

**KEEPING THE RULE OF LAW SIMPLE: COMMENTS ON
GOWDER, *THE RULE OF LAW IN THE REAL WORLD***

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Let me start by just stating my *experience* of reading *The Rule of Law in the Real World*¹ because it will help make sense of the structure of my remarks. The first third of the book: I am utterly convinced, even blown away, by the elegance and persuasiveness of the argument and the analysis; even when there is merely a summary, I am helped and bettered by it. The second third of the book: I am inclined, based on the enormous goodwill generated by the first third of the book to accept—almost uncritically—the historical discussion and the conclusions drawn from it. The third part of the book: This is not written for me, probably right, probably very useful, but less interesting to me. The conclusion of the book: Back to being utterly convinced, even blown away, by the elegance and persuasiveness of the argument. But it is *with the conclusion* of the book that I start getting doubts—and start seeing the outlines of my criticisms of the book. Does what Paul says in the conclusion follow from what he said earlier in the book, especially in the first part—the part I so completely agreed with? In a sentence, I worry that the conclusion runs further ahead than the normative framework Paul has laid out can take him.

My Comment has four parts. In the first Part, I raise a general question about the nature of the rule of law. Is it an essential part of the rule of law that it be *simple*? And do we, therefore, have reason to resist—to even suspect—accounts of the rule of law that are too complex? I tentatively conclude that there really is something to the idea that the rule of law should be simple, which reveals something important about it as a concept. In the second Part, I try to flesh out my worries that Paul's arguments in the conclusion of his book may not be something he can get without sneaking in additional principles other than the rule of law. I want to be able to attack the things he attacks using the tools he uses, but I am not sure we can; I also wonder how much of a loss it is if we cannot. In the third and fourth Parts, I move outside of Paul's book, to maybe

* This paper is based on remarks given at a roundtable on Paul Gowder's book, *The Rule of Law in the Real World*, at the Central Division Meeting of the American Philosophical Association. Thanks to Paul for his response, to Matt Lister for organizing the roundtable, and to Robin West and Colleen Murphy for discussion. I am grateful to Desiree Austin-Holliday for edits on an earlier draft.

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

suggest two different things he could have concluded on (and I wish he had, and hope he will address): incarceration and immigration.

I.

Should the rule of law be simple, that is, not composed of too many moving parts? I am inclined to think that it should be. This also inclines me to think that the rule of law should probably stop with what Paul calls *regularity* and *publicity*.² I start to worry when generality comes in because this relies upon (in Paul's words) having rules that do not make "irrelevant distinctions."³ But irrelevant to whom? Or better, irrelevant under *what theory*? Regularity and publicity might entail some substantive normative theorizing, but it seems on the light side. Generality gets us thick into the weeds of questions of equality, and by that, I mean normatively substantive questions. I feel like we cannot get equality from generality unless we *start* with a theory of equality from which to *get* the right kind of equality.

I am getting ahead of myself here. We need to ask, first: Why go into the rule of law thinking that it should be simple? Not everything is simple. Morality is not simple, but it is binding all the same. If it is complex, it is complex. Democracy is not a simple thing, but it is a good thing and worth thinking about and working through all the complexities involved in it. Why should the rule of law *have to be simple*? Well, maybe it does not.

But let me try to say why it should be, and it is for a mix of reasons. It strikes me that the rule of law is something like a fundamental, baseline thing that states have to comply with. The rule of law should not have to require much more than this; it is a *starting point* in how we evaluate states. And as a starting point, it just means states should just have to do some basic things, like satisfying regularity and publicity. The idea is, no matter what the overall structure of the state is, it has to *apply* that structure in ways that are regular and public—and in kind of an all or nothing way. Regularity and publicity seem to me, too, to be relatively *formal* requirements, formality being something that (in my mind at least) is close to simplicity. I also think that being simple means being relatively easy to pick out. We can tell when a regime is not being regular and not being public; we do not need that thick of a theory to see when states act whimsically or behind closed doors.

Does Paul need to disagree with this? Certainly, he will agree that regularity and publicity are important.⁴ But he might say that *generality* is simple, too, and then we might disagree on what goes into simplicity. He might also say that the rule of law is not all or nothing; it can be more or less.⁵ So we can test

2. *Id.* at 12–18.

