idea of the legal authority to which the official appeals to dispute the decision. This roughly corresponds to the contemporary U.S. legal norm.

[47] The more numerous and detailed principles Summers (1998, pp. 1693-1695) and Solum (2004, pp. 122) offer are approximately equivalent to my principles of regularity and publicity.

Note that the obligation of explanation-giving attaches to those official acts that amount to exercising coercive power directly over individuals. A legislature enacting an ordinary statute need not explain its reasons (although, as will be seen in the next section, the distinctions drawn in a statute must be justifiable by public reasons, legislatures are not obliged to actually utter them). A legislature enacting an act of attainder, by contrast, would be required to explain how that exercise of direct coercion were authorized by preexisting, reasonably specific law; the impossibility of doing so implies a rule of law prohibition against attainder. Likewise, a city council enacting an ordinance need not explain itself; a city council exercising the power of eminent domain must do so. The distinction is not by official but by function. Police officers arresting individuals and judges issuing orders of course must explain themselves.

A state can run afoul of publicity, but not regularity, if officials' power is actually constrained by preexisting rules, but non-officials have no access to those rules or influence over what befalls them under their auspices. In such societies, the law is the exclusive domain of an elite class of officials, and non-officials must rely on those elites to protect them.[48]

If regularity is the official-centered side of the rule of law, publicity is the subject-centered side. It responds to the concern not only that officials' use of the state's coercive power actually be constrained, but that subjects of law be able to *know* and to *subjectively rely on* the constraints. Thus, many of the same practices that serve regularity also serve publicity by involving individuals in the mechanisms to control official power. However, some standard practices of rule of law states serve publicity in particular: these include the prohibition against secret law, the requirement that subjects of law have notice and an opportunity to be heard before being coerced, the right to be represented by counsel, the right to be confronted by the evidence

[48] The law can be public with respect to some subjects but not others, e.g., if women must rely on male guardians to appear for them in court.

against oneself, and similar practices that allow subjects of law to observe that officials are constrained by rules and participate in the application of those constraints.[49]

Publicity allows non-officials to verify for themselves that the state satisfies regularity. From a non-official's perspective, a state that satisfies regularity but not publicity might not look very different from a state that satisfies neither. We can see this by reading Kafka's *The Trial*.[50] To Josef K, it looks vaguely like something is going on behind the veil of officialdom, as if official behavior is following some kind of logic. But he, and hence the reader, can't really tell, because the rules are unavailable to him. Maybe there are no rules at all; maybe the officials are just doing whatever they want. Or maybe high-level officials are fully constrained by the rules, but neither K nor the low-level officials with whom he gets to interact have any hope of figuring out what those rules are. It makes little difference to K's experience of the situation.

This account of publicity, unlike my account of regularity, is fairly conventional. Just about every previous rule of law scholar has argued that the law must be public, and the additional procedural requirements guaranteeing non-official participation in the application of the rules are found in most conceptions of the rule of law under the label "natural justice." Because it is so conventional, I won't defend it at length.[51]

The requirement that officials explain themselves to those whom they coerce has received less attention in the academic literature than the other elements of publicity, but is quite important in the legal culture of rule of law states.[52] As Cohen points out, we ordinarily expect judges, in

[49] Waldron (2011b) offers an extensive list of judicial procedures that contribute to satisfying his version of the publicity principle.

[50] Kafka (1992).

[51] For a convincing defense of the inclusion of such procedural protections in a conception of the rule of law, see Waldron (2011b) and Dicey, Raz and Thompson cited therein.

[52] The power of juries, who traditionally need not explain themselves, may be seen as a counterexample to this claim. (I thank Dan Markel for raising this point.) In the U.S. system, this may be a justification for

particular, to not only have but to *offer* reasons for their decisions – a judge who fails to offer written opinions on serious controversies, or who issues significant rulings from the bench without any explanation, has seriously violated legal norms.[53] Such a judge will be seen as high-handed, dismissive of the interests of the parties and of the fact that it might matter to them that they understand what is being done to them and have the opportunity to respond to the reasons given them with their own reasons. As I will argue shortly, such a judge is indulging in an act of anti-egalitarian hubris: by declining to explain herself she is expressing the idea that she doesn't *have* to explain herself – that she is of sufficiently higher status than those appearing before her that she can give imperious commands and those coming before her should just shut up and do what they're told.[54]

I now proceed to the details of that very point.

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limiting juries to questions of fact: at least in theory, this would keep jurors from considering the (more normatively loaded, and thus requiring more explanation) legal questions reserved to reason-giving judges. In effect, we impute reasons to the jury by limiting them to questions of fact: we can ordinarily interpret a jury's ruling as being given because they found facts consistent with the legal theory given to them by the judge. (Incidentally, this suggests a potential rule of law objection to jury nullification, though I cannot take this question up here.)

[53] Cohen (2010). In the words of Judge Kozinski, dissenting from the refusal to punish a judge who issued a ruling "just because I said it": "no one knew why the district judge had done what he did—the order gave no reasons, cited no authority, made no reference to a motion or other petition, imposed no bond, balanced no equities. The two exercises were a raw exercise of judicial power[.]" *In re: Complaint of Judicial Misconduct*, 9th Circuit No. 03-89037, unpublished opinion of September 20, 2005, available online at [http://caselaw.findlaw.com/9th-circuit-judicial-council/1023783.html].

[54] Schauer (1995) points out that reason-giving behavior can be an expression of relative status in this way. See also Schwartzman (2008, pp. 1004), who argues that giving reasons is necessary to "respect the rational capacities of those subject to their authority," and works cited therein.

1.2. Vertical Equality

There are two major vices of a state in which publicity and regularity fail: first, officials treat non-officials with *hubris*: they behave as if they are a superior class in a status hierarchy. Second, officials inflict *terror* on non-officials: they force non-officials to fear their power and make it rational for individuals to behave submissively in the face of it.

1.2.1. Respect and Hubris

When officials use coercive power without offering reasons, drawn from preexisting law ("legal reasons"), to the objects of that power, they deliver the message that the one using the power is superior to the one over whom the power is used.[55] I call this idea "hubris" to acknowledge its derivation from the classical Athenian hubris law, which forbade the striking of fellow citizens (and even slaves) because such striking expressed a disrespectful attitude of superiority toward its victims – it was a figurative as well as a literal slap in the face.[56] By contrast, when a state complies with regularity and publicity, officials express respect toward non-officials and the political community as a whole.

Here we must pause to fix a term. When I say that a legal act *expresses respect* (or disrespect), I mean to invoke the idea given by Anderson and Pildes: "[t]o express an attitude through action is to act on the reasons that attitude gives us."[57] To express respect for another, thus, is to act in a way appropriate for someone who has respect for the other. However, it is not

[55] Kramer (2007, pp. 65-6) aptly argues that an official who makes rulings solely on the basis of her own interests shows "contempt" for the interests of those who have come before her. My position is more ambitious, since it does not depend on the official's rulings being self-interested.

[56] On hubris as status-motivated insulting violence in Athens, see Fisher (1992, 1976) and Demosthenes's *Against Meidias* (Dem. 21).

[57] Anderson and Pildes (2000, pp. 1510).

necessary to actually hold an attitude in one's head to express it; it is merely necessary to act as someone who has the attitude in question acts. Expressing an attitude in the Anderson/Pildes sense is (at least partly) conventional: sometimes we express an attitude by engaging in behavior that members of an interpretive community understand to express that attitude. But there need not be a very strong convention: we can express contempt in more subtle ways than by spitting on people or giving them "the finger," for example.[58] Most importantly, expressions can structure social relationships: by expressing the attitudes appropriate to a relationship, an actor can lay claim to, or "constitute," that relationship.[59]

I claim that when officials act contrary to the principles of regularity and publicity, they express disrespect to those over whom they hold and use power, and by doing so create a relationship of subordination. By following the principles, they express respect and in doing so create a relationship of equality.

By offering reasons for their use of power at all, officials express three distinct forms of respect toward those over whom power is to be used. First, they express the recognition that they actually have to have reasons, and hence that subjects of law are immune from the casual use of official power.[60] Superiors do not need reasons to use their power over inferiors: masters need

[58] Moreover, many expressions are cross-culturally meaningful. Physical violence, for example, expressed/expresses disrespect in both ancient Athens (as just noted) and in the contemporary western world – and most probably is an expression of disrespect in a much wider range of societies.

[59] Anderson and Pildes (2000, pp. 1527-9). I would add one gloss to Anderson and Pildes's account. An expression need not have simple content like "respect," "disrespect," "superior," or "inferior." We can also express the fine details of these attitudes and relationships – we can express respect for equal citizens or disrespect for putatively racial inferiors, for example, or express "tough love" by demanding that someone stand up for himself or non-tough love by repeatedly helping a friend out of scrapes.

