

PAUL GOWDER'S RULE OF LAW

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Paul Gowder's book, *The Rule of Law in the Real World*,¹ is a terrific addition to the growing philosophical and jurisprudential literature on the rule of law. It sets out to accomplish several tasks—and largely succeeds. The first and major goal of the book is to introduce a novel conception of the rule of law that is grounded in the widely accepted norm that law must be general.² This is a familiar understanding of the meaning of the rule of law, but Gowder gives it distinctively unfamiliar—and quite appealing—content. Any law, Gowder argues, to be “general” and therefore compatible with the rule of law, must be backed by public reasons that can be rationally understood by all citizens, but most important, by all citizens it directly targets.³ Those reasons, in turn, must be consistent with each such citizen's basic equal worth and equality (among other requirements as well: the law must also be justified by reasons that are aimed at a sound public policy, and third, by reasons that reflect loosely the community's self-conception and values).⁴ A law justified by reasons that can be understood by the law's presumed targets only by first accepting the claim that they are inferior to others—such as a law requiring black citizens to sit in the rear of buses, or a vagrancy law forbidding both rich and poor from sleeping under bridges in the face of widespread homelessness, or theft laws that forbid the theft of food, given the existence of severe poverty—therefore, violate the rule of law.⁵ These laws can only be understood by those whom they target as resting on or justified by reasons that in turn presuppose affective commitments of the lawgiver and of the community to the inferiority, unacceptability, or indeed the contemptibility of black people, the homeless, or the poor.⁶ Particularly for those who have no choice but to commit the prohibited act—such as homeless people who must, after all, sleep somewhere, or poor people who are hungry and must eat to survive—the laws prohibiting these acts cannot be understood in any way other than as resting on a claim that these people's

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

2. *Id.* at 28.

3. *Id.* at 33.

4. *See id.* at 33, 37.

5. *See id.* at 38–40, 45–47.

6. *See* GOWDER, *supra* note 1, at 38–39, 46.

very existence is offensive, or at best that their status is lower.⁷ This claim is in turn inconsistent with the generality required by the rule of law, when that generality is properly understood as requiring not any formal or linguistic property, but rather, a commitment to the general equal worth of all citizens.⁸ Therefore, Jim Crow laws, and literacy requirements for voting, but also quite ordinary laws prohibiting theft or vagrancy, are violations of the rule of law because in each case, they are premised on reasons that in turn rest on affective attitudes that presuppose the inferiority of the groups they target—and, thus, their lack of “generality.”⁹

This is, Gowder shows, a far more ambitious and robust understanding of the “generality” required by the rule of law than the “formal” interpretation one more commonly finds at the heart of dominant interpretations of the rule of law and the Equal Protection Clause both—interpretations that typically require (at least in the legal literature) only that “like cases be treated alike,”¹⁰ with no substantive reference to either substantive equality, or the equality of citizens. An interpretation of the rule of law that requires the latter, Gowder argues, rather than the former, is both more consistent with the history of the ideal itself (drawn from English legal history)¹¹ and more consistent with the politically and morally ambitious goal of a substantively equal and fair society—a goal that is least arguably at the heart of this country’s Reconstruction amendments, as well as our history of progressive politics.

The book’s second major goal is to put to rest progressive worries about the rule of law, and its purportedly inexorable connection to the protection of property and property rights, and, therefore, its antipathy for progressive causes, particularly the amelioration of wealth disparities.¹² That worry, which has been a staple of left wing academic political and legal writing since Marx, but most recently voiced by Morton Horwitz, Gowder contends, is misplaced: the rule of law is a vehicle, not an obstacle, for progressive politics.¹³ Progressives, he argues, should “learn to love the rule of law.”¹⁴ The rule of law, he shows, understood as requiring generality in the sense he describes, is basically incompatible with a legal system that criminalizes, through laws against theft or vagrancy, poverty that renders compliance with these laws prohibitive or impossible.¹⁵ Therefore, a legal system that confers property rights—as legal

7. *See id.* at 46–47.

8. *See id.* at 31, 33, 47.

9. *See id.* at 46.

10. *Id.* at 29.

11. *See* GOWDER, *supra* note 1, at 140–42.

12. *See id.* at 47–51.

