THE RULE OF LAW, DEMOCRACY, AND OBEDIENCE TO LAW

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In *The Rule of Law in the Real World*, Paul Gowder engages three audiences: philosophers interested in the concept and normative value of the rule of law, political scientists interested in measuring and empirically assessing the degree to which societies meet its demands, and development scholars aiming to cultivate the rule of law in contexts where it is currently absent or minimally present.[1] Gowder covers an impressive range of materials from across disciplines, and his synthesis of different strands of thought about the rule of law is brilliant.

Gowder defends a version of the rule of law that consists in three basic principles: a principle of *regularity* (which requires officials in their conduct and action to adhere to a reasonable conception of what declared legal rules permit and prohibit, especially in the coercive use of state power); *publicity* (which requires that legal rules be made known to legal subjects in advance, be justified or justifiable to them, and be open to contestation by those subject to coercion).[2] These first two principles constitute the weak version of the rule of law and provide safeguards against two kinds of threats: *hubris* (in which officials act coercively toward subjects without offering any reason for the basis of their actions, and in this way treat legal subjects as their inferiors not warranting any explanation); and *terror* (where the conditions under which officials' use of coercion is not made known to citizens in advance and so subjects are not put in a position where they can reliably determine what actions to take to avoid coercion).[3] These two conditions, Gowder argues, are mutually reinforcing.[4] This minimal version does not place demands on the substantive content of law; it does not entail respect for rights and it is compatible with unjust articulations

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1. PAUL GOWDER, THE RULE OF LAW IN THE REAL WORLD 4 (2016). The second criticism was published in my review of Gowder's book for the Tulsa Law Review. Colleen Murphy, *The Rule of Law and Obedience to Law*, 53 TULSA L. REV. (forthcoming 2018).

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

3. *Id.* at 8.

4. *Id.* at 7.

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of the conditions under which coercion will be exercised. The third condition, which transforms the rule of law from its weak to strong version is a principle of *generality* (which requires laws to treat legal subjects equally, or as equals); Gowder specifies the demand of generality as a demand to satisfy the constraints of public reason.[5] The explanation of the purpose of a particular regulation must appeal to reasons that can be reasons for those asked to obey, legislators, as well as the broader community.[6] Such reasons cannot hinge on the subordinate status of some relative to others to explain why a given rule obtains.[7] Together, these principles constitute the rule of law as an egalitarian ideal, structuring relationships of vertical equality (between legal subjects and officials) and horizontal equality (among citizens).[8]

After articulating these three principles, which he notes can be met to different degrees and which do not require any specific institutional arrangement, Gowder goes on to show how ancient Athens and contemporary Britain fared according to the criteria articulated above.[9] He then considers the conditions under which the rule of law will be stable and under which it can be cultivated in contexts where it is absent.[10] Stability turns on equality in Gowder's view; to the extent that a legal system satisfies the generality condition it is stable in part because of the commitment to the rule of law this generates.[11] Generating the rule of law is also a function of generating commitment to law as the way in which interaction between citizens and officials and among citizens will be structured, as well as fostering control of the use of force by the state among other conditions.[12]

Like all theories, Gowder's account has a certain set of starting points and basic assumptions that orient his theory. I focus on two in particular: (a) framing the principle of generality as an egalitarian principle; (b) rejecting the claim that the rule of law requires obedience on the part of citizens.

I. GENERALITY AS AN EGALITARIAN PRINCIPLE

Gowder begins chapter two with the following statement: "It is widely accepted among rule of law scholars, as well as lawyers and philosophers at large, that the law must be general—that it must treat all in the community equally, or as equals."[13] Gowder then sets for himself the task of explaining what understanding of generality we should adopt. An adequate understanding,

5. *Id.* at 7–8.
6. *Id.* at 11.
7. GOWDER, *supra* note 1, at 11.
8. *Id.* at 7–8.
9. *Id.* at 5.
10. *Id.* at 167.
11. *Id.* at 31, 76.
12. GOWDER, *supra* note 1, at 73, 75.
13. *Id.* at 28.