[60] For this reason, officials must actually be constrained, just as in the principle of regularity, to offer reasons for their uses of coercive power. If an official explains herself to a subject out of the goodness of

not have any particular reason to beat their slaves; bosses need not have any particular reason to fire their employees. Second, they express the idea that they are *accountable* to the particular individuals over whom power is used.[61] Equals are accountable to one another; superiors are not accountable to inferiors: even if the master or boss has some coherent reason for his behavior, he need not explain it to his slave or employee. Third, they express respect for individuals' powers of reasoning – they express that non-officials are capable of understanding why they are to be coerced, and that it matters that they be given the opportunity to so understand.[62] To be given reasons is to be *treated like an adult*.

So far, this doesn't require very much respect. When the defendant asks why she's going to jail, the judge might just say "because I don't like you." That's a reason, to be sure, and it's perhaps a little better than "shut up or I'll double your sentence," but it still clearly expresses an attitude of superiority.

It is slightly more respectful to offer a reason drawn from something other than the official's personal will. Rather than saying "because I don't like you," or "because I felt like it," she might say "because your conduct posed a danger to the community." This suggests that she

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her heart, that explanation is not a product of the official's being accountable to the subject, and cannot express that accountability.

[61] Tribe (1988, pp. 666): "the right to be heard from, and the right to be told why… express the elementary idea that to be a *person*, rather than a *thing*, is at least to be *consulted* about what is done with one" (emphasis in original).

[62] Plato (1980, IV.718b-723b), argues that the laws must contain explanatory preludes by drawing an analogy to the difference between a doctor for citizens, who "teaches the one who is sick," and a doctor for slaves, who "commands like a headstrong tyrant." This analogy is particularly apt, because the slave doctor is doubtless acting for the good of his patients, but nonetheless is blamable for disrespectfully treating them as if they're unable to understand. Similarly, even benevolent officials are blamable for not offering subjects reasons.

doesn't get to use her power just because she wants to – it implies that if the individual's conduct hadn't posed a danger to the community she wouldn't have been entitled to punish him. However, this still falls short of the respect an official ought to offer a subject of law. For offering "because your conduct posed a danger to the community," standing alone, suggests that the official is the sole judge of what reasons suffice to use her power. She could have just as well said "because you're a jerk," or "because the moon is in Virgo." An individual who is entitled only to this kind of reason can reasonably think that his life is under the general supervisory control of someone else: the judge knows better than he does what reasons apply to regulate his conduct, and so gets to order him around whenever she thinks it's best.

If an official offers legal reasons for her use of coercive power, however, matters are different. Even if the law just authorizes the defendant's imprisonment based on the same reasons that our judge would otherwise have offered on her own (e.g., "anyone whose conduct poses a danger to the community is liable to imprisonment"), legal reasons are embedded in a network of other people's judgments – depending on the precise details of the legal system in question, a legislature or prior judges will have decided that there should be a law about the conduct in question, appellate judges will review the trial judge's decision to ensure that it's actually authorized by the law, prior cases will have filled out the legal rule and given the one over whom power is to be used some idea of what sort of evidence she might offer to defend herself, and so forth. An official who offers legal reasons treats individuals respectfully by showing that her use of power isn't just a matter of her own judgment, but responds to the judgment of all those other people too. When an official listens to an individual's arguments about how the law is to be applied in her particular case, she also expresses respect for that individual's judgment.[63]

[63] Compare Allan (2001, pp. 79), who suggests that legal systems in which subjects of law are entitled to offer arguments to the decision maker and receive reasons for their treatment express respect by recruiting their acceptance of the outcome, either as fully justified or at least as "fairly adopted by [democratic]

A judge who offers legal reasons for her use of power also treats the political community as a whole respectfully in two ways. First, she acknowledges that it's not ultimately her judgment about the rightful use of that power that matters, but the judgment of the political community. Her judgment is involved in applying the legal rules, but only within bounds specified by the collective judgment. Second, she acknowledges the agency relationship between herself and the state. The judge who uses her official power without appealing to legal reasons is like an employee who disrespectfully uses her employer's property as her own, commingling them and not distinguishing between her purposes and her employer's purposes.[64]

To clarify the last point, my argument may be compared to Evan Fox-Decent's fiduciary theory of the rule of law.[65] On Fox-Decent's argument, the state is in a fiduciary relationship with its citizens, and the obligation to comport with the rule of law arises from (or constitutes) this

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procedures enabling all citizens to exert an influence." My claim is weaker: an official act of coercion carried out pursuant to the principles of regularity and publicity might be carried out without any claim that the law applied is justifiable to the subject, but nonetheless is minimally respectful insofar as the official carrying out the coercion at least acknowledges some source of authority other than her own will which grounds her use of power over the subject.

[64] Officials avoid hubris by maintaining a separation of role and personal identity. When an official acts in an official role, she is bound by rules and is bound to the practice of explaining her acts in terms of those rules; the rules and the practice of reason-giving constitute the role. By contrast, an official who is not so constrained communicates that her right to exercise coercive power over another individual is a personal property, rather than a property of her role. The explanation "because the rules say so" attributes authority and status to the law, the explanation "because I say so," like no explanation at all, attributes authority and status to the official. Even an official who exercises discretion, when he acts in good faith by doing so on the basis of legal reasons, again attributes authority and status to the rules; by incorporating reasons drawn from his personal preferences or beliefs he attributes authority and status to himself.

[65] Fox-Decent (2005, 2012).

relationship. Generally, Fox-Decent's account of the rule of law is compatible with my own; my argument can be seen as filling out the content of the state's fiduciary relationship with its citizens. That is, one reason we might think that the state is obliged to treat those under its power as equals is that we accept Fox-Decent's argument that the state is their fiduciary, and obeying the rule of law is part of what it means for the state to treat those under its power as equals.

However, it is important to distinguish Fox-Decent's claim that the state is the fiduciary of its citizens from my further claim that officials are obliged to treat their power as the instrument of an agency relationship with the state. Fox-Decent's claim is about the proper relationship between the state as a whole and the entire populace; my agency claim is about the relationship between officials and the state, and what this relationship expresses about the relative status of officials and ordinary people; the latter imposes additional demands on official conduct, without which the rule of law cannot be achieved. To see this, imagine a state in which the technology of governance is insufficiently advanced to permit it to operate a non-corrupt bureaucracy. Such a state may best satisfy its fiduciary obligations to its citizens by relying on a cadre of rent-seeking officials with more or less unconstrained power to provide public goods (this is Olson's "stationary bandit").[66] Nonetheless, it may not satisfy the rule of law.

Republican Rome may be a quintessential example of this sort of organization, in that it relied on corrupt and arbitrary provincial governors to maintain peace in the provinces. Suppose that Rome would have less-well satisfied its fiduciary obligation to provide peace and public order under any feasible alternative system, even one that made improvements from the rule of law standpoint. For example, it might be the case that Rome could have better complied with the rule of law by giving provincial governors less power, but, in doing so, would have had to take away the military flexibility necessary to preserve order. Under those assumptions, Rome satisfied (thanks to the principle that ought implies can) its fiduciary obligations to the people

[66] Olson (1993).

even if governors, in turn, failed by their corrupt behavior to respect the agency relationship between themselves and the state, and even if, in consequence, Rome did not comport with the rule of law. Consequently, I deny that a state must comport with the rule of law to satisfy its fiduciary obligations to the public in all circumstances.[67]

Of course, not all failures of the agency relationship between officials and the state lead to inequality between officials and ordinary people. For example, if a governor converts public funds meant to build roads, he steals his employer's (Rome's) property, but does not treat those whom his employer is obliged to serve (the people) as less than equals. On the other hand, if a governor converts the coercive power entrusted to him and begins to issue arbitrary commands, he does treat the people as less than equals by expressing the hubristic claim that he has the personal right to issue orders to members of the public just because he wants to.