3. *Id.* at 28–29.

4. *See, e.g., id.* at 13.

5. *Id.* at 84.

compliance with the rule of law along regularity, publicity and also generality—it may meet the first two, but not the last. This would be a more or less conciliatory response because it might allow that we first look for simplicity, make sure it is there, and then go on to the complexity of generality.

But I think I want to equate publicity and regularity with the rule of law *simpliciter* (in Paul’s terms, I get stuck at Rule of Law 0.5).⁶ I think we should stop here because generality gets us into too much complexity; in particular, it requires us to do more in the way of substantive moral theorizing—theorizing about equality, in particular. We move away from the formal, and more or less substance free. And when we do this, the rule of law turns from something basic into something complicated. I do not have a decisive reason why the rule of law *could not* be complex; it just seems better to keep it simple.

This may go to a more general methodological preference I have. There are a lot of values. Not all values have to contain everything. The rule of law is a good thing, but it is not the *only* good thing that states can have. There are other good things, too (including equality and liberty). We aid analytical clarity when we do not pack *too much* into any one concept—even when that concept is so important and fundamental as the rule of law. Indeed, the importance and fundamentalness of the rule of law should caution us that we really *ought* to keep it simple.

II.

My concern about the simplicity of the rule of law came about from reading the stirring, compelling coda to Paul’s book: *A Commitment to Equality Begins at Home*.⁷ While I agree with Paul’s normative claims—and his diagnosis of much of what is wrong with the criminal justice system in America,⁸ I was left wondering: Are all of these really problems with the *rule of law*? Or are they really other kinds of problems? And what do we get from labeling all of these—varied and troubling—problems as problems with the rule of law? Moreover, even supposing they *all* are manifestations of rule of law problems, surely they are not all rule of law problems in the *same way*.

I do think, though, that we can go a lot of the way with regularity and publicity. Regularity condemns pretextual police stops—as not done in good faith, and not involving the “regular” application of preexisting, reasonably specific rules. This also, I think, blocks discriminatory prosecutorial and judicial decisions about charging and about sentencing. Publicity helps buttress these things—denounces “testilying,” prohibits the use of “black sites” to torture and interrogate suspects, and may open up grand jury proceedings. It strikes me that we can go far by keeping to the simpler rule of law—and I wish Paul had been

6. GOWDER, *supra* note 1, at 27.

7. *Id.* at 189–95.

8. *Id.* at 190–92.

more explicit about how this could be so, but I can see how this might slow the rhetorical charge of his conclusion.

I do not think that regularity and publicity can get us to condemn something like the *system* of fines and citations in St. Louis County—where municipalities raise revenue by ticketing people from everything from broken tail lights to excessive yard waste.⁹ It does get us the avoidance of arbitrary enforcement of these laws, and that may be enough. If these laws were enforced regularly against everyone, then we can expect the laws not to last long. So while we cannot condemn the laws as themselves violative of the rule of law, rule of law values can bring us to a point where those laws cannot survive. This, I take it, is one of the virtuous cycles of the rule of law, where formal values can lead us to good, substantive results. The connection here is contingent, not conceptual, but there is still a connection.

We may also be able to get to Paul's more controversial conclusion about the criminalization of poverty via regularity and publicity. Paul argues that if the state is responsible for putting some citizens in extreme poverty and then as a result of this, those citizens are unable to follow the law, then the state cannot arrest and imprison them for this failure.¹⁰ Paul comments (rightly) that this conclusion requires a lot in the way of empirical data.¹¹ Is the state responsible for these conditions, and if so in what way? And do these conditions really render people unable at all to comply with the law? What about the fact that some people face devastating conditions and can still obey the law? This suggests that what happens in these cases is that it is very hard to follow the law, but not impossible.

