

## RESISTING THE RULE OF MEN

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Each of the commentators has offered insightful and provocative commentary and challenge to my argument in *The Rule of Law in the Real World* (“*RLRW*”).<sup>1</sup> Unfortunately, I am already over-prevailing on the kindness of the Saint Louis University Law Journal with this excessively long essay, and cannot address every point made by each. Instead, it will be most productive to focus on several key themes that run throughout multiple comments and are relevant to the core of the rule of law project, as I conceive it.

First are a series of questions surrounding the principle of generality—the obligation imposed on substantive law in a rule of law state to treat all subject to it as equals. Is such a strong conception the right way to conceive of the principle? Does the principle even belong in the rule of law, either in its traditional form or in a modern progressive reimagining? This is a question that cuts across the comments, and, indeed, across the response to *RLRW* overall—the account of generality appears to be far and away the most controversial part of my theory.

Second is the problem of foreigners and borders (per Chad Flanders and Matthew Lister).<sup>2</sup> What can (or should) the rule of law say about the legal relationship of those considered members of a political community with those considered nonmembers?

Third, and perhaps most difficult for my theory to handle, is the problem of lawless power exercised by non-state actors, like racist mobs in Jim Crow (per Colleen Murphy)<sup>3</sup> or abusive husbands in patriarchy (per Robin West).<sup>4</sup> Am I right to insist that the rule of law only regulates the behavior of states, or, at

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1. PAUL GOWDER, *THE RULE OF LAW IN THE REAL WORLD* (2016).

2. Chad Flanders, *Keeping the Rule of Law Simple: Comments on Gowder*, *The Rule of Law in the Real World*, 62 ST. LOUIS U. L.J. 313, 319 (2018); Matthew Lister, *Can the Rule of Law Apply at the Border? A Commentary on Paul Gowder's The Rule of Law in the Real World*, 62 ST. LOUIS U. L.J. 323, 324–26 (2018).

3. Colleen Murphy, *The Rule of Law, Democracy, and Obedience to Law*, 62 ST. LOUIS U. L.J. 293, 295–96 (2018).

4. Robin West, *Paul Gowder's Rule of Law*, 62 ST. LOUIS U. L.J. 303, 310–11 (2018).

most, those who come close to state-level power (i.e., to acquiring what I call the “Hobbesian” and “Weberian” properties—dominant coercive force and a claim to legitimate authority)? If so, how is my account consistent with the intuition that such systematized forms of violent injustice are qualitatively distinct from ordinary individual legal disobedience?

I will consider these questions (with some digressions and interludes) in turn. Doing so will require me to omit addressing many points. In particular, I cannot in this already-far-too-long essay respond to Flanders’s worries about mass incarceration,<sup>5</sup> to Murphy’s worries about the rule of law’s compatibility with non-democracies,<sup>6</sup> or, except at the end of a very brief footnote, to West’s worries about the potential for the rule of law to restrict a full-fledged official assault on economic misery.<sup>7</sup> Each of those worries is deserving of full attention, and I hope to be able to turn to them properly in future work. However, I think I can say enough, here, to redeem the core of the theory from the key worries elucidated by the commenters—and perhaps even highlight some of its positive appeal?

#### IN DEFENSE OF STRONG GENERALITY

Why do I insist that the idea of generality belongs in the conception of the rule of law?<sup>8</sup> As Murphy correctly observes, I understated the extent to which scholars such as Joseph Raz and Lon Fuller have rejected the notion of including an egalitarian conception of generality in the rule of law; she rightly suggests that I owe the claim some more of a defense than I have heretofore offered.<sup>9</sup>

The heart of the idea is this: the rule of law contrasts, and has always contrasted, with the rule of women and men, that is, with power that manifests itself as raw command rather than as reason. (I’ll henceforth use the traditional term “the rule of men” to contrast “the rule of law,” but the reader is asked to interpret “men” in a non-gendered fashion.) This is the ideal that Aristotle expressed in the famous claim that is often translated as, “law is reason unaffected by desire.”<sup>10</sup> At the heart of the conception of the rule of law that flows from Aristotle to contemporary thinkers is a contrast between the sheer will (desire) of someone or some group of people with power, and a set of regulations for the whole political community that are not attributable merely to the fact that someone wishes that the community be ordered that way.

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5. Flanders, *supra* note 2, at 317–19.

6. Murphy, *supra* note 3, at 296.

7. West, *supra* note 4, at 308.

8. GOWDER, *supra* note 1, at 7.

9. Murphy, *supra* note 3, at 294–96.

10. ARISTOTLE, POLITICS 140 (Paul Negri & John Berseth eds., Benjamin Jowett trans., Dover Publications, Inc. 2000) (1905); Aristotle, *Politics*, PERSEUS DIGITAL LIBR., <http://www.perseus.tufts.edu/hopper/text?doc=urn:cts:greekLit:tlg0086.tlg035.perseus-eng1:3.1287a> [<https://perma.cc/HP6P-SK33>].

The weak version of the rule of law, regularity and publicity, responds to one way that a political community might disregard this ideal: if it allows its officials to simply run about issuing commands and using force, in a way that is not cognitively accessible to or publicly debatable by ordinary people.<sup>11</sup> The particular vices of states that fail to satisfy the weak version, hubris and terror, are symptoms of the rule of men: to exercise personal, rather than legal, rule is to hubristically set oneself and one's desires or goals (rather than, as Aristotle might have seen, personal-will-independent reasons) above the legitimate interests of those whom one rules; because personal rule cannot be justified by desire-independent reasons, one cannot explain one's commands to those whom one commands, and because the commands are unexplainable, they can only persuade those who are asked to obey using raw fear.

The strong version responds to a distinct failure of precisely the same ideal: the situation where a state is dominated by some groups of people (e.g., "aristocrats," "whites," "men") who use the power of the state to reinforce their continued dominance.<sup>12</sup> And the intuition driving my conception of generality is that this is the same kind of wrong as that wrought by the untrammelled police official who kicks down doors without a warrant. In each case, the awesome powers of a state have become not a universal possession but a *personal* possession, to be used by some individual or group to serve their own narrow interests and desires regardless of the extent to which that power and the commands backed by it can be accessible to the reason of those who are subject to that power and those commands. A radically non-general state is hubristic on the group level—a state in which whites, for example, experience themselves as entitled to command blacks on grounds of a belief in racial superiority. And such a state operates by terror on the group level—because the laws of caste dominance cannot be defended with reference to reasons that apply to the subordinated castes, those groups can, yet again, be ruled only by fear.

Observe how group hubris manifested itself in the first two stages of American white supremacy. During the time of slavery, individual whites directly ruled individual blacks with the untrammelled power of a property owner. Simultaneously, as a group, blacks were wholly outside the protections of law—the state of slavery was not dissimilar to a state of outlawry in which a slave simply lacked legal rights. Thus, in *Dred Scott v. Sandford*, Chief Justice Taney explained the connection between the arbitrary power claimed by whites as a group and the social inferiority of blacks:

[Blacks] were at that time considered as a subordinate and inferior class of beings, who had been subjugated by the dominant race, and, whether emancipated or not, yet remained subject to their authority, and had no rights or

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11. GOWDER, *supra* note 1, at 7–27.

12. *Id.* at 28–41.

privileges but such as those who held the power and the Government might choose to grant them.<sup>13</sup>

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They had for more than a century before been regarded as beings of an inferior order, and altogether unfit to associate with the white race, either in social or political relations; and so far inferior that they had no rights which the white man was bound to respect; and that the negro might justly and lawfully be reduced to slavery for his benefit.<sup>14</sup>

During the time of Jim Crow, the white power structure of the South was partially prevented from outright excluding blacks from the law. (I say “partially” in view of the lynchings further discussed below.) However, whites attempted to replicate the same social relations using different tools—using legal discrimination to reassert that blacks were not entitled to “associate with the white race either in social or political relations”<sup>15</sup> by, *inter alia*, forbidding intermarriage, restricting blacks from a wide range of economic activity (such as by redlining and restrictive covenants), mandating spatial segregation in everything from schools and swimming pools to water fountains and railroad cars, and extraordinary efforts to keep blacks from exercising the core right of citizenship, the electoral franchise.

It seems to me that my conception of generality as a component of the rule of law is the best way to understand, from the legal point of view, the undeniable social fact that Jim Crow was an extension of slavery by other means. In both cases, whites as a class attempted to reflect and reinforce a social hierarchy through the use of tools of law—during slavery by simple exclusion of blacks from legal personhood, and during Jim Crow by the creation of a subordinate category of legal personhood. The egalitarian conception of the rule of law that I articulated in *RLRW* has the capacity to explain how both slavery and Jim Crow corrupted the law, while still capturing the intuition that slavery was a worse corruption of law than was Jim Crow.

