

**CAN THE RULE OF LAW APPLY AT THE BORDER? A
COMMENTARY ON PAUL GOWDER'S *THE RULE OF LAW IN THE
REAL WORLD***

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INTRODUCTION

In his excellent new book, *The Rule of Law in the Real World*, Paul Gowder deftly combines historical examples, formal models, legal analysis, and philosophical theory to provide a novel and compelling account of the rule of law.¹ To my mind, the most important and interesting contribution of the book is in providing a strong argument for the claim that the core of the rule of law is not to be found in any particular institutional scheme, but rather in the idea of social equality within a state.² Using the idea of social equality, Gowder is able to show how the rule of law may be instantiated in a wide variety of institutions, so long as these institutions allow a significant enough portion of the population to coordinate and therefore control the use of political power.³ Importantly, this account of the rule of law also allows us to see how it can come in degrees and apply to some people but not others within a given society.⁴

At the core of the rule of law, Gowder argues, is the “mechanism [of] commitment: the rule of law will exist and persist only if the members of a political community can see how it preserves their equal status, and are able to commit to coordinated enforcement of the law against the powerful.”⁵ As Gowder deftly shows, this commitment and coordination can be brought about in a number of different ways, and has been successfully instantiated in different forms at different times, including the mass juries of ancient Athens,⁶ the

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1. PAUL GOWDER, *THE RULE OF LAW IN THE REAL WORLD* 4–5 (2016).
2. *Id.* at 6.
3. This argument is developed slowly and meticulously through the text, but finds a clear exposition at *id.* at 154–55.
4. *Id.* at 146–47.
5. *Id.* at 5.
6. GOWDER, *supra* note 1, at 79–85.

“customary” restraints on royal power found in Britain,⁷ and in institutions such as an independent judiciary, the Supreme Court in the United States, and other modern liberal democracies.⁸ However, no matter what form the mechanism of commitment takes, it is always applied by “members of a political community” or, just as often, by “citizens.”⁹ This makes good sense, for it will be members of a community—typically the citizens of a state—that are both most directly affected by the actions of those with power, and which have the greatest opportunity to contest and control this power, thereby ensuring the rule of law. At this point, however, a question arises: What happens to people subject to the power of the state who are not seen as “members of the community” or treated as full citizens? One of the most interesting contributions of the book is the discussion of how the rule of law can exist for some people subject to the power of a state while not being extended to others.¹⁰ Gowder illustrates this point particularly well in his discussion of the failure of the rule of law in relation to lynching¹¹ and Jim Crow.¹² Furthermore, Gowder provides some reason for optimism in these areas with his innovative argument as to how the internal logic of the rule of law tends to push it toward a more and more egalitarian understanding, incorporating more and more members of the political community, providing them with full citizenship.¹³

I. THE PROBLEM OF THE BORDER FOR THE RULE OF LAW

This brings us to the problem of the border. While some of what I will talk about in this Paper literally takes place at a border (such as the decision of an immigration official—a Customs and Border Patrol officer in the United States—to admit someone or not), many of the actions I will consider are at the metaphorical border—the area where a foreigner first seeks the right to enter another country, or applies for a visa, or is subject to removal despite being physically inside the country. The problem of the border, as I want to consider it here, is whether and how the rule of law can be applied, in any consistent way, to people who are not part of the political community in question, not primarily because they are a subjected class (as in most of the cases Gowder considers), but because they are members of *other*, distinct communities. The border, understood in this sense, is an area where the rule of law has regularly failed. Consular officers make arbitrary and largely unreviewable decisions when

7. *Id.* at 124–28.

8. *Id.* at 155–56.

9. *See, e.g., id.* at 110–11, 118–19, 126, 128.

10. *Id.* at 56–57.

