# RESISTING THE RULE OF MEN

PAUL GOWDER*

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*").[1] 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 RLeh 0.03 28.8 (e59Td [(h]TJTj.003 T1 0.03

Second is the problem of foreigners and borders (per Chad Flanders and Matthew Lister).

[2] What can (or should) the rule of law say about the legal relationship of those considered members of a political community with rulconsidered nonmembers?

lawless power exercised by non

een Murphy)

[3] or abusive husbands in patriarchy (per Robin West).[4] Am I right to insist that the rule of law only regulates the behavior of states, or, at

* Professor of Law (with courtesy

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most, those who come close to state-level power (i.

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privileges but such as those who held the power and the Government might choose to grant them.[13]

. . . .

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.[14]

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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.[16]

## 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.[17] 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"?[18] As I

16. *Id.* at 39.

17. There may be some reason to argue about whether we should interpret regularity as

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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.[19] 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.[20] 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

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implications of the enterprise of subjecting human behavior to rules.[22] 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.[23] 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."[24]

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.[25] 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,[26] 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).

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to no one deny or delay right or justice,"[27] 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.[28] 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 V68C.8 (s)2.9 (t)5 Td

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.[33] 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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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." "

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## 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.[40] 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

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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.[51] 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,[52] 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 wouldTc 0.001 Tw [(erd(e)0.8 73 (ar)2.

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the Weberian property).[65]

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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.[69] 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."[70] 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

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.[77]

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.[78]

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,

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.

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respect for judicial process is a small price to pay for the civilizing hand of law,

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To be sure, there are many more difficult cases where whatMCID 0 ,ID 0 z ( b)10.4 (e TJ 88lET 137