An official need not convert the power entrusted to him to his own purposes to commit hubris; he can also do so by pursuing the state's purposes by impermissible means. Consider the classic *noir* police detective, who is sometimes moved to manufacture evidence against a criminal whom he *knows* is guilty, but cannot prove via ordinary (that is, authorized, lawful) means. Our detective violates the rule of law even though he acts for a public purpose, because he disregards the procedural legal constraints on his coercive actions, inconsistent with the principle of regularity. Framing people, even criminals, is also inconsistent with the principle of publicity, in that it makes the explanation offered to the convict of his punishment into a lie: the convict was not actually convicted because the evidence showed he was guilty of the crime. By carrying out

[67] Note that a state can respect the rule of law even if its officials do not acknowledge a fiduciary relationship between the state and the public, and even if, on the whole, they disregard the obligations given by any fiduciary relationship. The officials under a Mancur Olson-esque stationary bandit might obey the rule of law because it's the most efficient way for them to extract rents from the public. Their obedience to the rule of law is praiseworthy for the reasons given in this paper even if the state as a whole is blameworthy on Fox-Decent's argument.

the frame-up, the detective acts with hubris: he arrogantly places his personal convictions about the need to punish the criminal above the public procedures by which that punishment is to be carried out.

I conclude that the subjects of law are offered hubristic disrespect in states that do not comport with regularity and publicity.[68] They are confronted with officials who act as if they are entitled to exercise power over others pursuant only to their own will and judgment. Such officials use the power of the state to lay claim to a superior status, even if their intentions are benevolent.

The concept of hubris clears away a prominent but troubling claim in the existing literature. Meir Dan-Cohen has argued, convincingly, that "acoustic separation" (the promulgation of strict public criminal laws and secret, more lenient, rules to guide the decisions judges actually make) does not run afoul of the values underlying his conception of the rule of law.[69] This is a surprising and counterintuitive conclusion, because we ordinarily see the requirement that the law (the *actual* law) be public as a characteristic feature of rule of law states.

Dan-Cohen bites the bullet and concludes that the (rule of) law is morally dubious because it permits the intuitively unpalatable practice of acoustic separation.[70] We need not be so

[68] Mirabeau (1787, pp. 3), in his polemic against the infamous *lettres de cachet* (orders in the *ancien régime*, under the imprimatur of the king and available at his whim, often used to imprison those who had annoyed the influential), suggests that their use was characteristic of Louis XIV's character, viz.: "by nature haughty, corrupted by fortune and flatters, [and] spoiled by an enthusiastic nation" (spelling edited to conform to modern usage). That is, hubristic.

[69] Dan-Cohen (1984, pp. 667-673). On his conception of the rule of law, the law must be predictable and able to guide individuals' conduct, in order to serve their autonomy, freedom, and welfare.

[70] Dan-Cohen actually concludes that the law itself is morally dubious, apparently because he endorses the Fullerian claim that the requirements of the rule of law are constitutive elements of law itself and its "internal morality." We need not go so far.

hasty. The coherentist method I use here leads instead to the suggestion that if one finds that one's conception of the rule of law endorses a morally unpalatable practice, that rule of law states characteristically reject, one ought to conclude that one has the wrong conception of the rule of law. Once we understand that the rule of law requires officials to treat individuals with the respect due to equals, we can see why acoustic separation violates it. Acoustic separation is egregiously hubristic: it expresses the idea that the subjects of law are not adults to be trusted with the rules that actually govern their behavior, but children to be herded about with "noble lies" by officials who know better. And that is why it offends against the rule of law.

It might be objected that hubris isn't really what's wrong with the casual use of the immense power of official violence. If a police officer beats someone up just because he wants to, it seems to miss the point to say that this behavior is wrong because it carries an insult. But nothing here entails that hubristic insult is the *only* ground on which we might object to such a beating. As an offense against the rule of law, I will say in the next section that the casual beating is also wrong because it participates in a system of terror against the public. But it is also wrong for numerous reasons that have nothing to do with the rule of law. It's wrong in general to beat people, absent some special justification, regardless of whether the person doing the beating is a police officer.

In order to discern the way in which *rule of law* violations are distinctly wrong, we should not imagine cases like the casual police beating. Instead, we should imagine cases that would be perfectly justifiable but for the offense against the rule of law. Suppose, for example, that Phil comes up with a brand new way to harm his fellow citizens for his own benefit – a way nobody has ever dreamed of before, and hence that has not yet been outlawed. Maybe he invents, and deals, a very addictive and very dangerous drug. Before the legislature gets around to outlawing it, Jane, a police officer, arrests Phil and holds him in jail until he agrees to return his ill-gotten gains, destroy the drug, and pay for treatment for those he's harmed.

We should have some sympathy for Jane's moral position. She's using her power to right a wrong. Nonetheless, she is blamable for her treatment of Phil. Once we strip away the distracting features of the casual beating case, we can see that Jane's behavior is wrong, from the rule of law standpoint, because she is, in the vernacular, "appointing herself judge, jury, and executioner" (and legislator besides). By taking upon herself the sole power to judge and correct Phil's behavior ("taking the law into her own hands"), she claims a personal authority over Phil, and over the political community as a whole, inconsistent with equality. This is hubris.

But suppose Jane first resigns from the police department and becomes a vigilante? One might worry that her behavior expresses a disrespectful attitude regardless of whether it is backed up by state power. But I've said that the rule of law is a regulative principle only for states. If vigilante Jane still commits hubris, then either hubris isn't a distinctive wrong associated with violations of the rule of law, or the rule of law regulates private coercion. Either horn of the dilemma poses problems for my argument.

This objection is not compelling. Jane's behavior is so disrespectful in part because she is using the state's power. Recall the Weber/Raz point from the introduction: the state claims a monopoly over the *legitimate* use of force, and claims authority for its law, including the power-conferring rules giving Jane the power to arrest Phil. Because of this, ordinarily official power is used under at least a minimal claim of right. State officials ordinarily claim that subjects of law are obliged to obey their commands, and forbidden from resisting state force directed against them. So when Jane uses her official power, she participates in a system that routinely asserts that her uses of power are right and generate obligations for others; she herself implicitly asserts that the particular use of power she uses is right and generates obligations for Phil. Indeed, if Phil tries to fight off her illegal arrest, he may be subject to prosecution for "resisting arrest," or "assault on a police officer," or various other crimes that many jurisdictions establish to back up the authority they claim for their officials. These powers give rise to status hierarchies: if I say that I have the power to oblige you to submit to my unauthorized violence, I claim a higher status

relative to you than if I simply use that violence against you with the shared awareness that you needn't docilely suffer it. Thus, officer Jane's hubris is significantly more severe than vigilante Jane's.

1.2.2. Terror

In some non-rule of law societies, officials do not exercise their unconstrained coercive power against every individual (there are only so many hours in the day). Often, they may have unconstrained power over everyone, but only actually use it against a subset of individuals – political dissidents, for example, or those who have accumulated enough wealth to be worth plundering. There may even be societies in which unconstrained officials never have to resort to the use of their power, because non-officials are sufficiently good at anticipating official desires that no one ever crosses an official.

Non-officials in states that do not comport with regularity and publicity, whether or not they are actually targeted by official violence, have good reason to fear officials. Those who are subject to such terror are rendered unequal twice. First, they are subjected to the experience of relative powerlessness and fear.[71] Second, they are forced to act out their own subordination by behaving submissively toward powerful officials.[72]

Note that terror comprises three distinct wrongs: fear, the fact that this fear is unequally distributed, and the fact that non-officials are made to fear *other people*, and thus to behave submissively toward them. Doubtless, it's bad for people to live in fear, and a political community that gives the subjects of its law reason to live in fear wrongs them in virtue of that

[71] Shklar (1998) interprets Montesquieu's account of the rule of law as essentially concerned with protecting the populace from fear.

[72] Unless, that is, they are more courageous than we have any reason to expect. Spartacus doesn't come around very often.

fact alone. But not all fear is created equal. Suppose, for example, that a state exaggerates some external threat in order to intimidate the populace into supporting policies that it would otherwise resist. Individuals have reason to complain that the state has put them in fear, but do not have reason to complain that they've been treated unequally. Now suppose the state builds unsafe nuclear power plants on earthquake fault lines: such a state gives the public reason to live in fear, and this fear has been distributed unequally (residents of San Francisco experience it, residents of Chicago do not) but doesn't give them further reason to behave submissively, because earthquakes don't respond to groveling. The reckless-nuke society strikes a blow against its citizens' *welfare*, but not their *status*. By contrast, a state that confers the power of casual violence on officials gives the subjects of law good reason to walk on eggshells around those officials, behaving submissively in order to avoid drawing their ire.