Let us return to abstractions. I will say that we have “the rule of men” or “personal rule” when those who wield the power of the state are not obliged to give reasons to those over whom that power is being wielded—from the standpoint of the ruled, the rulers may simply act on their brute desires.

Connecting that to the three principles of *RLRW*: In the absence of regularity, this failure to give reasons is direct and immediate; swaggering officials order people around “because I’ve got the gun and you don’t.” In the absence of publicity, there might be reasons referring to legal rules, but those reasons are not actually given to (in the sense of disclosed to, or in the sense of appealable-to-by) those over whom power is wielded.

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13. 60 U.S. 393, 404–05 (1856).

14. *Id.* at 407.

15. *Id.*

And in the absence of generality, the immediate actions of officials are purportedly justified by law, that is, by the reason “the law says so,” but the reasons underlying the law are themselves nothing more than the brute desires for superiority, expressed by the empowered classes who made the law and who are imposing it on disempowered classes. This is why, from the second person perspective, as I said in chapters two and three of *RLRW*, those asked to obey such laws cannot understand them as justified (backed up by something that might count as reasons to them) unless they actually internalize the notion that they are social inferiors who deserve to be oppressed by the classes who made the law.<sup>16</sup>

#### FORMAL VS. SUBSTANTIVE, AGAIN

With that idea in hand, let us take another look at the problem with a formal conception of generality. Suppose that the Iowa Legislature passes, and the governor signs, the following law: “Paul Gowder shall be subject to a 100% wealth tax, starting next month.” It seems to me that such a law would satisfy the criteria of regularity and publicity: an official who kicks down my door to take all my stuff a month from now would be acting pursuant to a previously established rule, I’d have the full opportunity to hold the official accountable for sticking to the terms of the rule (e.g., to contest his seizure of property that belongs to my spouse), and so forth.<sup>17</sup> I’d even be able to reassure Hayek that I know perfectly well what to do to avoid getting my stuff taken (i.e., flee the state within the next thirty days).

But I take it that we have an undeniable resistance to describing that legislation as consistent with the rule of law. It is no different, practically speaking, from flat-out expropriation, it is just expropriation with a few magic law words uttered to pretty it up, an exercise of sheer malicious will rather than legalism. It is, in short, the rule of men. And this intuition lies behind the widely (albeit not universally) accepted formal conception of generality, according to which at a bare minimum the law is not permitted to have proper names in it.

If you accept that, however, the proverbial camel’s nose has entered the tent. For how different really are the laws “Paul Gowder shall be subject to a 100% wealth tax” and “Black people shall be subject to a 100% wealth tax”?<sup>18</sup> As I

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16. *Id.* at 39.

17. There may be some reason to argue about whether we should interpret regularity as containing a stability criterion that forbids such laws, but we might imagine fairly stable personalized laws, where a handful of people are outlawed and stay outlawed.

18. The later law, let us remember, is not all that different from much of Jim Crow. One odd point of commonality that I share with the right-wing rule of law scholars is that like them I think that expropriation is a key evil that the rule of law is meant to guard against. I just think right-wing rule of law scholars are terribly confused about who is expropriating whom. Contemporary expropriation looks a lot less like Roman populares seizing the land of the wealthy, and a lot more like Ferguson, Missouri, nickle-and-diming low-income African Americans to death with

argued in chapter two of *RLRW*, we cannot really sustain any attempt to distinguish, from a rule of law standpoint, a law arbitrarily targeting one person and a law arbitrarily targeting a group of people.<sup>19</sup> From that argument, it directly follows that if we reject laws like “Paul Gowder is subject to a 100% wealth tax” on generality grounds, we have to have a substantive conception of generality that forbids arbitrary distinctions in law, i.e., at a minimum forbids legalized caste.

Ultimately, then, the rule of law should contain a strong conception of generality because the alternatives are either to permit magic-word expropriation or to be incoherent. In Flanders’s terms, there just is no simple conception of the rule of law available.<sup>20</sup> And this is so because of the nature of the core rule of law ambition to abolish arbitrary power, a.k.a. “the rule of men.”

For that reason, I do not think that we should be worried that I get all these claims about things like economic injustice out of the rule of law. The ultimate distinction between the kinds of injustices that fall within the scope of rule of law critique and the kinds that do not are the same as they have always been: “Does this, or does it not, lead to the rule of men?” Extreme poverty subjects some to the rule of others, because of the way in which it does and historically has licensed those who control state power to arbitrarily use force against those who are the victims of such poverty—whether that appears in the form of contemporary loitering and vagrancy laws or the English Poor Laws.<sup>21</sup> The rule of law forbids that arbitrary force, and hence, practically speaking, forbids extreme poverty.

#### MERE RULES VS. THE RULE OF LAW

My commitment to the egalitarian conception of generality also comes out of a methodological difference between my project and Fuller’s. As Murphy ably explains, Fuller’s ambition was (primarily) to tease out the moral

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occupancy permits and fines for walking incorrectly down the street. *Pace* West, this is part of why I cannot find myself terribly moved by the Horwitzian critique of the rule of law as impeding state redistributive discretion. My sense is that in the real world, the rule of law rarely impedes states from redistributing wealth in the ways those of us on the left would like. Politics is a much more substantial impediment. By contrast, the rule of law at least gives us an argument against regressive and unjust kinds of redistribution like Ferguson, civil asset forfeiture, cash bail, and other kinds of right-wing expropriation by socially superordinated classes.

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

20. Flanders, *supra* note 2, at 314–15.

21. For a summary of the English Poor Laws, see William P. Quigley, *Backwards into the Future: How Welfare Changes in the Millenium Resemble English Poor Law of the Middle Ages*, 9 STAN. L. & POL’Y REV. 101, 102–03 (1998).

implications of the enterprise of subjecting human behavior to rules.<sup>22</sup> His conception of general law responded to that ambition.

But of course it is possible to make sense of a system of profoundly unequal laws as nonetheless rule-governed. Feudalism, for example, can be conducted in a rule-governed fashion, in which the serfs are tied to the land and have profoundly inferior legal rights relative to the nobles, even though the relationship between serfs and nobles nonetheless is governed by rules.

I deny that Fuller's project to give an account of the moral virtues of having rule-governed activity is the same as the project of making sense of "the rule of law," understood as something that exists on top of the notion of law, that is, as a set of principles governing the morality of the state's use of coercion.

To be sure, Fuller's inner morality of law happens to *coincide* with a number of the virtues of the rule of law in the sense that I am describing. This parallelism probably accounts for the fact that Fuller's classic criteria of legality have often been used as a stand-in for the rule of law.<sup>23</sup> However, I do not see why we should think that the moral principles governing the use of state coercion over individuals are limited to something like the conceptual preconditions of rule-governed behavior, or why we should think that Fuller and Aristotle were trying to get at the same thing with, respectively, the mere possession of rules and "reason unaffected by desire."<sup>24</sup>

I am with Aristotle. My ambition is to give an account of what those who have fought for the rule of law and who have honored it in their societies have thought that it was about.<sup>25</sup> They were not just fighting for there to be rules. It is significant that Pericles's funeral oration (as reported by Thucydides) appeals to the equal justice of the laws,<sup>26</sup> that chapter forty of the Magna Carta offers the protection of the laws to all freemen, and declares that "[t]o no one will we sell,

22. Murphy, *supra* note 3, at 296 (citing LON L. FULLER, *THE MORALITY OF LAW* 46–47 (3rd prtg. 1967)).

23. Daniel B. Rodriguez, Mathew D. McCubbins & Barry R. Weingast, *The Rule of Law Unplugged*, 59 EMORY L.J. 1455, 1466–67 (2010).

24. Aristotle, *supra* note 10.

25. *Id.*

26. Thucydides, *The Peloponnesian War*, PERSEUS DIGITAL LIBR., <http://www.perseus.tufts.edu/hopper/text?doc=Thuc.+2.37&fromdoc=Perseus%3Atext%3A1999.01.0199> [<https://perma.cc/TVP3-KBVZ>]. Thucydides reported:

Our constitution does not copy the laws of neighboring states; we are rather a pattern to others than imitators ourselves. Its administration favors the many instead of the few; this is why it is called a democracy. If we look to the laws, they afford equal justice to all in their private differences; if to social standing, advancement in public life falls to reputation for capacity, class considerations not being allowed to interfere with merit; nor again does poverty bar the way, if a man is able to serve the state, he is not hindered by the obscurity of his condition.