13. Paul Gowder, *Equal Law in an Unequal World*, 99 IOWA L. REV. 1021, 1023, 1071–78 (2014).

14. *Id.* at 1021–22.

15. GOWDER, *supra* note 1, at 52.

systems typically do and should do—must ensure that all citizens have sufficient resources to comply with the laws of theft that give those property rights heft.¹⁶ The rule of law then requires not just sufficient economic welfare rights so as to provide basic biological needs, but rather, sufficient welfare so as to ensure the capacity of all citizens to comply with (and to understand) fundamental laws—including whatever material resources are required to facilitate that compliance.¹⁷

Third, Gowder wants to show that these minimal welfare rights are required by virtue of the rule of law—by legalism, in effect—rather than, or in addition to, whatever may be required of a decent society by the demands of justice, utilitarianism, liberalism, Rawls's maximin, Kantian morality, or any particular constitutional scheme (etc.).¹⁸ Although he does not dwell on it as much as perhaps he should, this is an important contribution and ambition of the piece. It is the idea of law itself, Gowder contends, and not the idea of justice, or utility, or Kantian morality (etc.) that requires the provision of economic resources in any legal system that also confers property rights.¹⁹ Therefore, anyone (whether they be constitution drafters, critics, legislators, or academics) committed to the ideals embedded in the rule of law, whether or not they are also committed to social justice, Rawlsian liberalism, or Marxist egalitarianism, must be likewise committed to the eradication of poverty—at least to the degree required so as to render its property regime, and the laws that sustain it, compatible with rule of law principles.²⁰ This is a very strong claim, not only for the strategic reason that it puts the burden on the shoulders of those committed to the rule of law to worry more about poverty than perhaps they have done to date. It also provides a much-needed first step toward the end of explicating the moral value of law itself, in a healthy and admirable direction. If Gowder is correct, then law is not only premised upon, for example, the moral value to all of physical security, as Hobbes posited.²¹ It is also premised upon the moral value of the equality of persons, including to some degree the amelioration of those material conditions that render some lives so radically unequal, or lesser. That connection—between core legalistic values and substantive equality—is both not at all obvious and, if sustainable, hugely important; it would impact, for example, not only how we theorize, but also how we teach, study, and practice law quite generally.

16. *Id.* at 47–48.

17. *Id.* at 45.

18. *Id.* at 48.

19. *Id.*

20. GOWDER, *supra* note 1, at 48.

21. Robin West, *Re-Imagining Justice: Progressive Interpretations of Formal Equality, Rights, and the Rule of Law*, Georgetown Public Law Research Paper No. 12-074, 40, 48 (2003), <https://ssrn.com/abstract=2083806> [<https://perma.cc/VYN2-YBBG>] (“[The] Hobbesian Rule of Law contrasts quite sharply with the contemporary view.”).

Finally, Gowder's most ambitious goal in the piece, I think, although he does not say it this way, is to reconfigure the moral grounds of property rights in liberal legal regimes.²² A property regime that is imposed *by law*, as opposed to one imposed in some other way (by force or conquest), must itself meet moral conditions—and must do so regardless of its political commitment to constitutionalism, or to any other justificatory principles. A property regime imposed by law—through property rights protected by legal rules—to be general, and hence to be consistent with the rule of law, must ensure that all citizens have recourse to the material resources—the property—necessary to comply with all legal rules that protect property itself.²³ Thus, laws against theft—which are essential to property regimes—violate the rule of law if they coexist with extreme poverty, no less than do segregation rules or literacy requirements for voting in the context of white supremacy: like the latter, the former can only be understood as resting on reasons that presuppose the inferiority or inconsequentiality of the group they target.²⁴ This too is a vital finding. If protection of property is at the heart of liberal legal social orders, and if that protection is inconsistent with legalism itself without some provision for welfare rights, then the property regime, if structured by law, is not only not a threat to those rights but virtually requires them. This is an original and significant understanding, then, not only of the relation of the rule of law and welfare rights, but also of property itself, and its connection to the eradication of poverty.

Those I take it are the major objectives of Gowder's piece. I think he is remarkably successful in making the case for each. Gowder has a genuinely novel argument and interpretation of the rule of law that opens up a very new area of inquiry: perhaps the rule of law, properly understood, requires much more than Fullerian procedural justice or horizontal equity. If so, then we need to re-think not only our commitment to, or criticisms of, the ideal itself, but also how we think about and how we teach law.