When an ordinary citizen passed by a member of the Tonton Macoutes or the KGB, he must have felt a pang of alarm, an urge to cringe away and avoid the attention of the wielder of fearsome powers. He must have been obsequiously polite if he was forced to interact with them, and would have been inclined to submit to any "request" the official made.[73] Note that this is also

[73] Pettit (1996, pp. 584) has aptly caught the gist of this form of inequality (though, as I argued in Gowder (2012c), he errs by welding it to a conception of liberty as nondomination):

> The powerless are not going to be able to look the powerful in the eye * * * the asymmetry between the two sides will be a communicative as well as an objective reality.
>
> Conscious of this problem, John Milton deplored "the perpetual bowings and cringings of an abject people" that he thought were inevitable in monarchies. And a little later in the seventeenth century, Algernon Sydney could observe that "slavery doth naturally produce meanness of spirit, with its worst effect, flattery." The theme is given a particularly interesting twist a century later,

true in a society that has achieved regularity, but not publicity. Even if the KGB officer is constrained by rules, if an individual doesn't know what those rules are, or will have no say in their application, he still has reason to fear the officer's power. The individual doesn't know the circumstances under which the officer will be able to do him harm, and will not be able to participate in his own defense if he does come into conflict with the officer, instead having to trust other officials to protect his legal rights.[74] He is likely to feel powerless and fearful even if he believes that there really are background rules regulating the officer's behavior. By contrast, a non-official who can help herself to the power of rules that constrain the power of officials need not bow and scrape, because she can rely on those rules to keep the officer from retaliating against her for failing to do so.

The asymmetry confronted by an ordinary person facing the might of the state is an essential feature of inegalitarian terror.[75] In a Hobbesian state of nature, we may have

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> when Mary Wollstonecraft deplores the "littlenesses," "sly tricks," and "cunning" to which women are driven because of their dependency on their husbands – because of their slavery, as she also calls it.

(Internal citations, footnotes omitted.). Locke (2002, sec. 91) also notes that absolute monarchs are "corrupted by flattery."

[74] Kafka (1992, pp. 193-4) describes the lawyer-client relationship in a world where lawyers are in league with officials and the law is secret: "The client ceased to be a client and became the lawyer's dog. If the lawyer were to order this man to crawl under the bed as if into a kennel and bark there, he would gladly obey the order."

[75] It should not be surprising that Locke preferred anarchy to Leviathan on these grounds. "[A]s if when men quitting the state of nature entered into society, they agreed that all of them but one, should be under the restraint of laws, but that he should still retain all the liberty of the state of nature, increased with power, and made licentious by impunity. This is to think, that men are so foolish, that they take care to avoid what mischiefs may be done them by pole-cats, or foxes; but are content, nay, think it safety, to be devoured by

unconstrained power over one another, but it doesn't make us unequal. Defenselessness in the face of overwhelming power creates the pervasive fear characteristic of systems of state terror. This is one reason that the rule of law is a regulative principle for state violence, not private violence.

Before moving on, consider the following objection. The law might actually authorize officials to terrorize; for example, it may permit judges to issue a torture warrant.[76] Under such circumstances, this objection goes, the rule of law would not prevent terror: officials with the power to torture are terrorizing regardless of whether their power to do so is regularized by the procedural apparatus of a rule of law legal system.

I submit, however, that regularized torture is different in kind from the terror that is inflicted in the sort of states where one is always subject to the knock on the door in the middle of the night from some KGB officer. To see this, consider that in the contemporary western democracies, those who run afoul of the state are subject to incredibly gruesome treatment. The conditions in U.S. prisons might fairly be described as torture, pervaded as they are by horrors such as rampant rape and other prisoner-on-prisoner violence, the punitive use of solitary confinement, extraordinarily negligent medical care, and too much else to list. Yet the prospect of being put in one of those prisons does not ordinarily cast a pall over day-to-day life in the U.S. because, at least in those communities where officials comport with the rule of law, ordinary people know that they aren't likely to be put in prison unless they commit an actual crime, they'll have a chance to defend themselves beforehand, and so forth.

If officials wished to adopt regularized procedures to create full-fledged terror, they doubtless could do so. They could, for example, create a system of secret *ex parte* torture

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lions." (Locke 2002, sec. 93.) Locke, however, may have read Hobbes uncharitably: Dyzenhaus (2010b) has argued that that Hobbes's Leviathan is actually constrained by the rule of law.

[76] See Dershowitz (2003) on this possibility. I thank an anonymous reviewer for raising this point.

warrants, and thus replicate the knock on the door in the night under the aegis of procedural propriety. But this would manifestly violate the principle of publicity, as would any system in which officials were authorized to inflict brutal treatment on subjects without notice and an opportunity to defend themselves. By guaranteeing a minimum of warning, and by guaranteeing that those subject to brutal treatment at least have an opportunity to put up a defense in a forum where their objections will be listened to and taken seriously, the rule of law puts a strong upper bound on the extent to which any legal system can inflict terror.

Note the further important point that this entails: the weak version of the rule of law, on the conception given in this paper, not only does not require liberal democracy, but can even be morally valuable in states other than liberal democracies. The case of the torture warrant shows that the weak version of the rule of law is morally valuable in a state that does not respect basic human rights. For another example, the weak version of the rule of law can be morally valuable in a state that does not respect political freedoms, and punishes dissidents, in virtue of the fact that it at least does not allow dissidents to be terrorized: at least they will get trials before they are punished, and the punishment will not come as a terrifying surprise. It follows that non-liberal states and non-democracies are blameworthy for not complying with the rule of law, and praiseworthy for complying with it, *independent* of their blameworthiness for not being liberal or democratic.[77]

[77] Here, I disagree with Allan (2001, pp. 63), who implies that it is only "in the context of a liberal democracy" that "departures from [the weak version of] the rule of law are properly occasions of moral censure." Even if an unjust state merely follows the weak version of the rule of law as "a 'management technique' in a programme of 'social control,'" it is still to be praised for not choosing those management techniques that subject its people to hubris and terror, even as we condemn it for its overall wickedness.

1.3. The Factual and Normative Robustness of the Hubris-Terror Argument

I have said that accounts of the evaluative side of the rule of law should be factually robust, in that they are likely to be true of a broad range of human societies, and normatively robust, in that they avoid controversial normative claims as much as possible. [78]

With respect to factual robustness, I primarily rely on conservative and conventional beliefs about the corrupting force of power. The lessons of history across human cultures have demonstrated that officials who lay hold of state power without adequate controls often succumb to the temptation to terrorize the populace; individuals in a regime with even decent unconstrained officials have reason to fear, since they can't reliably know that their officials won't follow the examples of the Thirty Tyrants, Caligula, Vlad Tepes, Mao, Idi Amin, Stalin, Hitler, Pol Pot, Robespierre, Pinochet, Suharto, Antonescu, Franco, Ceausescu, Trujillo, Papa Doc Duvalier, Ivan the Terrible, Ferdinand II, Ran Min, Niyazov, Mobutu Sese Seko, Kim Il-sung, and so on, not to mention the countless other less extraordinarily wicked but still terrorizing rulers and officials through history. With those kinds of precedents, anyone would respond to unconstrained power with fearful submissiveness.

One potential worry is that there might be unconstrained, but reliably benevolent, officials. Plato's guardians are not constrained by public rules, but we may suppose that they do not terrorize the public, because they can be trusted not to abuse their power. Moreover, guardians could govern by, in Schauer's terms, "rule-sensitive particularism."[79] A rule-sensitive particularist makes case-by-case decisions that are not *bound* by rules, but takes the goodness of

[78] The hubris part of the argument is true in all realistic societies: officials who use power without offering legal reasons and giving those over whom power is used some say in the matter commit hubris just in virtue of the expressive content of the act itself. It is logically, but not practically, possible for there to be a society in which ordering others around in such a fashion does not carry a message of hierarchical superiority.

[79] Schauer (1991, pp. 649-50).

having rules as one reason to guide those decisions. Such guardians might always actually govern via public rules, and even give individuals the full panoply of procedural protections before coercing them, just because they happen to know that the public will be best off if they do so, all the while reserving the right to declare a Schmittian state of exception in which they act at will. Is Kallipolis free from hubris and terror?

One possible answer to this objection is just to deny that the guardians would be unconstrained. The rule of law need not be the object of a game theoretic equilibrium of the sort suggested by Weingast; any reliable way of constraining officials will do.[80] We can understand many of Plato's institutional prescriptions as ways to control guardians' behavior. The prohibition against guardians owning property guards against the temptation to get rich at the expense of their charges. Living and dining together gives them plenty of exposure to potential social sanctions from their fellows. And, of course, the rigorous control exercised over guardians' educations is an attempt to directly shape their dispositions.