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Gowder claims, will be such that it helps us specify what it means for law to treat all in the community equally.[14] Before defending his considered conception, Gowder notes that some theorists do dissent with the thought that generality is an egalitarian principle, citing Joseph Raz specifically.[15] Raz, Gowder writes, rejects the idea that generality has anything to do with equality and claims that the rule of law is compatible with discrimination.[16] But, despite this caveat, Gowder states that his assumption that generality is an egalitarian principle "is neither novel nor controversial."[17]

My first point is that defining generality as an egalitarian principle requires a more robust defense. It is controversial not simply because leading theorists of the rule of law, Raz as well as Lon Fuller, flat out reject the claim that serves as Gowder's starting point (though this by itself should warrant at least some words of defense on Gowder's part).[18] It is also controversial because it is at odds with a basic intuition about the rule of law held by many (one might even say most) people. This is the intuition that the rule of law is compatible with profound injustice, particularly in the form of discrimination and gross inequality.

When numerous scholars—and ordinary citizens—think of Nazi Germany, apartheid South Africa, and the Jim Crow South in the United States, these societies are frequently characterized as ones in which regimes pursued gross injustice while respecting the rule of law. No one challenges the inegalitarian structure of these legal systems. The starting point is precisely the reverse: recognition of the profoundly inegalitarian character of such systems. Such cases are seen as challenging the strength of the moral value of the rule of law precisely because they are cases in which the rule of law is taken to have been satisfied by flagrantly discriminatory and unjust legal regimes. Governing by law does not guarantee that the law will be good law. And, so the thinking goes, this is true regardless of how robustly the requirements of the rule of law are satisfied. Put differently, Gowder's starting point is the assertion that the rule of law cannot be inegalitarian,[19] when it is precisely the intuition that the rule of law *can be* profoundly inegalitarian which troubles those who view apartheid South Africa and Jim Crow United States as paradigm cases of respect for the rule of law that was grossly unjust. From personal experience, I can say with confidence that this conviction is both widely shared and runs very deep. I have argued against it, but making the argument (on the basis of grounds that are different than

14. *Id.* at 29–30.

15. *Id.* at 2.

16. *Id.* at 29, 74.

17. GOWDER, *supra* note 1, at 28.

18. LON L. FULLER, THE MORALITY OF LAW 46–49 (3rd prtg. 1967); GOWDER, *supra* note 1, at 75–77.

19. *See* GOWDER, *supra* note 1, at 58.

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Gowder's grounds) was a case to be made and a case that was almost always met with (deep) skepticism.[20]

In addition to contesting the egalitarian character of the rule of law generally, there is reason to question Gowder's egalitarian interpretation of the generality requirement. Gowder simply stipulates that if the generality requirement of the rule of law rules out anything, it rules out the rules constitutive of apartheid or Jim Crow.[21] In his words, if any principle is not general, "Black people must sit at the back of the bus" is.[22] But this move, too, is controversial. There is nothing incoherent—at least conceptually—about rules that are general but in a discriminatory way. Good laws are not discriminatory, but it seems on the face possible that a system of law may be general but in a discriminatory manner. Indeed, scholars like Fuller explicitly reject the demand that generality requires equality.[23] Fuller writes,

> The first desideratum of a system for subjecting human conduct to the governance of rules is an obvious one: there must be rules. This may be stated as the requirement of generality. . . . the desideratum of generality is sometimes interpreted to mean that the law must act impersonally, that its rules must apply to general classes and should contain no proper names. . . . But the principle protected by these provisions is a principle of fairness, which, in terms of the analysis presented here, belongs to the external morality of the law. This principle is different from the demand of the law's internal morality that, at the very minimum, there must be rules of some kind, however fair or unfair they may be.[24]

My final point on the relationship between the rule of law and equality concerns the relationship between the rule of law and democracy. The principle of generality, as Gowder defines it, is, I will suggest, incompatible with non-liberal democratic regimes conceptually and not just empirically. The principle of generality Gowder endorses requires us to examine the expressive function of laws and consider whether they could be publicly justified to the community, the legislator, and the particular individual being asked to submit to a particular rule. At various points, Gowder mentions the compatibility of his account of the rule of law (even in its strong version) with different types of regimes, including theocratic monarchies.[25] I am skeptical that this case can be made.