11. GOWDER, *supra* note 1, at 54–55.

12. *Id.*

13. *Id.* at 149–51.

deciding whether to grant a visa or not.¹⁴ Airline officials, tasked with significant amounts of border enforcement, decide whether would-be passengers have sufficient or adequate documents to allow them to travel, with no opportunity for review.¹⁵ Customs and Border Patrol agents decide whether people presenting their documents pose security risks or are likely to violate the terms of their visas, making admission decisions that can largely not be challenged.¹⁶ People subjected to expedited removal at this point are provided with only the slightest of review possibilities by law, none of which address the propriety of the removal order itself.¹⁷ Furthermore, governments, including the U.S. government, routinely assert the right to change admissions categories at will,¹⁸ to prevent entry on the basis of secret evidence,¹⁹ and fail to provide even the most minimal due process. As an (in)famous case put the issue, “Whatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned.”²⁰

The border, then, is an area where the rule of law has had difficulty finding root, but where we might hope for it to grow. Gowder’s account, however, would seem to suggest reason to doubt that the rule of law will have a place at the border. If, as noted above, the rule of law depends heavily on, or is perhaps even equivalent to, “members of a political community” or “citizens” coordinating to prevent the use of force against themselves by those with power, then it is no surprise that the border is close to a lawless zone in many ways. Those subject to the power of states at the border (both the actual and the legal or metaphorical one) are, after all, outsiders—foreigners—and so not members of the community and certainly not citizens.

If Gowder’s descriptive claim about the nature of the rule of law is correct, then so long as there are borders,²¹ the rule of law will be difficult to instantiate,

14. The doctrine of consular non-reviewability, giving essentially arbitrary power to consular officers to decide on visa applications, was upheld by the Supreme Court in the recent case of *Kerry v. Din*, No. 13-1402, 2015 U.S. LEXIS 3918, at *2141 (U.S. June 15, 2015). This arbitrary power—the ability to make a decision and give no reasons for it, with no chance for review—was upheld even though the case involved the important right of being able to live with one’s spouse. *Id.*

15. See Tilman Rodenhäuser, *Another Brick in the Wall: Carrier Sanctions and the Privatization of Immigration Control*, 26 INT. J. REFUGEE L. 223, 229 (2014).

16. 8 U.S.C. § 1225(b)(1)(A)(i) (2012).

17. 8 U.S.C. § 1252(e)(2) (2012).

18. This is most recently displayed in the Trump Administration’s so-called “travel ban” executive order, supposedly justified under the Immigration and Nationality Act § 212(f), 8 U.S.C. § 1182(f) (2012).

19. *Shaughnessy v. Mezei*, 345 U.S. 206, 210–11 (1953).

20. *U.S. ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 544 (1950).

21. I expect that this will be our situation for at least some time, perhaps perpetually. For the classic argument against eliminating borders, but for trying to bring them as far as possible into a lawful state, see IMMANUEL KANT, *Perpetual Peace: A Philosophical Sketch*, in KANT’S POLITICAL WRITINGS 102–04 (Hans Reiss ed., H.B. Nisbet trans., Cambridge Univ. Press 1970)

as the needed group membership and coordination will be, at best, difficult to supply. And yet, the arbitrary and lawless treatment of many at the border is a condition that we ought to regret and oppose. In the next section of this paper, I will suggest some grounds for building solidarity at the border of the sort that Gowder's account suggests is necessary, and will suggest some reforms to current practices that seem to me to be both independently desirable and compatible with the account.

II. CAN WE BRING THE BORDER INSIDE THE RULE OF LAW?

Groups seen as outsiders are often denied the (full) protections of the rule of law. Gowder notes this in his discussion of how, in the United Kingdom and other countries, "unpopular" groups such as "terrorists and war criminals" are denied the protection of the rule of law and subject to largely arbitrary and unchecked power.²² While noncitizens and foreigners are not as unpopular, typically, as terrorists and war criminals, they are nonmembers, outsiders, and so subject to many of the same deprivations. However, at least a few strategies may be deployed to help bring them, at least partially, into the rule of law. (Here it is useful to remember that, on Gowder's account, the rule of law is a scalar or continuum notion—it applies more or less, and not all or nothing, and that partial satisfaction of it is better than no satisfaction.²³ This insight—and the way it is made explicit—seems to me to be among the most important in the book.)

I will suggest that (at least) two methods of "drawing in" outsiders into the relevant community can allow for a partial extension of the rule of law to the border, allowing us to eliminate or reduce the worst instances of arbitrariness and lawlessness. The methods I will discuss are, first, drawing direct ties between the nonmember seeking to enter a state and current members, and secondly, a widening of the relevant community by appealing to universal norms accepted by all legitimate states. In developing these accounts, I apply Gowder's approach to show how the rule of law can be extended to the border, and also show why we ought to do so.