*Id.*

to no one deny or delay right or justice,”<sup>27</sup> and that the Equal Protection Clause of the Fourteenth Amendment was written the way it was and has been read the way it has been, that is, as a guarantee of law that applies to all on the same terms.<sup>28</sup> Those texts gain their power to inspire from appealing to something much more demanding than mere rule-governed behavior.

This idea of “one law for everyone” has an enduring appeal as a distinct value of legal justice, as opposed both to bare legality and to social justice. To say that a state has “equal law” is not the same thing as saying that the state has achieved social, economic equality; it is not even really the same kind of equality. It is not distributive, instead, it is structural: it is a property of the rules that has something to do with this demand that likes be treated alike, or, as A.V. Dicey said, that nobody is above the law, everyone is subject to the law and courts.<sup>29</sup> It is this “everyone” property that we need to interrogate, the idea that there’s something of a universality in the idea of the rule of law, and that universality has a leveling function—everyone must show his or her face before the court on equal terms. I think it would be a huge bullet to bite to say that our account of the rule of law cannot make sense of this grip that “one law for rich and poor” seems to get on us.

By contrast, to take the Fullerian strategy and reduce generality to mere rule-governedness is to render it meaningless. As Murphy has pointed out elsewhere, Fuller’s flavor of generality is “consistent with general injunctions on behavior being issued to specific individuals or groups.”<sup>30</sup> So this is a conception of generality that, standing alone, might be consistent with what we could think of, satirically, as the Rule of Mad Sea-Captain, a la *The Caine Mutiny* or *Moby Dick*, where the laws are just utterances in ostensibly general form, but actually bearing little resemblance to legal rules as we know them. “Hey you, over there, you’re henceforth subject to the following rule: ‘Nobody standing at the corner of La Cienega and Florence at 3:45pm on Monday, August 21, may own a Rolex without giving it to King Ahab.’” To be sure, Fuller has other principles that would impede the Rule of Mad Sea-Captain, most importantly the demand that the law be stable.<sup>31</sup> But I do not think most of us would describe a system of even moderately stable running around and shouting orders at people to be remotely approximate to what the words “general law” might mean.<sup>32</sup>

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27. *Magna Carta*, USHIST.ORG, <http://www.ushistory.org/documents/magnacarta.htm> [<https://perma.cc/C989-FV2C>].

28. U.S. CONST. amend. XIV, § 1.

29. A. V. DICEY, *INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION* 185 (London, Macmillan & Co. 5th ed. 1897) (1885).

30. COLLEEN MURPHY, *A MORAL THEORY OF POLITICAL RECONCILIATION* 43 (2010).

31. FULLER, *supra* note 22, at 44, 79–81.

32. That being said, I do think that I might have claimed too much for this principle in one place: I now think I was mistaken to suggest, as I did in chapter two, that the demand of judicial impartiality has to fall out of the egalitarian ideal of generality. Fuller has a convincing alternative

## GENERALITY AND FERGUSON

Flanders suggests that while the rule of law might forbid discriminatory prosecutions, and might forbid arbitrary enforcement of unjust and expropriative laws, it cannot directly forbid systems of legal expropriation like that of Ferguson, Missouri.<sup>33</sup> To explain why I disagree, I will now turn around and, having previously renounced Fuller, return to embrace him. While, as noted, I do not think that the rule of law merely describes those conditions that are necessary for a state to have law in some conceptual sense, it does seem right to suggest that the converse is true—that the rule of law is offended by forms of political ordering that ape the forms of law but violate its most basic presuppositions.

Such describes “legal” regimes like Ferguson. Among the core presuppositions of the idea of law are that the commands given as laws are meant to be obeyed, that it is possible to obey them, and that obeying them will keep the government more-or-less out of your hair (at least modulo the degree of surveillance necessary to ensure that obedience is actually being delivered). But systems like Ferguson are structured—at best incidentally, but, let us be realistic here, deliberately—to generate *disobedience*—it is the expectation of disobedience that guarantees that the rent seekers and juridical remora will have their paydays, and that the system will continue propagating itself; it is the difficulty-to-impossibility of obedience built into the laws and enforcement mechanisms as they interact with their social context that guarantees that disobedience.

One way that we might try to get the prohibition of Ferguson off the ground even on a narrow, generality-free conception of the rule of law is by focusing on the way it necessarily creates arbitrary power. That is, one consequence of a legal system that is designed to generate disobedience is that it really gives officials an astonishing amount of discretion in the form of open threats—if you cross some petty bureaucrat in a legal regime like Ferguson’s, there is a pretty good chance that he can turn up some frivolous rule violation and bring down retaliatory punishment; if a police officer wishes to avoid sanctions for, e.g., violating the Fourth Amendment, she can always cook up some pretextual

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account in an article in which he said that judicial impartiality is just an implication of the idea that an adjudication is to be decided by reasoning. Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353, 365–67 (1978). As I understand it (perhaps misunderstand it), the core idea is something like this: “an impartial judge” is one who decides with respect to the rules, rather than with respect to his or her own preferences between the parties, and that is implied by the idea that argument about the rules will control the outcome of the case. That seems plausible to me, and, indeed, I rely on a similar idea in chapter one. So I was wrong to forget that point when I got to chapter two.

33. Flanders, *supra* note 2, at 315–16. Flanders refers to St. Louis County, but I shall refer to Ferguson in particular within St. Louis County in order to draw on reporting about the specific evils of that city—without ruling out the likelihood that other cities in the county are equally bad.

violation to justify the search, stop, and arrest, just because everyone is always violating the law.

It is not that the law is, strictly speaking, impossible to follow the way a vagrancy law is to a homeless person. You *could* go to the bureaucrat and blow a week's grocery money on some "occupancy permit" to get permission to have a roommate. But we all know nobody will. Obeying all the laws would be a full-time job: "What do you do for a living?" "I philosophize," "I program computers," "I obey the laws in Ferguson." And so you get a bunch of these laws together, and you have a system where everyone is breaking the law all the time—it is not a coincidence that you had something like three warrants per household in Ferguson.<sup>34</sup>

Note again, however, that we are right back to the prohibition on "the rule of men" that operates at the heart of the rule of law tradition. From that perspective, we can see that Ferguson's two core rule of law problems are both instances of the "rule of men": First, some people (elites, whites) have the power to impose oppressive rules on others (non-elites, people of color), using pointless regulations about things like home residency, cluttered lawns, and mere perambulation as a system of taxation against the politically powerless. Second, the enforcement of those rules gives the officials—who have direct command over state violence—rule over those who have (inevitably, unavoidably) fallen afoul of them.

Thus, Flanders suggests that the narrower conception of the rule of law, comprised of regularity and publicity alone, might indirectly forbid systems like Ferguson, for it forbids arbitrary discrimination in the enforcement of law, and enforcing the ludicrous laws of someplace like Ferguson evenhandedly (i.e., on officials, officials' children, and the white power structure of those who are treated as full citizens more generally) would quickly lead to their demise.<sup>35</sup>

However, it is far from obvious that a truly narrow conception of the rule of law can actually forbid arbitrary enforcement discrimination. The most natural place to find the prohibition on arbitrary distinctions in law enforcement (like "we enforce the occupancy permit rule against the poor black folks but not our friends") is in the principle of generality.

Because no legal system can avoid some degree of enforcement discretion—it is necessarily built into any system where the law is enforced by humans rather than robots—there is always a cop with the power to look the other way or a

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34. As economist Alex Tabarrok explained in a blog post: "You don't get \$321 in fines and fees and three warrants *per household* from an about-average crime rate. You get numbers like this from bullshit arrests for jaywalking and constant 'low level harassment involving traffic stops, court appearances, high fines, and the threat of jail for failure to pay.'" Alex Tabarrok, *Ferguson and the Modern Debtor's Prison*, MARGINAL REVOLUTION (Aug. 21, 2014, 7:22 AM), <http://marginalrevolution.com/marginalrevolution/2014/08/ferguson-and-the-debtors-prison.html> [https://perma.cc/8DJU-NNTW].

35. Flanders, *supra* note 2, at 316.

prosecutor who can *nolle pros* the charges, you need the principle of generality to distinguish between permissible and impermissible prosecutorial discretion.<sup>36</sup>

It might be that we could argue that cases like Ferguson supply *so much* discretion that they violate the principle of regularity. But there is some reason to be skeptical of that claim standing alone, for it is possible to have oppressive laws that regulate a lot of behavior without conferring arbitrary discretion on officials, in cases where the social context is such that people are well positioned to obey. (Consider Singapore’s ridiculous laws against chewing gum.)<sup>37</sup>

Rather, it seems to me that the discretion problem in Ferguson comes from the higher-level non-generality of the laws. First, the laws are particularly difficult to follow for subordinated groups, and there is a lot of factual subordination out in the world—the poor and African Americans, who are suffering the standard of living consequences of long-term residential segregation,<sup>38</sup> may lack the resources to do things like apply for a permit to get a roommate, pay the harassment fines for jaywalking, and so forth. This difficulty confers additional pernicious discretion in places like Ferguson relative to places like Singapore.