Still, if it is true that there are some cases where people simply cannot follow the law, then I think rule of law principles—a voluntary act requirement, mainly—would block the enforcement of those laws.¹² Maybe they even have access to a partial kind of excuse, such as diminished capacity. But I do not see in these excuses anything unique about poverty—they would apply to anyone who could not act otherwise. And more to the point, here is where my worry about making the rule of law do too much gains traction. Equality is a good

9. See Radley Balko, *How Municipalities in St. Louis County, Mo., Profit from Poverty*, WASH. POST (Sept. 3, 2014), https://www.washingtonpost.com/news/the-watch/wp/2014/09/03/how-st-louis-county-missouri-profits-from-poverty/?utm_term=.9e67b6234492 (last visited Feb. 1, 2018); see also THOMAS HARVEY ET AL., *Arch City Defenders: Municipal Courts White Paper*, ARCH CITY DEFENDERS 11–12 (Nov. 23, 2014), <http://www.archcitydefenders.org/wp-content/uploads/2014/11/ArchCity-Defenders-Municipal-Courts-Whitepaper.pdf> [<https://perma.cc/8JTF-VKYM>] (discussing three St. Louis County municipal courts' policies and practices that “violate fundamental rights of the poor”).

10. GOWDER, *supra* note 1, at 45–47.

11. *Id.* at 47.

12. See Jeremy Waldron in *Homelessness and the Issue of Freedom*, 39 UCLA L. REV. 295, 302 (1991), for a relevant argument that homelessness, in part, amounts to a denial of freedom.

thing; avoiding poverty is an even better thing.¹³ Do we need to make these things part of the rule of law, even indirectly? Or can we just say something like, let us give people roughly equal abilities to function and to flourish because these things are good in their own right? We might even then go on to say: a spillover effect is that when we do this, we are better able to help our citizens comply with the law—but something that is a spillover effect is not the same as something inherently in the concept of the rule of law itself.

III.

Gowder does not say much about punishment in his book, and I do not want to criticize him for not focusing on things he does not focus on—that is the lamest sort of comment on a good book you can give (“you talked about a lot of things, but not the thing I wanted you to talk about”). At the same time, I do think Paul’s overall concerns—especially as they show up in the conclusion—probably should have led him to talk about mass incarceration, and whether *that* comports with the rule of law. Instead, he talks mostly about the early stages of enforcing the law: arresting people and taking them to trial (policing, mostly).¹⁴ He does not talk about the end result of these things, i.e., punishment. But what does the rule of law say about punishment?

In order to focus the discussion, I want to assume some things about the U.S. system of punishment that are not true—that it does not discriminate on the basis of race, that it does not punish similar crimes in different ways, that it does not punish the innocent.¹⁵ Assume, then, that all or at least most people are in jail because they deserve it, and not for some other reason. Assume, that is to say, that the rule of law failures about our system of punishment does not rest on the early enforcement end. Let us just suppose that the United States locks up a lot of deservedly guilty people—people who commit violent crimes, for example¹⁶ and who do not do so for reasons of prior deprivation or necessity—and it locks them up for a long time. Should we be worried about this from a rule of law perspective? Or is a state that has mass incarceration, *so long as it is for the right reasons*, a state that can still be complying with the rule of law?

I am not sure that regularity and publicity can get us very far in objecting to mass incarceration (given my idealizing assumptions). Why could we not have a state with a relatively draconian criminal law that is *uniformly* applied, and the

13. See Harry Frankfurt, *Equality as a Moral Ideal*, 98 ETHICS 21, 21 (1987), for a discussion on the distinction between equality and having “enough.”

14. GOWDER, *supra* note 1, at 192–95.

15. See PAUL BUTLER, *CHOKEHOLD: POLICING BLACK MEN* 2 (2017) and MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* 3 (2010), for reflections on some of these themes.

16. See JOHN F. PFAFF, *LOCKED IN: THE TRUE CAUSES OF MASS INCARCERATION—AND HOW TO ACHIEVE REAL REFORM*, 2–4 (2017), for a discussion of the causes of mass incarceration in the United States.

rules (and the consequences for not following them) are clear and set out in advance? It may not be a very fun place to live, but it would still be a rule of law state. Nor, given the idealizing assumptions I have laid out above, does it seem that mass incarceration *itself*—as opposed to mass incarceration of some subset of the population—is inconsistent with generality. As I understand Paul, *legal caste* is about picking out morally arbitrary features¹⁷ and making them salient. Punishment punishes the guilty, and I do not see *that* feature—guilt—as being a morally arbitrary feature of someone. Maybe there is something that can be developed along these lines about people who have served their time and are let out—maybe this creates a sort of caste, especially when we consider the civil disabilities imposed against ex-felons. But it is not obvious how this argument should go.