But suppose (the objection continues) the guardians really are just fortuitously benevolent – they could engage in casual or malicious coercion against their charges at will, with no consequences or constraints, but they choose not to do so out of the goodness of their hearts, and everyone knows just how virtuous the guardians are? But at that point we've gone far beyond the bounds given by the factual robustness criterion. Perhaps, a society of reliably benevolent rulers would be free from state terror and hubris even if those rulers were not constrained to use their powers only in accordance with the principles of regularity and publicity. But history records no such society, and it violates our fundamental understanding of how people respond to (corrupting) incentives. I don't propose to offer arguments that hold true in all possible worlds, just in the human societies that are reasonably likely to actually occur.

[80] For an equilibrium model, see Weingast (1997).

Now, to normative robustness. Although equality is often a highly controversial ideal (witness the interminable debates about distributive justice), some egalitarian ideas are uncontroversial: the claim that the state ought not to create a group of citizens (officials) who can engage in arrogant hubris over others or terrorize them into submission is unlikely to draw objections. The avoidance of hubris and terror is compatible with a very broad range of ways of thinking about equality and overall normative standpoints. Those, for example, who value treating the subjects of law with equal dignity can recognize that hubris and terror are wrong because of the way they create a status hierarchy between officials and ordinary people.[81] Egalitarian democrats, who are concerned primarily with the distribution of political power, may note that the failure of the rule of law is inconsistent with the participation of ordinary citizens as equals in the political process, because officials could use terrorizing power to prop up their own rule against citizens' wills.[82] Those who are concerned with the egalitarian distribution of economic resources can note that terrorizing power enables rent seeking and exploitation. Welfarist egalitarians can note that the lives of those subjected to hubris and terror go dramatically less well than the lives of those who inflict it. Capabilities approach egalitarians can

[81]Those in the "status egalitarian" school of thought associated with, inter alia, Elizabeth Anderson (1999) and Samuel Scheffler (2003) are particularly likely to endorse the notion that hubris and terror are forms of status or dignitary inequality. Hegel (1991, sec. 132, 215, 228, 258) offers an autonomy-centered version of the same idea, suggesting that the "right of self-consciousness," a "right to recognize nothing that I do not perceive as rational," grounded on the individual's "intellectual and … ethical worth and dignity" entitles individuals to know the law, and also shields individuals from exploitation by those who do know the law. Waldron (2009) has similarly argued that the law contributes to individual dignity in virtue of the fact that it is "self-applying" – that individuals are expected to apply its commands to themselves.

[82] Those who subscribe to Christiano's (2008) conception of egalitarian democracy should agree that publicity is required for what Christiano calls "public equality," a principle requiring that citizens not only be treated as equals but be able to observe their equal treatment.

note that terror drastically reduces one's functional opportunities.[83] Even those who do not think of themselves as egalitarians, such as Nozick-style libertarians, can agree that the state ought not actually *create* hierarchies between individuals.

Note also that, as noted at the end of the previous section, the weak version of the rule of law does not require liberal democracy. Its moral value is, further, independent of liberal democracy. Thus, it does not require one to endorse liberalism or democracy in order to endorse its demands.

So much for the contemporary reason-giving power of hubris and terror, but one might object that the same cannot be said of the past. I advanced the normative robustness desideratum on the basis, in part, that it is necessary to make the philosophical/legal conception of the rule of law compatible with historical and social scientific explanations that take into account the actual motivations of those in rule of law states. However, the rule of law has been around, in various forms, much longer than the general consensus that the state should treat the subjects of law as equals. Pseudo-Xenophon, for example, criticized Athens for protecting slaves from hubris and terror.[84]

However, for determining whether a conception of the rule of law is normatively robust, the relevant motivations are those of officials and ordinary people who take the internal point of view in societies that already have the rule of law, as well as those who are fighting for the rule of law in societies without it. It is not relevant that Pseudo-Xenophon saw fit to criticize elements of the rule of law in the pursuit of his own oligarchic interests, interests naturally leading him to be

[83] For example, the approach in Sen (1979) would be compatible with such an argument.

[84] Pseudo-Xenophon (1968).

opposed to the institutions of democratic Athens, or that feudal states without the rule of law have been built on an ideology of natural inequality.[85]

2. The Strong Version of the Rule of Law: Generality and Horizontal Equality

I have said that achieving regularity and publicity rules out hubris and terror (except in some marginal cases), but this is only partially true: a state can be regular and public with respect to only some of the subjects of law, while still inflicting hubris and terror on others (e.g., slaves). To be wholly free from hubris and terror, a state's laws must be minimally general in that official coercion of *all* subjects of law satisfies regularity and publicity.

However, even if the state achieves publicity and regularity with respect to all subjects of law, its legal system still might not treat the subjects of law as equals, if there is one (public and regular) law for some individuals (i.e., elites) and another for the masses. Generality, the third and strongest principle of the rule of law, forbids this. For the state to comply with the principle of generality, officials must substantially satisfy the principles of publicity and regularity *and* only use the state's coercive power in accordance with laws that do not draw irrelevant distinctions between individuals (that is, general laws).[86] They must also use the discretion given to them consistent with the same principle: in a standard formulation, they must treat like cases

[85] At any rate, in other work, I show that the classical Athenians recognized the egalitarian importance of the rule of law. See Gowder (2012b).

[86] To be clear, generality can fail in two ways. First, generality can fail along with a partial failure of publicity and/or regularity because the state satisfies regularity and publicity (or just regularity) with respect to some subjects but not others. One example is a slave society, in which some people just aren't entitled to legal protections. Second, generality can fail if the state satisfies regularity and publicity for everyone, but some people have different rights and responsibilities without those differences being justified by relevant distinctions between them. This is common through history and the present, and is exemplified by segregationist societies, patriarchal societies, caste and feudal societies, and the like.

and individuals alike, treating them differently only if there is a relevant distinction between them.

Most of the argument in this section will be devoted to filling out the idea of a "relevant distinction." This, I argue, means that when a law or exercise of official discretion treats people differently from one another, there must be public reasons to justify the different treatment.[87] I then argue that the state achieves two additional uncontroversial egalitarian values if and only if it comports with the principle of generality: first, it satisfies the demand that the state not create castes among the subjects of its law; second, it satisfies the demand that the subjects of law have on one another that they shoulder their fair share of the burdens of producing the public good of law and order.

The claim that generality is an egalitarian principle is neither novel nor controversial. Just about every scholar who thinks that generality is part of the correct conception of the rule of

[87] Note that this includes the difference in the law's treatment of officials and ordinary citizens, that is, the fact that the law gives officials special powers. For the very existence of officialdom to comport with the rule of law, it must be justified by public reasons (Allan (2001) makes this suggestion first).

In this vein, Lister (2012) has criticized Fox-Decent for failing to offer an argument for the claim that "the bare idea of the rule of law implies his fiduciary account." The public reason account of generality may fill in most of the missing argument: if the rule of law requires law be general, and generality requires that distinctions, including the official/non-official distinction, be justified by public reasons, then all Fox-Decent need show to satisfy Lister's criticism is that the only public reasons that are available to justify the existence of official power over ordinary people are reasons that presuppose the existence of a fiduciary relationship – an argument that might be fairly read into his work thus far. The conception of generality offered in this paper thus can save Fox-Decent from Lister's objection.

law credits it with egalitarian moral value.[88] The main contribution of this section is to the far more vexed question of what generality demands.

Consequently, this section proceeds in the opposite order from section 1. There, I began with legal practices that exemplify regularity and publicity, defended the principles as the best way of rationalizing those practices, and then offered an argument for the controversial claim that the principles are egalitarian. In this section, I begin with the uncontroversial proposition that generality is egalitarian, and use that claim to develop an account of what generality requires (2.1). I then back up to fill in the details of precisely how generality contributes to equality (2.2).

2.1. Generality and the idea of a Relevant Distinction

2.1.1. Many Conceptions of Generality

The literature reveals no consistent account of what generality requires. Hayek alone has four different conceptions of generality within a few pages of one another: 1) general law applies to everyone, particularly those who make and enforce it; 2) general law can pick out particular classes of application so long as the distinction so made is equally justifiable to those within and without the classes to which it applies; 3) law is general when legislators cannot know the particular cases to which it will apply; and 4) generality is an "aspect" of a feature of law called

[88] This goes at least as far back as Dicey (1982, pp. 114-115). The most interesting version of the idea is Waldron's (2009) suggestion that the general distribution of the protections of modern law represents a concept of "human dignity" that makes universal the high status previously only enjoyed by the nobility. Habermas (1996, pp. 473) interprets Kant and Rousseau as claiming that legal generality is an egalitarian principle. Hayek (1960, pp. 85, 209) claims that it's the *only* permissible sort of legal equality. Ignatieff (2004, pp. 30) deploys the egalitarian view of generality to criticize the detention of Arabs and Muslims in the contemporary U.S. Marmor (2001, pp. 147-152) argues that judicial impartiality is a requirement of equal consideration for the parties. (Marmor's conception of judicial impartiality is structurally similar to my conception of generality.)