Second, we cannot ignore the fact that the *use* of that sort of excessive discretion tends to be directed at socially subordinated groups. The officials cannot arrest everyone without an occupancy permit, because that is almost everyone, albeit perhaps more concentrated among the subordinated (“What do you do for a living?” “I arrest myself and all my friends”), so whom do they arrest? Well, it might be individuals whom the officials do not like, but it also tends to be classes of people with whom the officials cannot identify, subordinated classes and out-groups. You get what you got in Ferguson, all these white police arresting the black people.<sup>39</sup> And the demand that the rule of law addresses to those police, and which they cannot meet, is “give us a public reason for who you arrested and who you didn’t arrest, a reason consistent with understanding those whom you did arrest as social and legal equals.” This is a demand generated by the principle of generality.

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36. And thank heavens, because that is the classic salve against injustice in individual cases: “Yes, you were speeding, but you were speeding on the way to the hospital because your spouse was having a heart attack, here, let me put on the lights and siren and give you an escort,” we cannot write rules to cover all foreseeable cases like that but it would be a brutal kind of society if we did not have that escape valve, or any room for official compassion, mercy, or just common sense.

37. Regulation of Imports and Exports Act, ch. 272A § 3 (1995) (Sing.).

38. See Paul Gowder, *Racial Classification and Ascriptive Injury*, 92 WASH U. L. REV. 325, 363–65 (2014).

39. See Rebecca Leber, *Ferguson’s Police Force Is 94 Percent White—and That’s Basically Normal in the U.S.*, NEW REPUBLIC (Aug. 13, 2014), <https://newrepublic.com/article/119070/michael-browns-death-leads-scrutiny-ferguson-white-police> [<https://perma.cc/QKK9-E4V8>].

## GENERAL WITH RESPECT TO WHOM?: MEMBERSHIP AND BORDERS

Let us now turn to the second central issue of the comments.

I am increasingly inclined to think that we can expand the domain of the rule of law to the entire world, that is, to say that states are obliged to offer public reasons for their use of coercive power even against noncitizens found abroad. (This is a position that I had not reached at the time I wrote *RLRW*.) And this is so even though states (a) engage in seemingly lawless activities like warfare against one another and against foreign citizens, and (b) are clearly subject to lesser obligations in many cases to foreigners than to its own citizens.

The existence of such things as wars is no objection to this view. After all, we are, at least in theory, long past the Westphalian worldview according to which states are privileged to carry out warfare against other states (and, more importantly, their people), at will and solely in pursuit of self-interest. Today, we largely recognize things like an international law norm against aggression.

Scholars such as Evan Criddle and Evan Fox-Decent have convincingly argued that international law and human rights principles governing warfare can rest on the same legal ideas that underlie core principles of domestic law: if we conceive of states as holding their power in trust for their people, and the people of the world, then we can understand powers like warmaking as constrained by that fiduciary relationship; those constraints can lead to international legal accountability for the initiation and conduct of warfare.<sup>40</sup> It may be that the international system as conducted on the ground does not yet enforce such high standards, but it is at least in principle open to rule of law scholars to say that it ought to—that those who control the state’s military force must be bound by law, indeed, by law to which those over whom the force might be used can appeal in order to regulate its use—and even that the legal standards in play (such as the principle of proportionality) must capture public-reason justifications for such force.

Similarly, some forms of the legal distinction between citizens and noncitizens (and concomitant legal restrictions on travel, employment, etc.) might be consistent with the principle of generality. Suppose, for example, that we accept a theory of states like Robert Goodin’s “assigned responsibility model,” according to which the special legal rights of citizens in any given state are justified by the fact that everyone (in principle) gets to be part of a state that provides those rights, and that it is better off for people in general to have a state that gives them such rights.<sup>41</sup> That justification might serve as a public reason that each state could offer to the people excluded by its borders. “I’m excluding you from sharing in this state because you have your own state, and everyone,

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40. EVAN J. CRIDDLE & EVAN FOX-DECENT, *FIDUCIARIES OF HUMANITY: HOW INTERNATIONAL LAW CONSTITUTES AUTHORITY* 8, 13–14, 16–17, 30–31 (2016).

41. Robert E. Goodin, *What Is So Special About Our Fellow Countrymen?*, 98 *ETHICS* 663, 678, 681–83 (1988).

including you, benefits from having a state to call your own with limited borders” sounds like a reason that, under some factual circumstances, could be accepted without supposing that anyone suffers under the burden of subordinate status.

Note the *under some factual circumstances* proviso of the previous paragraph. If we suppose that the full demands of the principle of generality apply to the state’s use of its coercive power to turn others away at the border, the points that I made with respect to inequality in chapter three of *RLRW* continue to apply: it is hard to see how a person who does not enjoy the benefits of the system of assigned responsibility to states can make sense of an argument that purports to justify a network of law that denies her access to other states on the specious ground that everyone has their own state that provides such benefits.<sup>42</sup> “Aren’t I part of that ‘everyone?’” she might fairly ask. In particular, given the second-person standpoint from which generality so often fails (see chapters two and three of *RLRW*),<sup>43</sup> she might fairly wonder why she ought to obey the laws that prohibit her from entering a country when the legal regime that purports to permit that country to forbid her from doing so is allegedly justified on the basis of universal benefits that she, and millions of people like her, do not receive.

At a minimum, arguments like that seem to entail a compelling rule of law critique of states that decline to admit refugees from warfare, genocide, slavery, repression, or failed states. There may also be fruitful potential (although I cannot develop it here) for extending the argument to those whom we might call “economic refugees,” i.e., people who have been so profoundly disadvantaged by the allocation of resources to different states that it can be fairly said that other states cannot plausibly defend hoarding access to economic opportunities away from them on the basis of the frivolous claim that they too benefit from the system of economic hoarding.

Consider this in the context of the traditional rule of law/rule of men dichotomy that I have been emphasizing in this response. A person standing at a border, confronted with an armed border guard who prohibits his passage, is in a position to ask “*by what right do you say that I cannot pass?*” A response that amounts to nothing more than “*by the right of the people who have paid for me to have this gun, and who don’t want you around*” sounds suspiciously like rule of those men who call themselves citizens, rather than the rule of law that can justify itself on the basis of abstract principles that apply to all.

I hasten to note that a cross-border rule of law on this conception does not depend on a theory of fiduciary authority like that of Criddle and Fox-Decent,<sup>44</sup>

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42. GOWDER, *supra* note 1, at 41, 50–51.

43. *Id.* at 34, 36, 38, 39, 44, 46.

44. CRIDDLE & FOX-DECENT, *supra* note 40, at 8, 13–14, 16–17, 30–31.

or an assigned responsibility theory of citizenship like Goodin's<sup>45</sup> (although I personally find both appealing on other grounds). The rule of law demands that we find some principled account, but other such accounts would serve. If one accepts that states owe duties under the rule of law to foreigners whom they coerce, then the core demand is that the use of state power to turn innocent strangers away at gunpoint from imaginary lines in the dirt be justified by something other than "we have the weapons and we say so"; generality requires that this justification come in the form of something that can give the ones thus commanded some real reason not to get their own guns and try to impose their own wills to the contrary. Otherwise we do not have law, we simply have violence and warfare.

#### INTERLUDE: HOBBS, GENERALITY, AND JUSTICE

The Hobbesian tone of the distinction a moment ago between a legal order and simple violence was not accidental. The rule of men—be it in the form of swaggering Tonton Macoutes, a Kafkaesque knock-at-the-door-in-the-night KGB state or a caste system like Jim Crow—or indeed in the form of a racist American President who issues immigration orders on the basis of a distinction between white-identified countries like Norway and alleged "shitholes" like Haiti<sup>46</sup>—is essentially a state of warfare because it presents itself as raw force to those who are subject to its predations. David Dyzenhaus probably put it best, in his brilliant elucidation of Hobbes's take on the rule of law: when a sovereign issues an egregious command that violates the law of nature, "the subject is entitled to disobey because the sovereign has put into doubt the subject's membership of the moral community that is a precondition for the subject to recognize the sovereign as an authority."<sup>47</sup> In those terms, the principle of generality bounds the legal commands that can be given without effectively throwing those who are thus commanded out of the legal order. And this is true whether the legal order is a thick system of domestic laws or a thinner system of international law.

