PAUL GOWDER'S RULE OF LAW

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Paul Gowder[1] argues, to begin with, that a 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

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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 lowly.[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–

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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 ideal 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 overidealization 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,

should proceed through the bypaths of the logic of generality. The rule of law, quite simply,