"abstractness," which appears to refer to law that does not give overly detailed directions to its subjects or too-closely specify its circumstances of application.[89] The relationship between those four versions of generality is obscure. For Rawls, generality is the requirement that like cases be treated alike, but he acknowledges that specifying a rule to determine which cases are like is a major difficulty with this formulation.[90] Hart also suggested that the principle of generality means "treating like cases alike," but added that "the criteria of when cases are alike will be, so far, only the general elements specified in the rules," which simply reduces generality to regularity.[91]

Some commentators would more or less strip generality from our conception of the rule of law. Most notable among these is Raz, who limits the principle of generality only to the constitutional basics of government – to the secondary rules governing how primary rules are to be made – and flatly denies that the rule of law forbids systematic discrimination.[92] Unsurprisingly, Raz also denies that the rule of law has anything to do with equality. Others have taken less extreme, but still minimalist, positions – most notable is Rousseau, who argued that general law is law that does not have a specific object, by which he appears to primarily mean law that does not pick out particular individuals by name.[93]

I propose to start with the mainstream Hart/Rawls like-cases-alike phrasing of the idea of generality. The object of this section is to fill out that conception by specifying what exactly it

[89] Hayek (1960, pp. 150-155).

[90] Rawls (1999a, pp. 237).

[91] Hart (1958, pp. 623-624).

[92] Raz (1979).

[93] Rousseau (2003, 2.6). Moore (1985, pp. 316) offers another minimal conception, suggesting that the like-cases-alike principle only requires courts to respect stare decisis.

means to treat like cases (and, by extension, like individuals) alike, and, in doing so, reveal the appeal of that version of generality as a way to fulfill the rule of law's egalitarian ambitions.[94]

2.1.2. The Need for a Relevance Criterion

We can start to understand the problems posed by generality by thinking about one of its more prominent loci of application, the principle of judicial impartiality. Certain applications of this idea are easy: no rule of law scholar would disagree with Locke's principle that no one may be a judge in his own case or the stronger demands of contemporary legal ethics that require judges to not share interests with the parties to a case and to resist pressure by the powerful.[95] But many things other than their personal interests can bias judges. For example, a judge may rule from racial animus. A racist judge manifestly violates generality. He treats like individuals differently because he distinguishes between them on the basis of irrelevant personal properties. But a judge is allowed to take some kinds of distinctions into account. She must not give one defendant a harsher sentence than another for the same crime because one is black and the other is white, but she may give a defendant a harsher sentence because, e.g., he held a position of trust with respect to the victim. It's surprisingly difficult to give an abstract principle that captures both the impermissibility of the first distinction and the permissibility of the second.

Similarly, we can consider how difficult is the job of lawyers in a common law jurisdiction. They are paid to consider a mass of cases – all of which are like in some respects

[94] I use "treat like cases alike" and "treat like individuals (subjects, etc.) alike" interchangeably. Either phrasing describes the same behavior.

[95] Locke's is in the Second Treatise (Locke 2002, sec. 90). For stronger forms, see e.g., the Code of Conduct for United States Judges, which begins with the command that "a judge should uphold the integrity and independence of the judiciary," and goes on to elaborate this with numerous restrictions on the conduct of judges directed at insulating them from sundry sources of pressure.

and not like in others – and demonstrate that the instant case is relevantly like some, and not relevantly like others ("distinguishing" those others, in legal jargon).

The same point applies to legislation. Consider that the law "no vehicles in the park" makes a distinction between inside the park and outside the park. We think that's general, as we do the law "no motorbikes in the park." But we don't think the laws "black people may not ride motorbikes in the park" or "Tom Smith may not ride motorbikes in the park" are general. One candidate for a formal principle to distinguish between those cases is that the latter single out specific classes of *people* – but that's permissible sometimes too. It doesn't, for example, offend the rule of law to decree "two parking spaces in each lot shall be reserved for disabled people" or "convicted felons may not own firearms."

In all these applications, we see that "treat like cases alike" does not give us enough information to guide officials.[96] We must have some account of what makes the cases like or unlike – we must have a relevance criterion governing the reasons under which officials may treat cases and individuals differently. The search is for some principle to capture the twin intuitions that disability is a relevant criterion for allocating parking spaces and race is not a relevant criterion for allocating the right to ride motorbikes in the park.

2.1.3. Public Reason as Relevance Criterion

If the point of the rule of law is to bring about horizontal equality, then our relevance criterion should track the idea that each individual is an equal subject of the laws. Thus, I propose that we say that the relevance of a legal distinction is picked out by its justifiability by

[96] As Schauer (1995) points out, the practice of giving reasons amounts to an appeal to general propositions: to say "I did X for Y" is to assert that in other cases in which Y applies, one will do X. This suggests that there can be no purely formal conception of generality with any normative appeal, because any reason for a decision, even a terrible one like "I convicted the defendant because I don't like him" is formally general.

public reasons, in Rawls's sense.[97] The idea of public reason is ready-made for this kind of problem, because it was designed to ensure that we treat our fellow subjects of law as equals by offering them reasons for the things we require of them that we can reasonably expect them to accept.[98] If all subjects of law know that distinctions between them are justified by public reasons, those who get the short end of the stick in some distinction are at least spared the insult of being disregarded or treated as inferiors, and comforted by the existence of some general reason, that counts as a reason for everyone, for their treatment.[99] Put differently, coercing someone based on reasons that at least have the potential to count as reasons *for her*, rather than simply determining her fate based on the idiosyncratic reasons of the decision maker, expresses respect for her status as an agent to whom justification is owed for what is done to her.[100]

I borrow selectively from the idea of public reason. As Rawls describes it, it is too demanding for the rule of law, for on Rawls's account it is extremely deferential to subjective beliefs found in a society – ruling out, for example, controversial scientific and economic

[97] Rawls (1996). Hayek (1960, pp. 154) expressed this first, in slightly different terms – suggesting that distinctions are permissible "if they are equally recognized as justified by those inside and those outside the group."

[98] Cohen (2009) argues that democracy requires the giving of public reasons in order to express the equality of all citizens. His point equally well applies to the rule of law, once we accept that the rule of law too serves equality.

[99] Waldron (2000, pp. 777-781) has a similar (though more demanding) idea. He too recognizes that the principle of treating like cases alike (what he calls "the consistency value of formal justice") requires legal actors give reasons to one another, and argues that the reasons offered must be ones that treat individuals as ends in themselves, that eschew "aggregate justifications."

[100] Along these lines, Solum (1993, pp. 738) suggests that "when the requirements of the rule of law are observed, laws and regulations are addressed to the public at large." This leads him to the idea that public reason is appropriate for "public discussion about the coercive use of state power."

theories. But that is not necessary to guarantee that the law treats its subjects as equals: the coercive enforcement of a controversial economic policy need not treat anyone as an inferior. Moreover, Rawls's restriction on offering religious and comprehensive doctrines as reasons may be appropriate as a distinguishing feature of liberal democracies, but, per the robustness criteria, the rule of law should not be built upon the requirements of a full-fledged liberal democracy.

Instead, I will focus on what I see as the heart of public reason, what Rawls calls "the condition of reciprocity."[101] Someone is offering public reasons only when they offer reasons that they could reasonably see as "at least reasonable for others to accept […], as free and equal citizens, and not as dominated or manipulated, or under the pressure of an inferior political or social position."[102] Equivalently, for A to offer a public reason to B (or a community of Bs) is to offer a reason that A could reasonably expect to count as a reason for B. And A will only "reasonably" hold that expectation if the reason in question is consistent with treating B as an equal. Such a reason must treat B's interests, as A can reasonably expect B to understand them, as just as important as A's.

Allan also invokes the idea of public reason to fill out what it means for law to be general, but he appears to make the stronger claim that the law must be all-things-considered justifiable to a given subject, either because she thinks it is substantively correct or because she is willing to defer to the result of a fair democratic procedure.[103] By contrast, on my account it is enough to say that law is non-general when there is some public reason justification available for it, even if a given subject thinks it is outweighed (even strongly outweighed) by other reasons.[104]

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[101] Rawls (1999b).

[102] Rawls (1999b, pp. 136-137).

[103] Allan (2001, pp. 7, 65, 79, ch. 4, *passim*).