Maybe the hierarchy that imprisonment causes is itself objectionable—as in Philip Zimbardo’s prison experiments, in which wardens and inmates just *cannot* see themselves as equals, or not for very long.¹⁸ But this leads to an abolitionist conclusion: prisons just are not the kind of thing that can enforce the rule of law because they put some people in authority and others in near absolute submissiveness to that authority.¹⁹ Maybe that is right, although it seems too strong. It seems at most an objection to a way of *running* prisons, not to the idea of prisons themselves (and we cannot have an objection to the idea of some people having authority over others, at risk of running headlong into anarchy). Humane, Norwegian prisons could be OK.²⁰ So let us stipulate that our prisons can become like *that*; have we removed the worry about a state imprisoning (again, we are stipulating that this is deserved punishment) a sizable percentage of its citizens?

I confess that even under these idealized conditions, it strikes me that there is something deeply incompatible between the rule of law and the carceral state. But I am hard pressed to say what it is.²¹ Could it be that the rule of law is at least congruent with a state that imprisons a lot of people? Such a state, however, looks a lot like a state that rules mostly *by force* rather than *by law*. I also see in the phenomena of mass incarceration precisely the *non*-benign trajectory that Paul worryingly hints at in the closing pages of his book.²² We have mostly become habituated to mass incarceration, and its expansion—people are

17. GOWDER, *supra* note 1, at 40.

18. PHILIP ZIMBARDO, *THE LUCIFER EFFECT: UNDERSTANDING HOW GOOD PEOPLE TURN EVIL* 204–05 (2007).

19. GOWDER, *supra* note 1, 18–20.

20. Jessica Benko, *Big Home: The Strange and Radical Humaneness of Norway’s Halden Prison*, N.Y. TIMES MAG., Mar. 29, 2015, at 44.

21. I attempt to provide an answer in *What Is Wrong With Mass Incarceration?*, although I do not rely on the rule of law. Chad Flanders, *What is Wrong with Mass Incarceration?* 14 (Sept. 4, 2016) (unpublished manuscript) (on file with author).

22. GOWDER, *supra* note 1, at 191, 195.

warehoused in prisons, and then when released, face imposing obstacles to full participation in democratic citizenship. But they are *not us*. The consensus that seemed to be emerging, to make America less punitive, is dissipating, and we are back to talk about law and order. Suppose we remove the racial tinge of this phrase and the terror it invokes. Suppose we focus just on our punishing people in large numbers. Is *that* kind of law and order in tension with the rule of law? I want to say yes, but I cannot—yet—say how.

IV.

There is another thing I would like the rule of law to be able to touch, but which I am, again, not sure it does: immigration policy. And where there are scattered references to punishment in the book—but not a sustained take on punishment—there is little, if anything, on immigration.²³ So I am led to conclude that for Paul the rule of law works within states, but not between states—although perhaps it may operate within (and between) international organizations. Still, the state seems to be the main unit of analysis, the unit that we can measure, and so we might wonder: What does the rule of law say about those whom the state interacts with, but does not govern? What does it say, in other words, about those who would enter the country and those who do enter the country, but are not authorized to enter the country by the sovereign?

Again, I want to see how far we can get with regularity and publicity—and also whether generality gets us much. I do think that there is a real problem with regularity with immigration laws, but this is something that seems to have been to the *benefit* of those who have violated them. President Obama put a priority on deporting those who had committed serious offenses, and—in general—wanted to use prosecutorial discretion in favor of letting many immigrants more or less *stay* in America, even if they were not authorized to do so.²⁴ President Trump now wants to change this, to make the enforcement of immigration laws more uniform, more consistent—and even harsher.²⁵ But isn't this *pro* rule of

23. Paul has since written a bit on immigration in his excellent essay on the Trump Administration. See Paul Gowder, *The Trump Threat to the Rule of Law and the Constitution*, NISKANEN CTR. (Feb. 3, 2017), <https://niskanencenter.org/blog/trump-threat-rule-law-constitution/> [<https://perma.cc/U72S-4BCL>].