I have four reservations. First, I am not convinced that Gowder has fully responded to the Marxist/Horwitzian complaint regarding the rule of law, for two reasons. First, to fully respond to this complaint I think requires an engagement with the intellectual history of the idea, and not just a possible theoretical reconstruction. It may well be possible to reconstruct the rule of law so as to require, rather than preclude, economic justice sorts of rights,²⁵ but that does not respond to the complaint that the rule of law has historically been associated with property rights, and interpreted in ways hostile to social justice. Second, I am not sure Gowder sees the strength of the Marxist/Horwitzian

22. See GOWDER, *supra* note 1, at 57.

23. *Id.* at 46–47.

24. See *id.* at 44, 46–47.

25. *Id.* at 47–48.

complaint that the rule of law is theoretically (and not simply historically) at odds with social justice sorts of concerns.²⁶ Gowder's response turns heavily on the insight that property law (and the theft prohibition at its core) requires the impossible of the very poor: just as vagrancy laws forbid the poor as well as the rich from sleeping under bridges, so anti-theft laws prohibit the hungry as well as the well fed from stealing food.²⁷ They are then not "general" because they cannot be interpreted in a way that does not presuppose the inferiority of the poor, the hungry, or the vagrant: they say to those targeted, "you can't comply with these laws, (because of your hunger/homelessness) but these laws are good laws required to maintain both property and public order, so you are just no good—we'd all be better off if you didn't exist."²⁸ So, because they are not general in their impact, they violate the rule of law.²⁹ Therefore, Gowder concludes, basically, the rule of law requires either that legal systems get rid of property rights—not a good idea—or that they get rid of the extreme poverty that leads to these dignity-denying interpretations.³⁰

Even if this is convincing, however, it does not counter the Horwitzian claim that by virtue of the generality at its core, the rule of law ideology (and rule of law adherents) is blind to the very real and the very particular misery in the midst of the sometimes wealthy and lawful societies in which the rule of law is regarded as key. One way to see this is by looking at Gowder's interpretation of Anatole France's complaint that "[t]he law, in its majestic equality, forbids the rich and the poor alike to sleep under bridges."³¹ Gowder understands France as objecting to the law's *lack* of generality (because the law as applied will prove fatal to the poor in ways he explicates).³² But one can as easily—I think much more easily—understand France as complaining in Horwitzian fashion about the law's blindness to poverty, precisely *because of* its obsession with generality. "The law is so obsessed with generality, it doesn't notice that some are differentially suffering." If the latter is what the comment is expressing, then it is not cured by providing only the minimum legal changes that would permit the poor to sleep under bridges without violating the law—nor, though, would it be cured by providing the poor enough shelter that they would not have to resort to bridge-sleeping. The law might make such provisions—it might make sleeping under bridges legal, or provide shelters for homeless people—but still be overly obsessed with generality, and at the cost of attending to misery. This is apparently what Horwitz means when he complains that the rule of law

26. Gowder, *supra* note 13, at 1024–25.

27. GOWDER, *supra* note 1, at 45–46.

28. *Id.* at 49.

29. *See id.* at 46–47.

30. *Id.* at 47.

31. GOWDER, *supra* note 1, at 45–46 (quoting ANATOLE FRANCE, *THE RED LILY* 95 (Frederic Chapman ed., Winifred Stephens trans., Dodd, Mead & Co., Inc. 6th ed. 1922) (1894)).

32. *Id.*

seemingly forbids “benevolent” uses of power to eradicate poverty or subordination.³³ Another way to see the problem is through a counterfactual: assume that the legal system responds to Gowder’s argument and changes the facts on the ground so that the poor are not forced to break the law when they sleep under bridges or steal bread (thus breaking theft laws). That still leaves quite a bit of poverty, or more simply a lot of misery. Can the law address that poverty, or misery, directly, by, for example, redistributing income from the rich toward the poor? Horwitz’s worry is that rule of law thinking and rule of law ideology has driven too many—e.g., F. A. Hayak and Robert Nozick—to the conclusion that it cannot: that the very idea of “law” puts burdens on progressive, redistributive understandings, of say, tort law, contract law, or for that matter tax law, because “generality” forbids this kind of eyes-open wide-awake differential treatment of rich and poor.³⁴ Even if Gowder is right that the rule of law, best understood, stands as a challenge to the forms of extreme poverty that drives the hungry to steal or the poor to violate vagrancy laws,³⁵ Horwitz may still be right that the same rule of law—the same over-idealization of the idea of generality—would stand as an obstacle rather than a facilitator of redistributive efforts, through the mechanisms of law, above this minimum.³⁶ Horwitz, to put it one final way, worries that the rule of law burdens benign uses of state power to affirmatively address poverty.³⁷ Gowder disagrees, but his response only addresses the burdens the rule of law might impose upon uses of state power to effectively criminalize conduct necessitated by poverty, not uses of state power to directly obliterate it.³⁸