The foregoing discussion sheds further light on why I say that the principle of generality does not just reduce to the demands of justice. A Hobbesian sovereign can use law to settle disagreement about justice without acting so egregiously as to exclude some people from the legal community.<sup>48</sup>

45. Goodin, *supra* note 41, at 678, 681–83.

46. Julie Hirschfeld Davis, Sheryl Gay Stolberg & Thomas Kaplan, *Trump Alarms Lawmakers with Disparaging Words for Haiti and Africa*, N.Y. TIMES (Jan. 11, 2018), <https://www.nytimes.com/2018/01/11/us/politics/trump-shithole-countries.html> [<https://perma.cc/97LL-V79R>].

47. David Dyzenhaus, *Hobbes on the Authority of Law*, in HOBBS AND THE LAW 209 (David Dyzenhaus & Thomas Poole eds., 2012).

48. For example, I happen to think the mortgage interest deduction is regressive and (for that reason) unjust. But it is not so far beyond the pale as to strip away my reason to obey the tax system. There are many unjust laws that are still consistent with justifications that allow those who are

## PRIVATE PERSONS, JIM CROW, AND ABUSIVE HUSBANDS

The state of war brings us to our final problem. For the discussion thus far makes Murphy's objections to my limitation of the rule of law to state (or state-like) power seem all the more urgent. "Can we not," we might imagine her saying, "understand black people in the Jim Crow South as in a *state of war*, not just with the government, but also with the dominant white racists and organizations like the Ku Klux Klan?" Indeed, it seems reasonable to think that groups like the Black Panther Party had a point: under lynch law, black people were substantially excluded from the legal community, and had no real choice but to start shooting back. If this state of war were constituted by private mob rule as well as by the acts of the state, then by the argument I just made, it seems we have strong reason to apply the demands of the rule of law to private actors as well. Nonetheless, I shall (mostly) continue to argue against that proposition, in particular by denying Murphy's claim that the rule of the mob in Jim Crow could be realistically distinguished from the state.

It might be true, as Murphy suggests, that not every case of Jim Crow lawlessness could have realistically been stopped by government action.<sup>49</sup> However, I must confess to a substantial amount of skepticism about the state's alleged powerlessness. We have no reason to credit self-serving claims of white Jim Crow officials who assert that it was the mob that made them accommodate racial bloodthirst, rather than their own desire to participate in the brutal enforcement of white supremacy.

Thus, consider the case that Murphy notes—the barbaric lynching of Sam Hose. I claim that the mob did not force officials to do anything they were not inclined to do anyway. Thus, as Murphy tells it, it looks like the key disagreement between the sheriff and the lynch mob was not over whether Hose would be lynched, but over when it would happen: Would the sheriff get to march Hose to the prison and give the reward to the person who turned him in, *then* hand him over to the lynch mob, or would he be obliged to turn him over to the lynch mob the moment the train stopped?<sup>50</sup> Even though the mob evidently won this argument, one cannot help but wonder if maybe, just maybe,

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disadvantaged by them to understand them as reason-giving without seeing themselves as subordinates. I am not in a state of war with my regressive tax-imposing legislators. And this is so because I can exercise the interpretive principle of charity to understand a coherent justificatory dialogue about these unjust laws in a way that I cannot with respect to things like Jim Crow. As a renter, I can put myself in the place of a (non-monstrous) legislator who supports the mortgage tax deduction because she simply balances the relevant public policies in a different way—perhaps in her judgment, the legitimate social interests in promoting broader savings (via home equity) and the independence that comes with owning important assets outweigh the importance of correcting our gross maldistributions of wealth. For further discussion, see Paul Gowder, *Equal Law in an Unequal World*, 99 IOWA L. REV. 1021, 1065 (2014).

49. Murphy, *supra* note 3, at 295.

50. *Id.* at 300.

had the sheriff intended to do something silly like give Hose a fair trial for the crime of which he was accused, rather than turn him over to a gang of murderers, he might have shown up to the scene of the crime better prepared to fend off the crowd.

For comparison, while the governor did nothing to protect Hose, he sent out an *entire National Guard regiment* to protect a white murderer from lynching in the same time period.<sup>51</sup> That is what it looks like when the state actually tries to protect its citizens.

To be sure, there are some indications that a couple of officials in the scene actually wanted to stop Hose's murder,<sup>52</sup> but there is precious little reason to think that the state as such actually made a serious effort to extend its force to put a stop to it. The U.S. attorney general that very day declared that there would be no federal effort to prosecute the lynchers.<sup>53</sup>

In a related lynching (of an alleged co-conspirator), the most salient official concern seems to have been that it not be conducted too close to the town marshal's house—a request that the mob politely obliged.<sup>54</sup> An “inquest” was held about this second lynching, but when the key witness appeared to testify, the judge *left the room*, evidently to avoid hearing any incriminating testimony about the lynch mob.<sup>55</sup> This barely even counts as pretending to offer access to the law to victims of lynching.

Anyway, you get the point. In view of the overall state endorsement of white supremacy, it is hard to actually imagine that officials were ever all that unwilling to let black people be lynched during Jim Crow; the Hose case in particular seems to me to be an example where the state's endorsement of lynching was barely even worthy of the label “tacit.”<sup>56</sup>

Notwithstanding the details of such particular cases, I would also emphasize the extent to which the state was responsible for establishing the long-run conditions in which Jim Crow existed (and, more broadly, the extent of state responsibility for similar conditions). It is the state, after all, that established the racial hierarchy in the first place by establishing the institution of slavery and the systematic economic and political disempowerment of black citizens after

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51. EDWIN T. ARNOLD, *WHAT VIRTUE THERE IS IN FIRE: CULTURAL MEMORY AND THE LYNCHING OF SAM HOSE* 13 (2009).

52. *Id.* at 101–02.

53. *Id.* at 121.

54. *Id.* at 126.

55. *Id.* at 128.

56. See ARNOLD, *supra* note 51, at 40–41 (describing “lynch narrative” in which—as I read it—law enforcement was represented as doing their ineffectual best to stop the mob despite, e.g., suspicious circumstances surrounding the seizure of victims and the failure to prosecute anyone for committing the lynching); *id.* at 43–44 (giving a particularly ridiculous example in which a sheriff who had already warned the governor of a risk of lynching nonetheless was supposedly taken by surprise when the actual lynch mob showed up, risibly claiming that he thought they were “sightseers and curiosity seekers”).

its abolition. Moreover, on the credible accounts of some historians, the state bears responsibility for establishing the very racial categories on which slavery was founded in the first place, in order to undermine the political capacity of economically deprived Euro Americans to resist the planter elite in the Antebellum South.<sup>57</sup> Less remotely, the state was also responsible for the general lawless condition of the Jim Crow South that permitted lynch mobs to form—for example, if the first few lynch mobs had been subjected to exemplary punishment, that plausibly would have made it much less likely that people would have dared to continue to form them. But, of course, they were not subjected to exemplary punishment, or, in so many cases, any punishment at all. The state encouraged mobs to form in circumstances like Sam Hose's killing by its sustained practice of turning a blind, if not actually encouraging, eye toward the private enforcement of white supremacy.<sup>58</sup>

As David Garland explained, the “public torture” lynchings like the horrific burning of Sam Hose were actually a manifestation of “legal pluralism” in which the (white) community enacted, with the approval of the authorities, a (white-)consensus conception of criminal justice on the bodies of the lynched:

These lynchings may have violated the letter of state law, but they were not violations that were ever liable to be sanctioned. This de facto suspension of state law occurred not because of a lack of enforcement capacity but because, in these situations, local norms of justice contradicted state law and interrupted its operation. The fact is that the lynchers' conduct was usually regarded with broad approval by large sections of the communities in which the lynchings occurred, and it was tolerated (and often applauded) by local politicians and law officers. In these locales, for these crimes, and for these suspected criminals, lynching was not deviance from group norms but instead the direct enforcement of group norms in a situation of conflicting powers and multiple authorities. Whatever state law said, and whatever the rest of the nation thought, in the counties and townships where they took place, public torture lynchings could claim to be socially approved civic undertakings, and not deviant acts.<sup>59</sup>

Of course the state looked the other way or joined in.<sup>60</sup> The point of these lynchings was to preserve a political order that benefited those who controlled the state, and those who controlled the state had every reason to keep it going.

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57. See THEODORE W. ALLEN, *THE INVENTION OF THE WHITE RACE VOLUME II: THE ORIGIN OF RACIAL OPPRESSION IN ANGLO-AMERICA* 249 (2d ed. 2012); KAREN E. FIELDS & BARBARA J. FIELDS, *RACECRAFT: THE SOUL OF INEQUALITY IN AMERICAN LIFE* 121–23 (2012); Paul Gowder, *Racial Classification and Ascriptive Injury*, 92 WASH. U. L. REV. 325, 326, 360–62 (2014).