In many cases, there are ties between nonmembers seeking to gain entry to a country and current members. This at least potentially establishes a basis for including the interests of the current nonmember into the political community, both by giving the nonmember a more concrete stake in the community (as opposed to a mere desire to join) and, perhaps more importantly, by having the

(1795). For a very helpful discussion of Kant's argument, see PAULINE KLEINGELD, *KANT AND COSMOPOLITANISM: THE PHILOSOPHICAL IDEAL OF WORLD CITIZENSHIP* 44–72 (2012). Even when the internal borders of a transnational federation, such as the European Union, are weakened, this is typically joined with a hardening of the external borders of the federation, leaving us in much the same situation from the perspective of this paper.

22. GOWDER, *supra* note 1, at 127–28.

23. *Id.* at 52.

interests of current community members reach out to those who are not (yet) members. These connections can come in stronger and weaker forms. I have elsewhere argued that states have an obligation, founded in considerations of justice, to provide admission to at least “immediate” family members.²⁴ If this claim is right, then this is likely the strongest and clearest example of “reaching out” to current nonmembers, but many others are possible. We may find such ties in connection with “personal” relationships other than those of the family,²⁵ such as friendships, collaborative relationships, and potential intellectual interlocutors.²⁶ Even much more formal, or less intimate, relationships can ground a relevant connection, such as that of a would-be employer and employee, or a student with a university.²⁷ Further ties to the community are possible, but beyond this point they become increasingly weak, and it is less clear that they can ground significant rule of law weight. However, when I come to discuss practical applications below, I will show how these ties might well justify establishing practices that would extend beyond cases with close ties themselves.

The second method of drawing in outsiders to a political community, and hence including them, at least to a degree, under the rule of law depends on the application of universal norms, including human rights norms, norms protecting refugees and others fleeing danger, and a more general moral principle requiring treating people in ways that they could in principle agree to. These are norms

24. See Matthew Lister, *Immigration, Association, and the Family*, 29 LAW & PHIL. 717, 735 (2010); Matthew Lister, *The Rights of Families and Children at the Border*, in PHILOSOPHICAL FOUNDATIONS OF FAMILY AND CHILDREN’S LAW 153–70 (Lucinda Ferguson & Elizabeth Brake eds.) (2018).

25. Luara Ferracioli has argued that many ties of this sort—she considers in particular friendships and creative collaborations—should ground rights as strong as those applied to the family. See Luara Ferracioli, *Family Migration Schemes and Liberal Neutrality: A Dilemma*, 13 J. MORAL PHIL. 553, 568–70 (2016). I argue against this claim in Lister, *The Rights of Families and Children at the Border*, *supra* note 24, at 159–64, but will not rehearse that argument here. Even if I am correct, the important point is that there is some tie here, and it can be enough to justify extending the rule of law to cases where these ties are found.

26. The United States Supreme Court rejected such grounds in *Kleindienst v. Mandel*. 408 U.S. 753, 765–70 (1972). The bare possibility that such grounds might be recognized was revived in the controversy surrounding the denial of a non-immigrant visa to Tariq Ramadan when he was to take up a position as a visiting professor at Notre Dame, a case which arguably fits within the paradigm of the lack of the rule of law at the border, and which is especially relevant in relation to the doctrine of consular non-reviewability discussed below. See *American Acad. Religion v. Chertoff*, No. 06 CV 588 (PAC), 2007 U.S. Dist. LEXIS 93424, at *3 (S.D.N.Y. Dec. 20, 2007).

27. Interestingly, though this is not by design on my part, this list of connections bears a strong resemblance to the exceptions to the Trump Administration’s “travel ban” put in place by the Supreme Court, providing some further reason to think that connections of this sort can establish enough of a connection to a political community to ground some degree of rule of law protections, even if not the full panoply. See *Trump v. Int’l Refugee Assistance Project*, Nos. 16-1436 (16A1190), 16-1540 (16A1191), 2017 U.S. LEXIS 4266, at *12 (U.S. June 26, 2017).

such that, insofar as the state in question purports to accept them, push the state and those within it to see itself as part of a larger, more global community. As Gowder properly notes, larger and more anonymous communities are more difficult to bring under the rule of law than are smaller, more closely knit and homogeneous ones,²⁸ and so there is a limit to how far these norms can work to extend the rule of law to the border, but they are not, I will contend, without some force.