24. *Transcript of Obama's Speech on Immigration Policy*, N.Y. TIMES (June 15, 2012), <http://www.nytimes.com/2012/06/16/us/transcript-of-obamas-speech-on-immigration-policy.html> [<https://perma.cc/8TRE-T9WW>] (“Effective immediately, the Department of Homeland Security is taking steps to lift the shadow of deportation from these young people. Over the next few months, eligible individuals who do not present a risk to national security or public safety will be able to request temporary relief from deportation proceedings and apply for work authorization.”).

25. As President Trump's former Homeland Security Secretary—now Chief of Staff—said in response to critics of President Trump's immigration policy: “If lawmakers do not like the laws they've passed and we are charged to enforce, then they should have the courage and skill to change the laws.” Devlin Barrett, *DHS Secretary Kelly Says Congressional Critics Should 'Shut up' or Change Laws*, WASH. POST (Apr. 18, 2017), <https://www.washingtonpost.com/world/national->

law, by making it more regular, and more public? President Trump will maintain that he is just applying the law, as it is written.

Or is there something here that is, in fact, arbitrary? It might be that *changing the law like this* disrupts previously held expectations, expectations that—maybe—were legitimately formed. We cannot simply turn on a dime like that, and have executive policy making change so rapidly, without really any warning. But what if the response is: well, this was *always the law* that was on the books, that Congress passed and authorized, and so not enforcing the law was always a matter of executive *noblesse oblige* and now things have changed—there is a new sheriff in town. Or maybe there is something to the idea that—expressed by Conor Friedersdorf in an *Atlantic* article—we never enforce all the laws, *all the way across the board*, so there is always the issue of selective enforcement, and about enforcement priorities.²⁶ So expectations on legitimate enforcement may create the baseline for regularity, and going back to full enforcement of the law actually makes things less regular.

But let us now see if generality helps us. I am just not sure. Just as in the case of punishment, where being guilty or innocent seemed a salient distinction, here citizen versus non-citizen also seems at least somewhat relevant. In other words, it would be non-arbitrary to say that there might be rules that regulate citizens, but not rules—or not the same rules—that regulate immigrants who are not authorized to be here. Of course, we might hold that even this does not mean that anything goes when it comes to treating immigrants, and I do want to say this, but I need to know what in the rule of law gets me there. Or maybe we want to argue that in fact, citizen versus non-citizen is at bottom an arbitrary distinction, and so generality condemns it. Generality says—being brutally brief—that we cannot create a legal caste, and we could see one being created by our current treatment of immigrants. But I take it that someone could respond that the creation of legal caste applies only to those who are part of a shared legal regime. And what (the response continues) if those who are undocumented are not really part of the same, shared legal regime? You can see how the dialogue can proceed. The response to the response would say: yes, in fact, everyone who is in a state is de facto part of that state's legal regime. Again, maybe—but this is something that needs to be developed, and I would like to see Paul develop it.

One way of putting this point—and the larger point of these last two sections—is that I would like to see the rule of law reach further: both to those who have been condemned by the law, but who still should benefit from the rule

security/dhs-secretary-kelly-says-congressional-critics-should-shut-up-or-change-laws/2017/04/18/8a2a92b6-2454-11e7-b503-9d616bd5a305_story.html?utm_term=.0df63e6609d9 [https://perma.cc/LCU2-76MU].

26. Conor Friedersdorf, *The Thorny Issue of Illegal Immigration and the Rule of Law*, ATLANTIC (Aug. 5, 2011), <https://www.theatlantic.com/national/archive/2011/08/the-thorny-issue-of-illegal-immigration-and-the-rule-of-law/243146/> [https://perma.cc/DXW7-BDU3].

of law, and those who are outside the law, but who still—I would think—deserve to be treated in accordance with the rule of law. So I will end here, giving Paul two perhaps contradictory requests: make the rule of law *less* (by making it simpler) and make it do more (by applying it to new problems).