58. Ida B. Wells explained as much in 1892. IDA B. WELLS-BARNETT, *SOUTHERN HORRORS: LYNCH LAW IN ALL ITS PHASES* (1892), <https://archive.org/stream/southernhorrors14975gut/14975.txt> [<https://perma.cc/3UNP-B2CG>] (asserting that the lynch mobs would not continue their behavior if they did not think “that neither the law nor militia would be employed against them”).

59. David Garland, *Penal Excess and Surplus Meaning: Public Torture Lynchings in Twentieth-Century America*, 39 LAW & SOC'Y REV. 793, 810 (2005).

60. *Id.* at 810–11.

No less an authority than Ida B. Wells, the greatest contemporaneous expositor and critic of lynching, explained matters as follows, in her pamphlet on *Lynch Law in Georgia*: “The real purpose of these savage demonstrations is to teach the Negro that in the South he has no rights that the law will enforce.”<sup>61</sup>

Wells captured the heart of the matter: the message to black people was *there is nobody to protect you, you are at our mercy*. The point of lynching was to use terror to exclude African Americans from the protection of the law—an enterprise in which the state was culpable from the bottom to the top.<sup>62</sup>

Contemporary scholars have agreed with Wells’s assessment. Here is Garland again:

To allow the matter to go to the authorities and be dealt with by the legal system was to depersonalize the relationship of white to black and to treat the matter of black misconduct as a question of law. By avenging the crime themselves, the lynchers implied that the relationship that counted was between blacks and whites, and that this was a relationship not of laws and citizens but of superiors and subordinates, masters and slaves. . . . it re-established the correlative status of the troublesome black man, which was as nothing, with no rights, no protectors, no personal dignity, and no human worth. To allow a black rapist or murderer the due process of law would be to treat him as a citizen, a fellow American, a fellow human being. The public torture lynching worked to deny this fellowship and to insist on the utter worthlessness of any black man who offended against white people.<sup>63</sup>

The point of this extended discussion of lynching is that the state’s contribution to lynch law rendered it qualitatively as well as quantitatively distinct from ordinary lawbreaking. Lynching both arose from and reinforced a public conception of who did and who did not count as a member of the legal community. By deliberately allowing lynching to continue, the state contributed to the elevation of lynch mobs from a bunch of terrorists to a sociologically legitimate (as opposed, obviously, to morally legitimate) institution operating with, at a minimum, impunity, and more likely with the actual collaboration of the sovereign.

One of the great virtues of the rule of law is that it gives us a moral language to capture that difference. The victims of lynching were not just killed by a mob, even a political mob. There was a state in the room, and that state withdrew its protection from black Americans, even though it had the capacity to provide that protection (the Hobbesian property, as I said in *RLRW*)<sup>64</sup> and had the profound *chutzpah* to maintain that it was acting in their names as citizens (what I called

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61. Ida B. Wells-Barnett, *Lynch Law in Georgia*, LIBR. CONGRESS (1899), [http://memory.loc.gov/cgi-bin/query/r?ammem/murray:@field\(DOCID+@lit\(lcrbmrpt1612div1\)\)](http://memory.loc.gov/cgi-bin/query/r?ammem/murray:@field(DOCID+@lit(lcrbmrpt1612div1))) [<https://perma.cc/2TWT-W93E>].

62. *Id.*

63. Garland, *supra* note 59, at 817.

64. GOWDER, *supra* note 1, at 55.

the Weberian property).<sup>65</sup> That casting out of the political and legal community, that thrusting of the citizen into a state of war with his or her sovereign, is a distinct evil from the barbaric murders themselves, and an evil that the ideal of the rule of law is distinctively equipped to condemn.

Even having said all that, let us leave aside the state's responsibility for racial terror and suppose (counterfactually, I think) that the Ku Klux Klan genuinely ruled the South, and had so much power that public officials were routinely unable to prevent them from lynching whomever they wanted. Under such circumstances, I would be inclined to say that the Ku Klux Klan had *become* the state. At least within their domain of operation, they would have achieved, or come very close to achieving, both of the Hobbesian and Weberian properties—they, *ex hypothesi*, would have established a sufficient monopoly over force (at least when they wanted to lynch someone) to frustrate the only other competitor for that title, and they exercised that force under a claim of (white supremacy) right. Under those circumstances, I have no qualms with saying that the rule of law would directly condemn their acts.

In the real world, the boundary between these two points is somewhat fuzzy, because the distinction between the kinds of groups that can carry out this kind of organized terror and the state is, at best, conceptually and empirically unstable. Put differently, Murphy is absolutely right to note that the lynching of Mr. Hose was a political act by the mob.<sup>66</sup> But it was a political act *in defense of a political order* in which white supremacists controlled the state, and in which it was routinely impossible to distinguish between state acts and Klan acts, or between state agents and Klan agents. At the crux of it, to say “the Klan was the state in the South” and to say “state officials were culpable for facilitating the acts of the Klan” are not all that different.<sup>67</sup>

Either way the rule of law has sufficient resources to explain the distinctive rule of law wrongness of societies like the Jim Crow South, without subjecting private individuals to the ordinary scrutiny of the rule of law.<sup>68</sup> And reserving the condemnation of the rule of law for those great crimes in which the state bears such responsibility is essential to preserving a language that is capable of capturing the distinctive evil of the state's participation in those crimes.

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65. *Id.* at 10.

66. Murphy, *supra* note 3, at 301.

67. As Mills explains, the enforcement of white supremacist political orders has classically relied on state and private violence. CHARLES W. MILLS, *THE RACIAL CONTRACT* 84–87 (1997); *see also* Charles Mills, *White Supremacy as Sociopolitical System: A Philosophical Perspective*, in *WHITE-OUT: THE CONTINUING SIGNIFICANCE OF RACISM* 42–43 (Ashley W. Doane & Eduardo Bonilla-Silva, eds., 2003).

68. GOWDER, *supra* note 1, at 51. For similar reasons, the rule of law can contribute to our explanation of less dire but similar law-supported injustices like the contractual expropriations of landlords, monopolistic employers, and mass consumer-facing corporations. *See* Paul Gowder, *Transformative Legal Technology and the Rule of Law*, 68 U. TORONTO L.J. 82 (2018).

## THE RULE OF A BUNCH OF MEN?

However, I remain quite worried by West's points with respect to private rulership, such as in households characterized by domestic violence.<sup>69</sup> Given the horrifying pervasiveness of violence against women in our world, it seems reasonable to assert that at least in some societies we have, today, a private but pervasive violent oppression of the caste of people called "women" by the caste of people called "men."<sup>70</sup> And it seems intuitive to suggest that the rule of law ought to capture something of what is wrong with such oppression. Someone who lives in a patriarchal household does seem to (quite literally) be subject to the rule of a man.

Can we do what we did with Jim Crow, and similarly understand this as a case of state failure? Doing so might allow me to avoid biting the bullet of imposing rule of law obligations on private individuals as such.

One way to blame the state for this problem would be if it is engaging in discriminatory nonenforcement. As I have suggested, cases like turning a blind eye to the Klan clearly violate the principle of generality. The law gives officials discretion in whom to prosecute, and this choice of how to exercise official discretion as between persons or classes of persons is one that itself has to be justified by public reasons. But there is no possible public reason that can justify "we arrest the black people who murder white people but not the white people who murder black people."

For similar reasons, I would agree with West that a state that declares particular parts of the community a no-go zone would offend against the rule of law<sup>71</sup>—not least because, in the real world, we know that the no-go zones would be declared around the homes of the disadvantaged and subordinated.<sup>72</sup> And exactly the same thing can be said about situations like rape and domestic violence: state officials are obliged to offer public reasons for being willing to devote resources to punishing, for example, street crime but not violent crime committed by husbands against wives.

What about nondiscriminatory abdication, where a state just allows a town to be run by mob bosses? I confess to some doubts about the concept of nondiscriminatory abdication, short of anarchy. West's worries about state abdication in the abstract<sup>73</sup> can be relieved, I think, by attending to the near-universal causes of state abdication in inequality and injustice, and the state's inevitable culpability in phenomena like segregation that create the spaces

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69. West, *supra* note 4, at 310–11.

70. According to one meta-analysis, almost a third of women worldwide had experienced "intimate partner violence." K. M. Devries et al., *The Global Prevalence of Intimate Partner Violence Against Women*, 340 *SCIENCE* 1527, 1527 (2013).