The Universal Declaration of Human Rights (“UDHR”), for example, implores all states to see all people as being of “equal dignity” and that all people should act toward each other “in a spirit of brotherhood.”²⁹ While the UDHR is of course not itself binding law, the force of accepting such norms may be to push us to treat others, including those not currently inside our political community, as if they were members, at least to a limited degree. Similar considerations arise with other international norms, including those calling for the protection of refugees, where states often feel compelled to provide at least minimal due process protection to those who profess a well-founded fear of persecution.³⁰ As these and other similar norms operate, they encourage the spread of the rule of law. This aspect of the rule of law will, consistent with the account Gowder provides, almost always be thinner than domestic aspects, given that the ability to coordinate will be lower, and the degree of equality required to comply with the norms will be relatively low. However, we may still expect that accepting such norms will push us toward some degree of the rule of law at the border, even if it is a limited amount.

Before turning to practical steps to improve the rule of law at the border, consistent with the above discussed justifications for it, it is worth noting a bit more explicitly how these approaches fit with Gowder’s methodology. Two aspects can be noted. As Gowder points out, the rule of law requires “a general commitment to the law,” but that this is more likely to develop when people are convinced that “it is in their interests to act collectively to enforce the rule of law.”³¹ Both of these features are relevant here. When we note that many people “at the border” have significant ties to those who are already members of the political community, it is easy to see that this can be a strong justification for

28. GOWDER, *supra* note 1, at 160–61.

29. Universal Declaration of Human Rights Art. 1, G.A. Res. 217A (III), U.N. Doc. A/810 at 71 (Dec. 10, 1948).

30. “Credible fear” interviews are one partial exception to the expedited removal procedure noted above, 8 U.S.C. § 1225(b)(1)(B) (2012). For a brief overview, see *Questions & Answers: Credible Fear Screening*, U.S. CITIZENSHIP & IMMIGR. SERV., <https://www.uscis.gov/humanitarian/refugees-asylum/asylum/questions-answers-credible-fear-screening> [https://perma.cc/4LTW-U4NY] (last updated July 15, 2015). It is perhaps worth noting that this Questions & Answers webpage is unlikely to be of significant use to the vast majority of people who might have such questions.

31. GOWDER, *supra* note 1, at 171.

extending the rule of law to the border. Furthermore, the tendency that comes from adopting universal norms has not only a self-interested aspect (each of us might benefit from these norms being applied in some cases) but also trains us to see the law as even more general than before, applying to all people, at least in some aspect. As we develop this tendency, the fully lawless nature of the border in the past—and even the recent past—comes to seem anachronistic and unacceptable. Both of these trends, I would suggest, were found during the strong uprising against the Trump administration’s so-called “travel ban,” and the lower level of deference given to the ban by federal judges than had been given to executive action on immigration in earlier cases, such as *United States ex rel. Knauff v. Shaughnessy* and *Shaughnessy v. Mezei*.³² In both popular action and decisions by courts, arbitrary action at the border was resisted to a greater degree than in the past, indicating a growing respect for the rule of law at the border. If this analysis is correct, then it is not hopeless to try to extend the rule of law to the border.

III. PRACTICAL STEPS FOR EXTENDING THE RULE OF LAW TO THE BORDER

Several changes to current practices would help give form to the justifications for extending the rule of law to the border argued for above. A first and important change would be to grant a limited right of appeal, and a more general right to receive notice of reasoning, when consular officers make decisions about whether to grant a visa or not, and when Customs and Border Patrol officers make decisions on admissibility. As noted above, currently decisions made by consular officers are essentially unreviewable, and it is very difficult—and discretionary on the part of the relevant officers—to even gain information about the cause of a denial. However, when we recognize the importance of ties to current political community members that many seeking visas have, we can see grounds for reforming this situation. While anything like full trials would likely be unworkable—grinding the operations of already overstressed consulates to a halt—some more modest form of review, which would require the officer in question to justify his or her decision in an accessible way—is not implausible. The level of process that would be due could be tied to the strength of the ties, with family ties getting the strongest protection, and others, such as employer/employee, friendship, and collaborators, receiving some lesser degree of process.