My second objection is that I am not sure why Gowder wants to insist that the heart of the rule of law, under his interpretation, is *generality*, in any form.³⁹ This seems just odd. The egalitarian sorts of values that he is underscoring, and that he believes to be central to the rule of law, are equal treatment, equal dignity, and equal worth.⁴⁰ Laws that are justified by reasons that run afoul of those central values, he argues, are not general, and therefore they violate the rule of law.⁴¹ I do not know that it makes sense, though, to ascribe these values to generality. Why not leave generality out of it? The rule of law, we might think, these days, requires that laws rest on reasons that in turn respect the equality, dignity, and equal worth of all citizens. I am not sure that much is gained by

33. Morton J. Horwitz, *The Rule of Law: An Unqualified Human Good?*, 86 YALE L.J. 561, 566 (1977).

34. *See id.*

35. GOWDER, *supra* note 1, at 46.

36. Horwitz, *supra* note 33, at 566.

37. *Id.*

38. *See* GOWDER, *supra* note 1, at 46–47.

39. *Id.* at 28–29, 33.

40. *See id.* at 33, 46.

41. *See id.* at 45, 47.

claiming that there is some strong and almost logical connection between the idea of generality that has historically been at the heart of rule of law thinking, and these values. Maybe better to suggest that we need to turn a corner in rule of law jurisprudence, and move past the idea that it is all (or only, or primarily) about generality.

Third, I am not sure why Gowder is so reluctant to acknowledge, or argue, that the rule of law affirmatively requires states to protect people—and to protect people equally—against abuses of private power, particularly against abuses of power that rely upon violence.⁴² He says, correctly, that the rule of law only regulates public, not private power.⁴³ But this does not make it irrelevant to the abuses and excesses of private power. Private power, and private violence, has potency, in substantial part by virtue of, and to the extent of, a state's decision not to regulate it. It is that choice not to regulate it—a state's decision not to provide the “protection of the law” to victims of private violence—to use the phrase employed by the Fourteenth Amendment⁴⁴—which itself, I believe, violates the strictures of any sensible interpretation of the rule of law. When the southern states chose not to enforce laws against murder and assault by white citizens on black citizens during Reconstruction and Jim Crow, it was indeed structuring and facilitating white supremacy. But it was also, very directly and literally, failing to provide equal protection of the laws to those black citizens against the white citizens who terrorized them. This seems like a paradigmatic failure of the rule of law. Now, to be sure, Gowder does argue that the state's involvement in lynching in the South during Reconstruction and into the twentieth century constituted a failure of the rule of law.⁴⁵ But it did so, he argues, because, and only because, the state was either withdrawing police protection only from freed slaves in a discriminatory way, or because the state was intimately involved in Klan terror: the lynching parties often included law enforcement personnel, and even where they did not, law enforcers were aware of the criminality and deliberately permitted it to go forward.⁴⁶ Therefore, Gowder concludes, the state, by virtue of either its discriminatory animus or its affirmative complicity, failed to respect the generality of all citizens, and it did so by countenancing or participating in the murder of some by others.⁴⁷ Its laws, then, were applied in a non-general manner, conveying a meaning of lack of equality.⁴⁸ Thus, the violation of the rule of law.

It is not clear, though, why this Gowderian conclusion should be so limited, or constrained by qualifiers. But nor is it clear, at least to me, why the argument

42. *See id.* at 9–10, 53.

43. GOWDER, *supra* note 1, at 9–10, 53.

44. U.S. CONST. amend. XIV, § 1.

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

46. *See id.* at 53–57.

47. *Id.* at 57.