71. West, *supra* note 4, at 307.

72. And we know that this would not be a coincidence.

73. West, *supra* note 4, at 310.

suitable for the abdication of law enforcement. Indeed, I find it difficult to imagine a world in which a state abandons its privileged to the predations of crime—what would have to happen for Beverly Hills, California, or Fairfield County, Connecticut, to be abandoned by the state?

One possibility is a kind of extreme capitalism, which we could call Rent-A-Cop Capitalism, where security becomes wholly privatized: the rich have crime control because they can pay for it, while the poor have nothing but warfare. In such a situation, I would simply say that the Hobbesian property has failed, and we do not have a state, we have anarchy.<sup>74</sup>

Unfortunately, there are much more insidious cases of discriminatory underenforcement. I am thinking of circumstances where no official has, perhaps, made a conscious decision to engage in discriminatory underenforcement, but it nonetheless happens. Perhaps the hardest challenge, which I take to be where the full strength of West's worries comes out, is a phenomenon like rape culture.

First, I must clarify what I mean by invoking the notion of rape culture. Let us suppose, perhaps counterfactually, that we have perfectly good laws against rape, domestic violence, and other gender-based crimes. But we nonetheless have systematic underenforcement of laws against rape, and other laws prohibiting kinds of violence characteristically suffered by women, relative to other crimes.<sup>75</sup>

Importantly, I will assume *arguendo* that in rape culture, the reason we have such underenforcement is not, or not exclusively, because officials have made the decision not to enforce laws protecting women for pernicious, non-public reasons. We have some officials who think that women deserve violence, but it is not like the Jim Crow South, where that is a kind of official consensus. Rather, I assume that we have a lot of perfectly well-motivated officials who nonetheless participate in the underenforcement of violent crimes against women.<sup>76</sup>

I further assume that the reason the officials participate in underenforcement is just what is implied by the term "rape culture"—because we have a corrupted culture that generates all kinds of superficially legitimate reasons for them to so participate.

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74. As for anarchy itself, as I argued in *RLRW*, it seems to me that if a state completely surrenders control over its territory, we do not need the rule of law to explain why something has gone terribly wrong: Hobbes and Kant have supplied more than enough arguments to move matters forward.

75. See, e.g., Deborah Tuerkheimer, *Underenforcement as Unequal Protection*, 57 B.C.L. REV. 1287, 1287 (2016); Corey Rayburn Young, *Rape Law Gatekeeping*, 58 B.C.L. REV. 205, 255 (2017).

76. To be absolutely clear: this is merely an assumption for the sake of argument. It might be counterfactual. But the reason I make the assumption is to make the problem harder. If we do just have a bunch of sexist officials, then that is just the same kind of easy case for the rule of law as was the official support for the Klan.

For example, we might plausibly think people, including police officers, prosecutors, and jurors, tend to be less inclined to believe women's complaints of rape than tends to be the case with other victims of other crimes. If this is true, it is a result, again, of our *corrupted culture*, which has corrupted our collective cognition, by, for example, encouraging people to believe that men are natural sexual aggressors and that women sometimes should and do say "no" when they mean "yes." But let us suppose for the sake of argument that this actually gives individual officials a relatively public-sounding reason to decline to prosecute any individual case of gender-based violence, even if they might prosecute a case with similar evidence in another crime. They may have good reason to know, for example, that a jury will not believe a so-called "he-said, she-said" rape charge, even though they also know a jury would believe the same kind of evidence if it were about, say, a mugging.

Making matters worse for my theory, even with all of these assumptions, rape culture generates something that looks exactly like the kinds of evils that the rule of law, on my account, is meant to prevent. Women are subject to terror, based in the use of power. I, as a male, do not fear walking down dark alleys or entering my car in deserted parking lots; many women report having those fears, and that those fears cast a pall over day-to-day life.<sup>77</sup>

To be sure, that terror does not arise, as in the classic Stalin and Papa Doc cases of terror, from the arbitrary use of state power against the victims of that terror. Nonetheless, as West points out, the withholding of state power in the form of the failure to protect women from gender-based violence does participate in the subjection of women to the arbitrary use of private power, in our society, right now, today.<sup>78</sup>

Yet it is difficult to understand rape culture as something that the state has an immediate rule of law obligation to remedy, because the state may not have control over rape culture—and might only have control over the legal consequences of rape culture, such as the under prosecution of crimes against women, at a high rule of law *cost*.

Surely we cannot simply say "the state must get those rapists convicted regardless of the biases of juries," for we have strong reason to worry about the kinds of pro-prosecution biases we would have to introduce into the criminal justice process in order to allow it to effectively prosecute crimes against women in the face of the distortion introduced by our corrupted culture. For example,

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77. See MARGARET T. GORDON & STEPHANIE RIGER, *THE FEMALE FEAR: THE SOCIAL COST OF RAPE* 1–4 (1991); Ross MacMillan, Annette Nierobisz & Sandy Welsh, *Experiencing the Streets: Harassment and Perceptions of Safety among Women*, 37 J. RES. CRIME & DELINQ. 306, 306 (2000).

78. West, *supra* note 4, at 310–11.

would such distortions—like making it harder for defendants to confront their accusers, for example—exacerbate the problems of mass incarceration?<sup>79</sup>

This is a symptom of a more general problem. The dangers that rule of law advocates characteristically worry about tend to be exacerbated by giving the state more tools and incentives to prosecute people for things where those prosecutions are impeded, not primarily by state choices, but by cultural phenomena that tend to resist the prosecutions.

I do see one possibility, albeit weak and underdeveloped, for the rule of law to give the state some reason to combat rape culture. Tentatively, it seems to me that we have a rule of law reason to suppose that the state is obliged to do its best with the resources it has. Even if it is rational for prosecutors to think, for example, that a patriarchal jury would refuse to convict a rapist on the basis of his victim's contested testimony, it is obliged to expend an otherwise irrational amount of resources doing its best to convince them otherwise.

What happened to the idea that this rational skepticism about the willingness of the jury constitutes a public reason that can be offered to justify the use of prosecutorial discretion to only pursue winnable cases? Well, let us consider the similarities between this argument and the argument of shop owners who asserted that, however pure their own motives were, customers could not abide the sight of black staff.<sup>80</sup>

The core rationale for rejecting these arguments is that accepting them would allow the actor who accommodates the racism of others to reinforce and support, rather than combat, that racism. And I think we can extend this argument to situations like the exercise of prosecutorial discretion in difficult rape or domestic violence cases: if they decline to pursue such cases, prosecutors allow the ordinary citizens who serve on juries to avoid confronting their own sexist biases, and they allow police officers to avoid having to learn how to build cases against rapists and batterers. That is, the exercise of these choices about how to use prosecutorial power itself plays a causal role in the maintenance of the corrupted cognitions that make up rape culture and patriarchy.

I cannot fully develop this argument here, but it seems like this style of argument is potentially sufficient to ground a state duty to take unusual measures to counteract the effects of at least those kinds of private power that operate in a pervasive way to establish relationships that closely resemble the caste-based rule of men, as do many of the manifestations of patriarchy. And this may at least partially redeem West's worries about my account of the rule of law's

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79. Aya Gruber has levied a sustained intra-feminist challenge on the use of aggressive criminal justice to pursue the control of sexual violence for these reasons. *See, e.g.*, Aya Gruber, *Rape, Feminism, and the War on Crime*, 84 WASH. L. REV. 581, 583–86 (2009); Aya Gruber, *The Feminist War on Crime*, 92 IOWA L. REV. 741, 759–60, 762 (2007).

80. *See, e.g.*, *Chaney v. Plainfield Healthcare Ctr.*, 612 F.3d 908, 914 (7th Cir. 2010) (rejecting customer preference defense in race discrimination claim); *Fernandez v. Wynn Oil Co.*, 653 F.2d 1273, 1276–77 (9th Cir. 1981) (rejecting customer preference defense in sex discrimination claim).

ability to help us understand the wrong of some of the more pervasive kinds of private violence that are systematic without being institutionalized, such as violence against women.

#### CONCLUSION: ON SYSTEMATIZED AND INSTITUTIONALIZED VIOLENCE

At this point, the reader may worry why I do not just bite the bullet and say, “the white supremacists and the domestic abusers and the gangs that might rule the poor cities in Rent-A-Cop Capitalism and all these other horrible people are bound by the rule of law *directly* rather than via the state’s obligation to try to do something about them.” I may seem to be building a substantial, and potentially unnecessary, argumentative superstructure around the rule of law just to avoid saying that it imposes duties on ordinary people. What price am I trying to avoid?

At bottom, the issue really comes down to the Hobbesian and Weberian properties. I find myself wholly unable to be convinced by any argument that purports to criticize the lawless behavior of individuals or even (nondominant) groups of individuals on the same terms as those of gigantic entities possessing overwhelming force who exercise that force with the assertions that it is used in the name over whom that force is exercised, and that those who are threatened with that force are under some obligation beyond brute fear and self-interest to obey the commands that are backed by it.