The next change in this process would be to greatly limit or modify the current “expedited removal” procedure, which allows a Customs and Border Patrol Officer to order a person seeking admission to the United States to be removed if the officer believes the person seeking admission has either made

32. See *Shaughnessy v. Mezei*, 345 U.S. 206, 210–11 (1953), and *U.S. ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 544 (1950), for two paradigmatic cold-war era cases of extreme deference to the executive in immigration cases.

false or misleading statements or does not have the correct documents.³³ Currently, only extremely limited review of an order of expedited removal is available—to see if the person ordered removed is a U.S. citizen, a permanent resident, or has a well-founded fear of persecution.³⁴ Hearings on the merits are not available, even if the officer is acting arbitrarily.³⁵ This policy clearly violates the rule of law. Good grounds for reform lie along similar paths as noted above. Some minimal form of review—a requirement to clearly state and provide reasons, ones which can be articulated and understood—flow from general principles of law found in universal instruments accepted by all decent states. When there are ties to current members, more ought to be required, including at least a modest degree of review by decision-makers independent of the Customs and Border Patrol, even if not full administrative trials of the sort typically found in immigration hearings. Making these reforms would go a significant way toward changing the border from a lawless to a lawful zone.

IV. AMNESTY FOR UNAUTHORIZED IMMIGRANTS AND THE RULE OF LAW

Many changes that could be made to United States immigration practice—such as improved access to legal counsel, adequate staffing of immigration courts and agencies, and setting up visa programs to cover clearly needed low-skilled workers—would help bring the system into accord with the rule of law as detailed by Gowder. I want to finish this discussion by considering the question of amnesty for long-term unauthorized immigrants.

As Gowder rightly notes in his discussion of ancient Athens, amnesties pose one of the most difficult challenges to the rule of law.³⁶ There are often strong political or pragmatic reasons to grant amnesty to law breakers, but doing so seems to fly in the face of the generality and equality requirements of the rule of law, given that some law breakers are not subject to legal penalties. While it would be absurd to compare the actions of those living in a country without legal authorization to the various oligarchic tyrannies that beset Athens in the last days of and following the Peloponnesian wars, the topic is an important one insofar as it has been one of the most controversial in immigration policy. If Gowder's account can help us know how to deal with this issue, it will give us further reason to favor it and will provide a service as well.

33. Immigration and Nationality Act § 212(a)(6)(C), 8 U.S.C. § 1182(a)(6)(C) (2012); 8 U.S.C. § 1225(b)(1)(A). Because removal, even expedited removal, includes a five-year ban on entry to the United States (*see* 8 U.S.C. § 1182(a)(9)(A)(i)), the most common response to a threat of expedited removal is for the alien seeking admission to withdraw their request to be admitted and “voluntarily” return to her or his country of origin. Immigration and Nationality Act § 240(B), 8 U.S.C. § 1229(B) (2012); CONG. RESEARCH SERV., R43892, ALIEN REMOVALS AND RETURNS: OVERVIEW AND TRENDS (2015).

34. 8 U.S.C. § 1252(e)(2) (2012).

35. 8 U.S.C. § 1225(b)(1)(A).

36. GOWDER, *supra* note 1, at 97–103.

As part of the 1986 immigration reforms undertaken by the Reagan administration, several million migrants living in the United States without authorization were made eligible for an amnesty program, leading to their eventual access to permanent residency.³⁷ While the benefits of bringing a large number of people out of the shadows and the grey or black economy is clear, opposition to future regularization or amnesty programs has proven to be one of the largest stumbling blocks in attempting to further reform the U.S. immigration system.³⁸ One particularly important argument is that granting amnesty to unauthorized immigrants both rewards lawbreaking and encourages future lawbreaking.³⁹ These arguments, assuming they are made in good faith, suggest an incompatibility between such amnesty or regularization programs and the rule of law.⁴⁰