48. *Id.*

should proceed through the bypaths of the logic of generality. The rule of law, quite simply, *requires* some things of states—it imposes obligations upon them—and one obligation it squarely imposes is the obligation to police against the use of violence by some citizens on others, and to prevent the private sovereignties unchecked private violence creates: the citizen who can impose violence upon another, and can do so with impunity, becomes the master of the citizen who must obey. So, the ruled citizen is ruled by the Rule of his or her master. The rule of law, by contrast, I would think, requires minimally the rule of *law*, rather than a rule by some private individual exercising private force backed by private violence. A state which persistently permits violence by some citizens against others is not a state with a rule of law, simply because in such a state some individuals are ruled by that unregulated private power, rather than by state sponsored law. They are not governed by Law, because law has abdicated.⁴⁹ In the South, then, when lynchers were met only by a blind eye from the state, the Klan ran the show, not the law. There was no rule of law. There was rather the rule of the Klan.

Likewise, it seems to me, a state that under-enforces the criminal law in areas of high crime, even if it does so because the local police force lacks sufficient resources, or because they are worried that aggressive and effective law enforcement will be met with lawsuits or worse, rather than out of a malicious or racist desire to demean or degrade some subgroup, is a state in which the rule of law is absent. No recourse to the logic of generality is required to get to this conclusion. Such a state or community is not governed by a rule of law, but rather, by gangs, local crime bosses, or strongmen. Likewise, in states in which domestic violence is not criminalized—but instead, perhaps, characterized as chastisement and broadly permitted—the rule of law is absent, in the lives of those persons, largely women, who, precisely because the law has abdicated its responsibility to protect them against violence, live out their lives in a violent domestic sphere in which their Husband, not the Law, rules. There is no rule of law in a violent household where there is no expectation that the state will intervene to deter, regulate, or punish patriarchal violence. There is rule by a violent patriarch, with power delegated by the state and backed by force. At the extreme, a state which decides to close down its police forces altogether—perhaps to put those resources to other ends—or decides to quit policing against murders, against rape, or in various designated areas, would create a social world that might be rich in other respects, might have terrific schools or arts programs, a great opera company, whatever—but it would clearly not have a rule of law. And because it would not have a rule of law, inequality would be badly exacerbated: those with the private resources would self-police, and everyone else would suffer through their decidedly nasty, brutish, and short lives. That inequality would be a direct result of the state's abdication of its

49. I have made this argument at length elsewhere. See West, *supra* note 21, at 37–38, 40.

responsibility to protect all, and to protect all equally—a duty directly imposed, by the way, by the express language of the equal protection clause of the Fourteenth Amendment.

Perhaps the state has other obligations as well, by virtue of the rule of law, and perhaps one such obligation is to protect citizens against extreme need, want, or poverty. But that seems much more debatable, to me, than the idea that the state is obligated to protect us against private violence. For that reason, I do think that some additional argument is needed to reach the conclusion that the state has affirmative obligations to protect citizens' welfare. Gowder's argument that states must provide minimal welfare entitlements, because if they do not do so, those citizens will be unable to fully comply with basic legal duties—such as the duty to respect the property rights of others—or participate in basic legal structures, such as the structures of the market economy⁵⁰—seems to me a terrific place to start. Gowder wants to characterize this conclusion as following from the rule of law. That strikes me as a choice, and a wise one. I think we should understand the idea of law as having this inclusive and generous meaning: we use law to set up property regimes, so we should also use law to ensure that those regimes work to the benefit of all, and only impose obligations and expectations on all of us that can be reasonably met. I am not sure that it follows directly from any widely shared understanding of law or of the meaning of the rule of law that states must do so. But it might well from any decent understanding of our legalist ideals, and Gowder has helped us see why.

This is very exciting work! Gowder has taken not just one—but several—stalled debates and given them new life: he has given a fresh interpretation not only to the rule of law, but also of our stalemated debates over the role of welfare rights, positive rights, and economic and social justice, in liberal legal and constitutional orders. His writing is stylistically almost flawless and he brings to the project a wide base of learning—sophistication both in the legal and philosophical materials. This is a worthy contribution to several related bodies of work in constitutional law, public law theory, international human rights law, and jurisprudence. The implications of his argument are broad, deep, and inspiring. We owe him our gratitude.

50. See GOWDER, *supra* note 1, at 47.