I am further vexed by a persistent worry about the rhetorical consequences of equating private lawbreaking with the lawbreaking of officials who command the might of the state. There is a familiar—and, I insist, plainly incorrect—rule of law claim that gets thrown at people who break the law to protest political injustice: that somehow they are undermining the rule of law. Such arguments are not just directed at the “antifa” who go around punching neo-Nazis like Richard Spencer<sup>81</sup>—as discussed in *RLRW*,<sup>82</sup> no less a peaceful protestor than Martin Luther King Jr. himself felt the need to defend his adherence to the rule of law in the Letter from Birmingham Jail.

Recall that in the court case that arose out of King’s decision to defy the order enjoining his protest, Justice Stewart sanctimoniously scolded King in rule of law terms:

This Court cannot hold that the petitioners were constitutionally free to ignore all the procedures of the law and carry their battle to the streets. One may sympathize with the petitioners’ impatient commitment to their cause. But

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81. Richard Spencer is an American white supremacist. Associated Press, *White Nationalist Richard Spencer Banned from 26 European Countries*, L.A. TIMES (Nov. 22, 2017, 12:50 PM), <http://www.latimes.com/world/la-fg-poland-spencer-ban-20171122-story.html> [<https://perma.cc/XPC7-MDLS>].

82. GOWDER, *supra* note 1, at 51.

respect for judicial process is a small price to pay for the civilizing hand of law, which alone can give abiding meaning to constitutional freedom.<sup>83</sup>

Similarly, Justice Black rose to new heights of misplaced eloquence in defending the prosecution of participants in a sit-in at a discriminatory lunch counter on the basis of the explicit claim that it was necessary to protect the rule of law against the protestors and against possible violent responses from the lunch counter owners:

A great purpose of freedom of speech and press is to provide a forum for settlement of acrimonious disputes peaceably, without resort to intimidation, force, or violence. The experience of ages points to the inexorable fact that people are frequently stirred to violence when property which the law recognizes as theirs is forcibly invaded or occupied by others. Trespass laws are born of this experience. They have been, and doubtless still are, important features of any government dedicated, as this country is, to a rule of law. Whatever power it may allow the States or grant to the Congress to regulate the use of private property, the Constitution does not confer upon any group the right to substitute rule by force for rule by law. Force leads to violence, violence to mob conflicts, and these to rule by the strongest groups with control of the most deadly weapons. Our Constitution, noble work of wise men, was designed—all of it—to chart a quite different course: to “establish Justice, insure domestic Tranquility . . . and secure the Blessings of Liberty to ourselves and our Posterity.” At times, the rule of law seems too slow to some for the settlement of their grievances. But it is the plan our Nation has chosen to preserve both “Liberty” and equality for all. On that plan we have put our trust and staked our future. This constitutional rule of law has served us well. Maryland’s trespass law does not depart from it. Nor shall we.<sup>84</sup>

It is this kind of argument that I am intent on resisting. To, in effect, equate a protest at a lunch counter or the defiance of a court order with secret police disappearances and gangs of enforcers roaming the streets is utterly inconsistent with taking genuine tyranny seriously.<sup>85</sup>

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83. *Walker v. City of Birmingham*, 388 U.S. 307, 321 (1967). David Luban explains the court’s errors in what is perhaps the most conclusive disemboweling of a nonsense argument in the entire corpus of legal scholarship. David Luban, *Difference Made Legal: The Court and Dr. King*, 87 MICH. L. REV. 2152, 2173–86 (1989) (demonstrating that disobedience of manifestly unconstitutional orders is actually instrumental to the rule of law); see also Paul Gowder, *What the Laws Demand of Socrates—and of Us*, 98 MONIST 360, 370 (2015) (arguing that the civil disobedient support the rule of law by accepting punishment for disobedience in democracies, and by defying undemocratic laws and undemocratic regimes).

84. *Bell v. Maryland*, 378 U.S. 226, 346 (1964) (Black, J. dissenting).

85. Murphy is concerned that I take on a too simplistic view of what those who think that private individuals are bound to the rule of law would demand. Instead, they could argue that, in her words: “To the extent that government officials fail in their obligations to adhere to the requirements of the rule of law, they undermine the conditions on which any obligation of obedience on the part of citizens depends.” Murphy, *supra* note 3, at 298. To this objection, I have two responses.

To be sure, there are many more difficult cases where what we have are lawless bands of citizens, indeed, perhaps even an entire lawless citizenry. But my account of the rule of law has the capacity to make sense of the idea of a lawless citizenry. Some kinds of private failures to follow the rule of law are the failures, not of individual citizens in their capacity as law-obeyers or lawbreakers, but of groups of citizens *as polities*. When the people of Athens ran amok and started executing generals for winning a battle too sloppily, it makes little sense to talk about the duty of ordinary citizens to obey the law: instead we can easily and sensibly talk about the duty of democracies to carry out their sovereign functions as democracies while still complying with the rule of law, because it was the citizenry itself that ran amok, as a citizenry, as a collective sovereign, not as a bunch of individuals.

Perhaps what I should have said in the book is that it is not so much that the rule of law governs states as such, as the rule of law governs systematized violent coercion, where the word “systematized” tracks the Hobbesian and Weberian properties. You can have systematized violent coercion without states in the post-Westphalian sense: you can have warlords, racist terror organizations, and mafia-dominated towns. In all these situations you have the essential stuff that gives rise to the fears that the rule of law is trying to dispatch: you have hubris on the part of those who hold power, and terror on the part of those who lack it, and in many of these cases you even have Weber-style claims to legitimacy on behalf of the violent.<sup>86</sup>

But it maybe goes too far to specifically attach the rule of law to “the state” as the central case, and to these kinds of organizations as peripheral cases—maybe systematized violence in general is the central case. (And this may also give me more resources to answer West’s worries about things like systematic but decentralized private violence.)<sup>87</sup> Of course, then I would have to give an account of how systematized private violence is distinguished from a sort of random individual violence, and I do not have a lot of confidence that I can do so. At any rate, this is a problem that requires, as we say, much further inquiry. The key idea—that it is the Hobbesian and Weberian properties that are at the

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First, in addition to the careful arguments of philosophers, we have reason to worry about the public and rhetorical impact of the claims we make, and to avoid giving ammunition to those who would uncaringly accuse the Martin Luther King Jr.’s of today of threatening the rule of law.

Second, in light of the fact that, as Murphy also suggests, it is controversial to suppose that the rule of law requires legal equality, can we confidently say that even the careful philosophers would suppose that the civil rights marchers were entitled to break the law on the grounds that the state abandoned the rule of law itself? Or would they say that the laws allowing racial discrimination were consistent with the rule of law, and hence insufficient to license disobedience?

86. Certainly the Klan has sometimes seemed like it has claimed legitimacy on behalf of some kind of conception of a white nation requiring vigilante protection. Think, for example, of the heroic portrayal of the organization in the film, *The Birth of a Nation*. *THE BIRTH OF A NATION* (David W. Griffith Corp. 1915).

87. West, *supra* note 4, at 309–10.

core of the mechanism that produces hubris and terror, and hence inflicts the evils that the rule of law aims to forbid—would be untouched by such a modification.

Not long ago, a libertarian political philosopher (and a friend) described, on social media, the people who cheered the punching of Richard Spencer at Donald Trump’s inauguration as “Stalinists.” To my mind, this exemplifies the kind of trivialization that we risk when we run together systems of state terror and ordinary private lawbreaking.<sup>88</sup> Maybe it was wrong to punch Richard Spencer—maybe we should not punch people for being Neo-Nazis. I am honestly not sure.<sup>89</sup>

But assuming it was wrong to punch Richard Spencer, it simply cannot be wrong in the kind of way that it is wrong to have KGB agents sending people to the Gulag, or even the way it is wrong for the police and courts of Ferguson, Missouri, to set up an oppressive legal system that results in three warrants per household. This has to be a difference in kind, not a difference in degree, or if it is a difference in degree, it is a difference on the order of the difference in degrees between the center of the sun and the surface of the moon.

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88. See Josh Marshall, *Should We Be Punching Nazis?*, TALKING POINTS MEMO (Aug. 28, 2017, 1:09 PM), <http://talkingpointsmemo.com/edblogger/should-we-be-punching-nazis> [<https://perma.cc/X2Y7-TLG8>].

89. If anything will convince me that it definitely is wrong, it is the tactical argument that when things devolve into street violence, fascists, having a built-in advantage in thuggery, tend to win. *See id.*