Even if an amnesty for unauthorized migrants presented worries for the rule of law, there might yet be reasons to favor it. However, rule of law concerns cannot just be ignored here, and so we should see if there are ways to minimize or even eliminate them. Gowder's discussion of amnesty in ancient Athens at least suggests several possible paths. An amnesty threatens the rule of law because it allows some who have violated it to escape the proscribed treatment. Even if we doubt that the treatment called for is fully justified, the value of the rule of law may give us reason to follow the treatment. And yet, if there are strong reasons, pragmatic and moral, to grant an amnesty, we may want to see if we can do this without harming the rule of law. In his account of the amnesties in ancient Athens, Gowder makes several points that are relevant to us here. He notes that the amnesty was compatible with the rule of law because of various ways that the ancient Athenians were able to signal a commitment to the rule of law compatible with the amnesty.⁴¹ Something similar may be done, though with different means, of course, in the immigration case.

37. Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, §§ 102, 201, 100 Stat. 3359, 3374–80, 3394–04 (1986), <https://www.gpo.gov/fdsys/pkg/STATUTE-100/pdf/STATUTE-100-Pg3445.pdf> [<https://perma.cc/CFF3-BQNQ>].

38. While opposition has been especially strong from conservative pundits, *see, e.g.*, David Frum, *Five Reasons Obama Shouldn't Declare Amnesty*, ATLANTIC (Nov. 17, 2014), <https://www.theatlantic.com/politics/archive/2014/11/five-reasons-obama-shouldnt-declare-amnesty-immigration-executive-order/382845/> [<https://perma.cc/EL7V-3HZP>], it has also been unpopular with the larger public, *see, e.g.*, Lydia Saad, *Americans Clearly Oppose Amnesty for Illegal Mexican Immigrants*, GALLUP (Sept. 6, 2001), <http://www.gallup.com/poll/4852/americans-clearly-oppose-amnesty-illegal-mexican-immigrants.aspx> [<https://perma.cc/97W5-B9H7>].

39. JOSEPH H. CARENS, IMMIGRANTS AND THE RIGHT TO STAY 42 (2010).

40. There are independent moral arguments for the regularization of at least many long-term unauthorized immigrants. *See, in particular*, Adam Omar Hosein, *Immigration: The Argument for Legalization*, 40 SOC. THEORY & PRAC. 609, 619–23, 627–28 (2014), and CARENS, *supra* note 39, at 5–6, 23, 27–28, 38, 41–42, 46–47, 50. Here I focus on the narrower topic of the rule of law.

41. GOWDER, *supra* note 1, at 102.

If an amnesty or regularization of the unauthorized population is done in such a way that it signals a willingness to be bound by the law by those granted the amnesty, such a plan may strengthen, rather than weaken, the rule of law. This would be done by bringing a large mass of people who now live in fear of the law but without its protection into the light, allowing them to live as normal members of society. Their interests would then much more readily coincide with the majority of the people in the society in establishing the rule of law. But what can serve as a signal? We can draw lessons from earlier amnesty schemes, requiring that those who are eligible not have significant criminal records, that they establish that they have been members of the society for a significant enough period of time to have formed congruent interests with current members, and that any relevant taxes are paid.⁴² These steps, especially if not imposed in a draconian or punitive way, would serve to signal a desire to comply with the law to current members of society. When joined with the rule of law benefits that come with bringing this population out of the shadows, we can see that an amnesty for the unauthorized population may be rule of law promoting rather than harming.

CONCLUSION

Gowder has provided us with a novel and potentially fruitful new account of the rule of law. A significant test of the theory will be whether it can make sense of and provide means for dealing with problem cases for the rule of law. In this Paper I have tried to show how the theory can both make sense of the traditional lack of the rule of law at the border and suggest concrete steps to improving this situation.

42. Most unauthorized immigrants have low income and so would owe little, if any, taxes, but the principle that taxes owed should be paid by all who live in the society applies even to low tax rates. Of course, many unauthorized immigrants do pay taxes as-is. See Francine Lipman, *The "Illegal" Tax*, 11 CONN. PUB. INTEREST L.J. 93, 96, 98, 102 (2011); Claire LaFont, *Tax Contributions of Unauthorized Immigrants: Leaving More in the Tax System than They Take Out* 13–20 (Feb. 26, 2017) (unpublished note) (on file with the author).