Consider first the cluster of rules specifying the basis on which one assumes control of decision-making in a political community. What mode of governance

20. *See* Colleen Murphy, A MORAL THEORY OF POLITICAL RECONCILIATION 41–42 (2010); Colleen Murphy, *Lon Fuller and the Moral Value of the Rule of Law*, 24 LAW & PHIL. 239, 251 (2005).

21. GOWDER, *supra* note 1, at 42, 210.

22. *Id.* at 32.

23. FULLER, *supra* note 18, at 46–47.

24. *Id*.

25. GOWDER, *supra* note 1, at 148–49.

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can be justified to those who will be governed under it that is compatible with recognition of the equal status of all? Gowder conjectures that in a religious community power being given to the clergy may not be experienced as insulting to those who are under its rules.[26] However, the salient question is not whether it could be empirically experienced this way. Rather, the question is what kind of reason could be offered for excluding non-clergy from *political* decision-making that would be compatible with recognizing the equal status of all citizens? Any justification would appeal to the greater theological knowledge or wisdom or tradition of members of the clergy or perhaps their special standing within a community. But this seems to say that citizens are not the equal of clergy in a community, and non-equal for reasons that seem arbitrary for purposes of political decision-making. By contrast, democracy is a form of decision-making, as Thomas Christiano notes, minimally predicated on equality at key moments of collective decision-making.[27] The normative core of democracy is that all individuals have a right to have a say—and an equal say—in how they are governed, by whom they are governed.[28] Public justification seems straightforward.

Similarly, when it comes to key rights associated with liberal democracies (e.g., rights to bodily integrity, rights to political participation, rights to speech and assembly), inclusion of recognition and protection of such rights seems necessary for law to be general in the sense of respecting the equal status of all. Human rights are widely taken to be constitutive of recognizing the dignity of human beings, and reflect the basic claims and entitlements that individuals can make on others. For what possible public reasons could be offered in defense of the failure to recognize such rights?

What I am suggesting, then, is that the question of the relationship between the rule of law and liberal democracy is not only an empirical question to be asked and answered by investigation of actual societies. Rather, if the strong version of the rule of law entails generality as an egalitarian principle requiring the justification of laws on the basis of public reasons acceptable to all, the rule of law demands democracy and robust protection of human rights. This conclusion should give us pause. An underlying worry about the strong version of the rule of law is a suspicion that Gowder has conflated the rule of law with the rule of good law, building more into what it takes to have, strictly speaking, law govern. And the urge to establish conditions under which it is not only law that rules, but law that is good, overlooks resources available to critique practices and rules without the cost of conflating the rule of law as one ideal among many which societies should strive to achieve.

26. *Id.* at 158–59.

27. Thomas Christiano, *Democracy*, STAN. ENCYCLOPEDIA PHIL. (Jul. 27, 2006), http://plato.stanford.edu/archives/spr2015/entries/democracy/ [https://perma.cc/43DZ-H9KD].

28. Thomas Christiano, *The Authority of Democracy*, 12 J. POL. PHIL. 266, 274 (2004).

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II. OBEDIENCE TO LAW

A consistent commitment of Gowder is that the demands of the rule of law are demands on officials or those individuals or groups who exercise state-like power.[29] His hesitancy to include any obligation of obedience on the part of citizens is based in part on his understanding of the source of the problem to which the rule of law is a solution.[30] The law, in Gowder's view, is a safeguard against tyranny and the tyrannical use of the power of the state to oppress and unjustly use violence against those subject to its power.[31] This is why the rule of law constrains officials in their exercise of power.