[104] For Allan, being justifiable by public reasons is a precondition for the law to be able to recruit citizens' rational consent, and thus oblige them to obey. On the account in this paper the law's ability to obtain rational consent is irrelevant, and citizens are not necessarily obliged to obey the law. Rather, the

Allan is somewhat inconsistent on this; at one point he suggests that distinctions in law should only count as offensively non-general when they evidently express disregard for some subjects.[105] There, my account is essentially identical to his.

My exposition thus far, like Rawls's, is unhelpfully abstract. (It also, unavoidably, contains far too much of "reason" and "reasonable.") Some examples can fill in the details. Reasons that appeal to plausible conceptions of the public good will always count: a law that forbids the blind from driving, for example, will satisfy the principle of generality because avoiding crashes is obviously a reason for both the blind and the non-blind.

Reasons based on patronizing or disdainful attitudes toward classes of individuals will never count.[106] A law that forbids women from working outside the home will not satisfy the principle of generality. Even if those who enact it think they are doing so in the interests of women, their belief that it counts as a reason for women is unreasonable. It takes into account women's interests only as the legislators (doubtless men) unselfconsciously understand them, not as women themselves can reasonably be expected to understand them.

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enactment into law of only those distinctions which can be justified by public reasons represents respect to those who are disadvantaged, by taking their interests into account.

[105] Allan (2001, pp. 159-160).

[106] Here, it is necessary to distinguish my view from that of Hellman (2008). Hellman argues, quite compellingly, that discrimination is morally wrong when it demeans its objects. For rule of law purposes, I submit that demeaning is sufficient, but not necessary, to raise objections from the standpoint of generality. Consider a classic case of non-general legal action: suppose a judge gives higher sentences, within the realm of his lawful discretion, to his political opponents. (And suppose that judge's discretion isn't so unbounded as to amount to a failure of regularity – those punished must still be guilty of crimes). Such a judge does not demean those whom he punishes – it might even be a grim sort of respect to view one's political opponents as so threatening that they require extra punishment – but nonetheless does not treat them as equals, because he does not offer public reasons to them to justify their different treatment.

However, public reasons are not just the same as good reasons. Wicked distinctions in law can be justified by foolish reasons without offending generality. For example, a state could exempt the richest ten percent of individuals from taxes on the theory that their increased incentive to be productive would make everyone wealthier. That policy would be very unwise as well as unjust, and it would rely on extremely implausible beliefs about the sensitivity of the rich to taxes and their investment preferences. It would not violate the condition of reciprocity. It would not disregard the interests of the non-rich, as the non-rich can be expected to understand them (i.e., in acquiring more resources); but would merely represent a delusion about how those interests are most effectively served.

On the other hand, a law forbidding racial minorities from voting, even if genuinely rooted in the belief that minorities would vote poorly in ways detrimental to the interests of everyone in the community, would fail the condition of reciprocity in virtue of the insulting attitude it would unavoidably express toward the capabilities of minorities. By contrast, the voting age is consistent with generality. The recognition that children are less competent than adults does not express disdainful attitudes toward children, as racist laws do toward those targeted.[107] Children could accept the reason for the age qualification without viewing themselves, or being viewed by others, as inferior.

[107] Some of our generality determinations will unavoidably depend on socially contingent beliefs. In some societies and some eras, the claim that women and minorities have inferior cognitive capacities would have been just as uncontroversial as the claim that children's judgment is underdeveloped is here and now. Unfortunately, there's no "view from nowhere" from which we can declare that our contemporary beliefs about children are correct while our (only partially past) racist and sexist beliefs were wrong. But this is a problem for normative theory in general, and has no special implications for the rule of law.

The social meaning of a particular distinction is part (but not all) of what may make it justifiable or unjustifiable by public reasons. Here, my argument is quite close to Hellman's: racist and sexist laws

Consider an application more relevant to the contemporary western democracies. Sometimes Congress exempts itself from generally applicable laws.[108] Hayek, who argues that officials must be subject to their own laws, would (presumably) absolutely forbid this. On my conception of generality, we must be more selective. We might think there are public reasons to justify a Congressional exemption from, say, civil service requirements relating to tenure of office and nonpartisanship, but not from laws against sex discrimination.

The relevance criterion that applies to the laws under which officials exercise coercive power also works as a rule for the exercise of that discretion that the law gives them. Some sorts of official discretion are clearly valuable. In the name of compassion and forgiveness, we certainly should permit a prosecutor to decline a criminal charge, and a judge to give a lenient sentence, even when the defendant is obviously guilty.[109] But those exercises of official

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cannot be justified by public reasons because they unavoidably express disdain for their victims, and no public reasons are available for so excluding some subjects from the community of equals.

[108] The Congressional Accountability Act of 1995, Public Law 104-1, 2 U.S.C. 1301 et. seq., extended numerous labor laws to legislative branch employees. Until then, Congress was exempt from the most significant laws regulating the workplace; it is still exempt from some of them (e.g., 29 U.S.C. 152(2) exempts the whole government from the National Labor Relations Act).

[109] Markel (2004) disagrees. He argues that mercy, understood as leniency for non-culpability-related reasons (i.e., out of compassion or some private preference or bias, rather than because of some unique circumstance relevant to criminal culpability) offends against the ideal of equal law. The public reason conception of generality suggests a softening of Markel's position. Compassionate mercy can serve as a public reason: "I let that criminal go free because he is dying" is reasonably acceptable to all subjects, including those not offered leniency, because all can endorse the general principle of kindness to the dying. Accordingly, its invocation in the favor of an individual criminal need not carry the message (contra Markel 2004, pp. 1461) that the beneficiary of leniency is of higher status than other subjects. Recall also

discretion superficially resemble failures of generality: a judge who decides to free a criminal defendant whom the law would otherwise convict seemingly fails to treat like cases alike, in virtue of the fact that that defendant is similar, in all respects specified by the law, to convicted defendants.

If an exercise of official discretion is supported by public reasons, we can justify it by supposing that it tracks a relevant distinction that the law's drafters could not anticipate. It's a truism that law cannot be written to give precisely the result its drafters would desire in all cases coming under its ambit.[110] So a judge who gives a lenient sentence to a criminal who has offered some reasonable excuse ("I stole the medicine for my sick grandmother.") does not offend generality, because the case in question was not relevantly like the cases of criminals with no excuse. Similarly, a judge who gives extra-strict sentences (within the scope of her lawful discretion) to criminals who, e.g., are repeat offenders, or committed their crimes in particularly malicious or gruesome fashion, does not offend generality. "We ought to deter recidivism with stricter sentences" is a public reason. By contrast, a judge who gives lenient sentences to defendants whom he likes, or to favor defendants of one race over another, clearly does offend generality, because the distinction he makes cannot be justified by public reasons.

I now turn to the egalitarian credentials of this principle. First, however, I anticipate an objection. I will say that generality is necessary and sufficient to achieve horizontal legal equality. But it's not obvious that generality *with public reason as a relevance criterion* is necessary: there might be some other relevance criterion that can render a state's laws general by

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that officials' reasons for exercising discretion must be connected to a good-faith interpretation of the reasons underlying the grant of that discretion (see n. 41 above).

[110] See Macedo (1994).

ensuring that they treat the subjects of law as equals.[111] I answer this objection by accepting it: we should not be wedded to the use of public reason as the relevance criterion. Because there is no purely formal way of picking out general from non-general laws, there must be some relevance criterion. Public reason is convenient, because it naturally develops the core egalitarian

[111] Marmor (2007) offers one candidate alternative: a law is appropriately general when the definition of the class to whom the law is to be applied responds to the reasons for the underlying enactment. He gives the example of a law to regulate pollution, which ought to regulate all and only those who can pollute. However, this idea fails for reasons revealed by an intriguing inconsistency in Marmor's account. Marmor claims that apartheid met this criterion, because the laws discriminating against black people were, in fact, responsive to the reason underlying them, i.e., creating an inferior class of citizens. – it just so happens that it was a wicked reason. From that, we could infer that Marmor holds that even wicked reasons for a law suffice to render distinctions thereunder consistent with generality. At the same time, he claims that the principle guards against "favoritism and partiality." From that, we could infer that at least some categories of wicked reason for a law will not suffice – that he would forbid laws like "the members of the president's family are exempt from taxation," even though the class of application of that law also responds to the reason for the underlying enactment, to wit, to transfer wealth to the president's family.

