Property and the Rule of Law

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Paul Gowder, *Equal Law in an Unequal World*, 99 **Iowa L. Rev.** 1021 (2014).

Paul Gowder's article *Equal Law in an Unequal World* is an exceptionally fine piece of scholarship, and 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 piece is to introduce a novel conception of the Rule of Law that is grounded in the widely accepted norm that law must be general. This is a familiar understanding of the meaning of the "Rule of Law," but Gowder gives it distinctively unfamiliar—but ultimately quite compelling—content. Any law, Gowder argues, drawing on an emergent moral-philosophical literature elucidating related concepts, 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. 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). 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 (etc.) 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. 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, or unacceptability, or indeed the contemptibility of black people, or the homeless, or the poor. 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 their very existence is offensive, or at best that their status is lower. 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. 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."

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 "likes be treated alike," 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) 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 article'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. That worry, which has been a staple of left wing academic political and legal writing since Marx, but most recently voiced by Morty Horwitz, Gowder contends, is misplaced: the Rule of Law is a vehicle, not an obstacle, for progressive politics. Progressives, he argues, should "learn to love the Rule of Law." 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. Therefore, a legal system that confers property rights—as legal 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. 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.

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 distributive justice, or utilitarianism, or any particular constitutional scheme, or liberalism, or Rawls' principles of justice, or Kantian morality (etc.). Although he doesn't 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. Therefore, anyone (whether they be constitution drafters, or critics, or legislators, or academics) committed to the ideals embedded in the Rule of Law, whether or not they are committed to social justice, or 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. 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. 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.

Finally, Gowder's most ambitious goal in the piece, I think, although he doesn't say it this way, is to reconfigure the moral grounds of property rights in liberal legal regimes. 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 rule—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. 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 face 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. 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. I suspect this article, along with Gowder's earlier and related work on the Rule of Law, will have a considerable impact, not only on Rule of Law Scholarship, but more broadly on jurisprudence and constitutional law scholarship as well. The thesis is novel and deep: the Rule of Law scholarship, with only a few exceptions, has dwelt on the purported procedural virtues of law, (Fullerian understandings of the requirements of generality, prospectivity and the like) on the requirements of formal equality (the like treatments of likes), the requirements of notice, and the idea that law bind the lawmaker as well as its subjects. Both Rule of Law devotees and Rule of Law critics have for the most part accepted these definitional limitations. 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. 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 three reservations about the overall argument. First, I'm not convinced that Gowder has fully responded to the Marxist/Horwitzean complaint regarding the Rule of Law, for a number of 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 sort of rights, but that doesn't 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, though, I'm not sure Gowder sees the strength of the Marxist/Horwitzean complaint that the Rule of Law is theoretically (and not simply historically) at odds with social justice sorts of concerns. 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. They are then not "general" because they cannot be interpreted in a way that doesn't 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." So, because they are not general in their impact, they violate the Rule of Law. 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.

Even if this is convincing, however, it doesn't counter the Horwitzean claim that by virtue of the generality at its core, Rule of Law ideology (and Rule of Law adherents) are 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 French's complaint that "the law in its majesty forbids the rich as well as the poor from sleeping under bridges." Gowder understands French as objecting to the law's *lack* of generality (because the law as applied will prove fatal to the poor in ways he explicates). But one can as easily understand French as complaining in Horwitzean 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 isn't cured by providing only the minimum legal entitlements that would render the poor able to sleep under bridges without violating the law—nor, though, would it be cured by providing the poor enough shelter that they wouldn't 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 I take it is what Horwitz means when he complains that the Rule of Law seemingly forbids "benign" uses of power to eradicate poverty or subordination. 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 to the conclusion that it cannot: that the very idea of "law" puts burdens on progressive, redistributive understandings, of say, tort law, or contract law, or for that matter tax law, because "generality" forbids this kind of eyes-open, wide-awake differential treatment of rich and poor. 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, 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.

My second objection is that I'm not sure why Gowder wants to insist that the heart of the Rule of Law, under his interpretation, is *generality*, in any form. This seems just odd. The sorts of values that he's underscoring, and that he believes to be central to the Rule of Law, are equality, dignity, and equal worth. 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. I don't 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'm not sure that much is gained by 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's all (or only) about generality.

And third, and finally, I'm not sure who the audience for Gowder's piece might be, and although sometimes there's no need to specify, here there might be. Is it Rule of Law philosophers? Statesmen and legislators? Judges? Constitution drafters? Constitutional lawyers? He indicates throughout (but particularly and explicitly at the end of the piece) that he believes his argument should inform interpretation of the Equal Protection Clause of the Fourteenth Amendment. That suggests an audience: if Gowder is right, then his conception of the Rule of Law might in turn influence the path of constitutional law. Perhaps that connection should be made explicit, and the full legal argument for it provided. Otherwise, the piece still stands as an important contribution to an ongoing debate, and literature, among political philosophers and some legal theorists regarding the Rule of Law. But beyond the constitutional-interpretation payoff, it isn't clear what of our current legal doctrine or doctrinal debates the argument should impact, and how. I can imagine all sorts of possibilities: it could affect, for example, international "Rule of Law" projects, or alternatively, it could affect, very generally but perhaps powerfully, how judges and legislators (and educators) think critically about ordinary domestic law—from tort to contract to property law. But it would be helpful if these implications could be drawn out. Perhaps that's a larger and contemplated project.

This is very exciting work! Gowder has taken not just one—but several—stalled debates and given them new life: he's 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. It is an excellent example of interdisciplinary work in law and philosophy that nicely illustrates the value of the genre. This is a worthy contribution to several related bodies of work as well, in constitutional law, public law theory, international human rights law, and jurisprudence. The implications of his argument, in other words, are broad as well as deep.

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