Moreover, demanding that citizens obey the law risks putting citizens in a position where they are being asked to submit to their own oppression rather than putting them in a position to contest state power and its abuse. This implication would potentially undermine the notion that the rule of law is a moral good. As Gowder writes,

> If the rule of law requires ordinary citizens to obey the laws, it would require—or at least offer some defeasible reason in favor of—citizens to obey even such evil laws. In doing so, it would perpetrate injustice, and might in fact bring it about that partial satisfaction of the rule of law is worse than no satisfaction of it. While this may simply be a moral truth—perhaps the rule of law has the potential for great wickedness in its partial implementation . . . in view of the fact that we ordinarily think that the rule of law is a moral good, it is worthwhile to strive to find a version of the concept that does not have these objectionable properties.[32]

However, Gowder's concerns seem to rely on an overly simplistic view of how we should conceptualize any requirement of obedience on the part of citizens. There is room in any analysis of an obligation to obey the law for that obligation to be conditional in nature. One may have an obligation to obey the law, conditional in part on what government officials do. 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. As Fuller, who defends the claim that there is an obligation to obey the law, notes,

> [T]here is a kind of reciprocity between government and the citizen with respect to the observance of rules. Government says to the citizen in effect, "These are the rules we expect you to follow. If you follow them, you have our assurance that they are the rules that will be applied to your conduct." When this bond of

29. GOWDER, *supra* note 1, at 55.
30. *Id.*
31. *Id.* at 55, 146.
32. *Id.* at 52.

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> reciprocity is finally and completely ruptured by government, nothing is left on which to ground the citizen's duty to observe the rules.[33]

One of the places Gowder defends the claim that obedience to law on the part of citizens is not what the rule of law requires is in his discussion of lynching in the United States.[34] He references the case of Willie James Howard, whose killers were never prosecuted and whose grave went unmarked.[35] His case, like others, Gowder claims, tells us about the "instrumental complicity of state authorities in private racial terror," allowing whites to take individuals from jail, impeding chances of prosecution for those implicated in lynching, and participating in lynching in certain cases.[36] Officials were instrumentally complicit in the sense that "at those rare moments where local officials actually tried to put a stop to the lynchings, they largely succeeded."[37] He concludes, "The rule of law is a condition to be established by and through the state, and by limiting the rule of law to a critique of the state's behavior, we enable ourselves to see what the state did distinctively wrong in handling the lynchings: it withdrew its protections unequally from black citizens."[38]

In my view, the picture Gowder describes of lynchings overstates the independence of the power of the state from citizens, and, relatedly, it ignores the importance of the willingness of citizens to obey the law for the rule of law itself. To see its misleading character, let me consider another case, that of Sam Hose, a twenty-one-year-old Georgian who was lynched in 1899.[39] Sam Hose was lynched for killing his white employer, Alfred Crawford, and allegedly raping his wife, Mattie, in their home after an altercation.[40] Following the murder and alleged rape, Hose fled the town of Palmetto.[41] Local newspapers ran stories about the murder and rape, writing also that when Hose was caught he would be killed or burned at the stake and that law enforcement should not interfere with "the people's will" by protecting Hose from the lynch mob.[42] Given the gravity of the case, articles stated, the people could not be expected to wait until law enforcement and the courts weighed in.[43] Along with this narrative, Hose was described in newspapers and details of a substantial financial award were published; the award was compiled by contributions from

33. FULLER, *supra* note 18, at 39–40 (footnote omitted).

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

35. *Id.* at 54.

36. *Id.*

37. *Id.*

38. *Id.* at 55.

39. PHILIP DRAY, AT THE HANDS OF PERSONS UNKNOWN: THE LYNCHING OF BLACK AMERICA 3–4 (2002).

40. *Id.*

41. *Id.* at 4, 9.

42. *Id.* at 5.