From this, we can see that the attempt to derive the relevance criterion for general law from the reasons underlying a given legislative act is caught in a dilemma. On the one hand, it may accept all reasons, even wicked ones, in which case the criterion is nothing but a restatement of the failed formal conception of generality, since we can always rationalize law targeted against or preferring particular groups with the claim that the reason for the underlying enactment was, in fact, to target or prefer those groups. (Or Marmor may have meant that generality only guards against favoritism by executive and judicial officials in implementing preexisting law, in which case his position just amounts to an abandonment of the proposition that law itself, as enacted, must be general.) On the other, it may reject some reasons and accept others, in which case it just pushes the problem back a step, for we still need a principle – like public reason – to determine which reasons are acceptable. (The shorter version of this point: surely apartheid was a case of "favoritism and partiality!")

idea that we must justify ourselves to those whom we treat differently. But some other relevance criterion, yet to be found, may serve as well.

2.2. Generality as Egalitarian Principle

The principle of generality captures the idea that subjects of law are to be treated as equals under the law. This is, as I've noted, largely uncontroversial (Raz excepted). However, the literature does not contain much detail on the conception of equality being invoked. Here, I will suggest that generality is necessary and sufficient for the state to satisfy two uncontroversial egalitarian demands.

First, generality satisfies an egalitarian demand we can call the *anti-caste principle*.[112] Few forms of inequality are more pernicious than those running along ascriptive group lines – the creation of superior and inferior groups of people based on race, gender, sexual orientation, parentage, etc. Many of history's greatest evils – numerous genocides, the centuries of discrimination against Jews, the mass enslavement of Africans – have been made possible by ascriptive caste. And while ascriptive castes can be created or maintained purely by private initiative, the state historically has propped these systems up with its laws by, inter alia, denying political representation to members of lower-caste groups, prohibiting them from owning property or participating in certain professions, and imposing badges of inequality on them. Sometimes the state even invents the castes, as the Belgians did in Rwanda. Every reasonable person endorses the view that the state is forbidden to create or support such castes.[113]

[112] Fiss (1976) gives an anti-caste principle which has been dominant in the equal protection clause literature, but, oddly, has not made an impression in the rule of law literature on generality. Jeffries (1985, pp. 213-4) has also aptly identified this as a goal of the rule of law.

[113] Some weaker relevance criterion than public reason may be able to rule out legal caste. However, it is not obvious what that criterion is. For example, "officials may not treat subjects differently because of their membership in some ascriptive group" would not work, because not all forms of different treatment

Many scholars have focused on the individual or society-wide implications of generality rather than its group implications. Hayek, for example, emphasizes that generality requires officials to be subject to their own laws, arguing that by doing so it deters them from restricting the liberty of everyone else. For Fuller and Waldron, law operates by general rules to permit individuals to conform their behavior to it. This attention is misplaced. Given the overwhelming historical significance of the state's role in creating and preserving ascriptive castes, and the great evils castes have enabled, the best theory of why we care about generality will attend first and foremost to its power to get the state out of the caste business.[114]

Some scholars have seen a tension between the rule of law's prohibition of caste and legal positivism. Dyzenhaus, in particular, draws our attention to the difficult position in which those two commitments place judges who are confronted with legislation that imposes caste.[115] Those judges are obliged by the rule of law to enforce the law, which, for a positivist, means the legislation as enacted, but are also obliged by the rule of law to resist institutions like apartheid.[116] Because he rejects positivism, Dyzenhaus's account has the resources to say that such judges must interpret legislation in light of a fundamental commitment to equality that he finds in the

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lead to inequality. That alternate criterion might, for example, forbid officials to offer affirmative action to subordinated minorities, even though affirmative action (arguably) promotes rather than inhibits the elimination of caste. By contrast, the public reason criterion permits such measures. The advantage of public reason as a relevance criterion is that, because it turns on whether reasons that respect the equality of all can be offered for a distinction, it is finely tuned to match such egalitarian judgments.

[114] This might be achieved in a state that only partially satisfies generality: there might be a state that fails to discriminate against ascriptive groups, but makes other non-general distinctions because, for example, judges routinely give lenient sentences to their relatives. However, at least a partial satisfaction of the generality principle is necessary and sufficient to avoid legal caste.

[115] Dyzenhaus (2010a).

[116] This point was also raised by an anonymous reviewer.

law itself, and thus can maintain their fidelity to law without lending their assistance to apartheid. Since, as noted, this paper aims to offer a positivist account of the rule of law and its egalitarian value, Dyzenhaus's elegant solution is not available here. However, the traditional response of officials in the face of a valid command to do severe injustice seems perfectly sufficient: such judges must resign their posts. (This would have the further salutary effect of depriving wicked regimes of the support of virtuous officials.)

Second, generality is necessary and sufficient to satisfy the demand that the costs of legal public goods be *reciprocally borne*. Subjects of any legal system share an interest in the benefits of law – benefits like security against violence, property rights, the power to make enforceable contracts, and so forth. But for there to be law, there must be some constraints on the choices of community members. Since each of us receives the benefits of those constraints, each should suffer from them on equal terms. It's just unfair for me to demand that others produce the public good of law by subjecting their behavior to social control unless I'm willing to pay the same price, or unless I can offer them some reason that I can reasonably expect them to accept to justify my special treatment.[117] Otherwise, I exploit them to serve my own interests; no

[117] I thank Kristen Bell for drawing my attention to this line of reasoning. It was also inspired by an argument for a reciprocity-based obligation to obey the law discussed in a workshop paper by Liam Murphy, as well as Sangiovanni's (2007) argument that claims to reciprocity from fellow-citizens who have contributed to the institutional framework of a productive economy give rise to obligations of distributive justice. Michelman (2002, pp. 974-977) considers a similar idea in a very abstract way, suggesting that public reason is a "reciprocity-tending" value that might guide judges.

Note that this conception of reciprocity is not the same as Fuller's. Fuller suggested that the rule of law establishes a relationship of reciprocity between ordinary people, who obey the law, and officials, who restrict their conduct to that consistent with the rule of law. (Fuller's explication of this point is somewhat obscure; Murphy's (2005, pp. 242) explanation is helpful, though her interpretation of Raz's contrary position seems seriously mistaken.) By contrast, I have argued that the rule of law does not

reasonable person can defend this behavior.

Nozick has an influential objection to this sort of fairness argument.[118] In the course of rejecting the argument that citizens have obligations of distributive justice in virtue of their having received the benefits of an overall system of cooperation, he suggests that it's unreasonable to demand that our fellow citizens accept their share of the costs of a public good that we've imposed on them without their consent.

Nozick's objection does not apply here: my argument is not directed against the anarchist who rejects law's demands.[119] An anarchist community necessarily satisfies the rule of law in virtue of the fact that there are no officials with power to use non-generally, and no laws to make unjustified distinctions between individuals.[120] The argument is directed against the voluntary

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require non-officials to obey the law, and am instead arguing that generality establishes a relationship of reciprocity among subjects of law, who do not receive special legal privileges against one another. In other words, what matters is not that subjects *actually obey* the law, but that they are subject to the same law, and subject to sanction on the same terms if they do not obey it.

[118] Nozick (1974, pp. 90-5).

[119] Moreover, Nozick's argument may just be wrong: there are all kinds of involuntary social relationships that arguably give rise to obligations of reciprocity, like family ties.

Note that associative obligations (arising merely from membership in a group) and reciprocity or fairness obligations (arising from a shared benefit) are not the same thing; both the state and the family might give rise to either. Dagger (2000) usefully clears up the distinction between associative obligations and fairness obligations; my argument depends only on the latter.

[120] The egalitarian conception of the rule of law can be expressed in the form of a material conditional: "a community complies with the rule of law if and only if it is true that if there are officials who wield state coercive power, then they do so consistent with regularity, publicity, and generality." Each of the three principles can be similarly recast. Since there is no state coercive power in an anarchy, it fully complies with the rule of law as a matter of logic. (This is just a version of Raz's (1979) point that the rule of law is a regulative principle to guard against the evils law might inflict.)

exploiter of a non-general legal system who demands that his fellow subjects of law (particularly, those of lower status) be constrained by law, but refuses to be constrained on the same terms himself. Such an individual wants the public good in question, he just doesn't want to share it; he wants his interests secure against the invasion of others while reserving the right to invade others' interests. True, it's open to any such person to say, "actually, I'd rather have no legal system at all than one in which I don't get to exploit the serfs." At that point, the demands of the rule of law come to an end, and the demands of other ideas in political philosophy (such as the numerous arguments for the moral necessity of a state) begin.

Conclusion

Most understandings of the rule of law are rooted in a conception of liberty: the traditional claim is that by allowing individuals to plan their lives in the knowledge of how the state will coerce them, the rule of law makes them more free. I have offered a conception of the rule of law that is distinctively *egalitarian*: I have shown that we can make sense of the legal practices of states that respect the rule of law with the idea that they respond to concerns with regularity, publicity, and generality, and that those three principles promote vertical and horizontal equality.

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