43. *Id.*

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newspapers and wealthy businessmen as well as the governor for Hose's capture.[44] As in the case Gowder considers, police failed in their investigation, not going to the crime scene to gather evidence and only talking to the close friends and family of Crawford.[45]

What matters for my purposes is the manner in which Hose was eventually captured and what transpired between his capture and brutal death. Hose had fled to his mother's home, seventy-five miles away from the town of the murder.[46] Eventually, the owners of the farm on which his mother stayed, brothers J.B. and J.L. Jones, learned of Hose's presence and, aware of the reward, arranged with another farm worker to lure Hose to a party where he was apprehended.[47] The farm owner tried to disguise Hose prior to going on a train so that he could be delivered over to law enforcement officials as the terms of the reward required.[48] En route, a passenger recognized Hose.[49] At a particular stop, sheriffs from two counties were waiting.[50] They, the Joneses and railroad company representatives, decided that a special train would be used for the remainder of Hose's journey.[51] One hundred and fifty unofficial, armed escorts went on that special train.[52] When the train arrived at Newman, dozens more men were waiting.[53] Sheriff Joseph Brown of Newman and the Joneses were worried about the mob and agreed that they would escort him to the jail, at which point the Joneses would collect the award, and then Hose would be subsequently turned over to the lynch mob.[54] However, as he was being marched to the prison, the mob turned on the sheriff, pointing a pistol at the sheriff and demanding that Hose be turned over to them at that point.[55] The march to the final destination where the lynching eventually would take place took time, during which period trains arrived carrying spectators who had come after Sunday mass to witness the lynching.[56] All told, 4000 spectators were present to participate in or witness Hose's unspeakably brutal death.[57]

As this case makes clear, it was not simply a matter of lack of will on the part of government officials to enforce legal protections to which black men like Hose were entitled. Citizens can render futile the actions of government officials

44. DRAY, *supra* note 39, at 8.
45. *Id.*
46. *Id.* at 9.
47. *Id.*
48. *Id.*
49. DRAY, *supra* note 39, at 10.
50. *Id.*
51. *Id.*
52. *Id.*
53. *Id.*
54. DRAY, *supra* note 39, at 10.
55. *Id.*
56. *Id.* at 12–13.
57. *Id.* at 14.

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in defense of the rule of law, and the case of Hose makes clear the ways in which this was so.

To blame citizens for murder alone in cases like Hose or, taking another case, suggest they were blameless for the failure to make substantive progress on legal enforcement of school desegregation is to offer an incomplete characterization of these cases. Among the 4000 witnesses to Sam Hose's death were individuals directly responsible for his killing, and many more bystanders to his death.[58] But this characterization misses the political character and purpose of his death. Hose's death, and the role of citizens in it, was wrong not just because a human life was extinguished in a brutal manner, though it was wrong for this reason. It was wrong also because it was the demonstration on the part of thousands of citizens of a lack of willingness to restrain themselves in the way that law demands when faced with an alleged rape of a white woman and killing of a white man by a black suspect. It was wrong because of the manner in which the actions of the sheriff were rendered futile. These actions also undermined the ability of law to meaningfully govern conduct in fact. This was not an ordinary criminal murder; it was political in its purpose and impacted the possibility of respect for law by officials.

Law is a social practice. Law depends on cooperative action and interaction between citizens and officials, as well as among officials. Citizens may certainly guard against the implementation of unjust rules, as Gowder rightly notes,[59] but through their actions they can also impede the enforcement of rules worthy of protection. Citizens may render futile the rule of law-oriented activities of law enforcement officers through their refusal to comply with the restrictions and limitations law places upon the conduct of citizens. Such actions are rightly deserving of critique from the perspective of the rule of law; however, Gowder's account does not enable us to criticize such actions as inimical to the rule of law.

CONCLUSION

I have argued that we have reason to question two assumptions underpinning Gowder's analysis of the rule of law. My critical comments should not, however, overshadow the remarkable achievement this book represents. Gowder's seamless weaving together of conceptual, historical, and empirical examinations of the rule of law significantly enriches our understanding of how law operates not just in theory, but also in practice. It sets a new standard for future interdisciplinary engagements of the rule of law, and definitively shows the necessity of having such engagements.

58. *Id.* at 13–14.

59. GOWDER, *supra* note 1, at 80.

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