CAN THE RULE OF LAW APPLY AT THE BORDER? A COMMENTARY ON PAUL GOWDER'S *THE RULE OF LAW IN THE REAL WORLD*

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INTRODUCTION

In his excellent new book, *The Rule of Law in the Real World*, Paul Gowder deftly combines historical examples, formal models, legal analysis, and philosophical theory to provide a novel and compelling account of the rule of law.[1] To my mind, the most important and interesting contribution of the book is in providing a strong argument for the claim that the core of the rule of law is not to be found in any particular institutional scheme, but rather in the idea of social equality within a state.[2] Using the idea of social equality, Gowder is able to show how the rule of law may be instantiated in a wide variety of institutions, so long as these institutions allow a significant enough portion of the population to coordinate and therefore control the use of political power.[3] Importantly, this account of the rule of law also allows us to see how it can come in degrees and apply to some people but not others within a given society.[4]

At the core of the rule of law, Gowder argues, is the "mechanism [of] commitment: the rule of law will exist and persist only if the members of a political community can see how it preserves their equal status, and are able to commit to coordinated enforcement of the law against the powerful."[5] As Gowder deftly shows, this commitment and coordination can be brought about in a number of different ways, and has been successfully instantiated in different forms at different times, including the mass juries of ancient Athens,[6] the

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4. *Id.* at 146–47.
5. *Id.* at 5.
6. G

OWDER, *supra* note 1, at 79–85.

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interests of current community members reach out to those who are not (yet) members. These connections can come in stronger and weaker forms. I have elsewhere argued that states have an obligation, founded in considerations of justice, to provide admission to at least "immediate" family members.[24] If this claim is right, then this is likely the strongest and clearest example of "reaching out" to current nonmembers, but many others are possible. We may find such ties in connection with "personal" relationships other than those of the family,[25] such as friendships, collaborative relationships, and potential intellectual interlocutors.[26] Even much more formal, or less intimate, relationships can ground a relevant connection, such as that of a would-be employer and employee, or a student with a university.[27] Further ties to the community are possible, but beyond this point they become increasingly weak, and it is less clear that they can ground significant rule of law weight. However, when I come to discuss practical applications below, I will show how these ties might well justify establishing practices that would extend beyond cases with close ties themselves.

The second method of drawing in outsiders to a political community, and hence including them, at least to a degree, under the rule of law depends on the application of universal norms, including human rights norms, norms protecting refugees and others fleeing danger, and a more general moral principle requiring treating people in ways that they could in principle agree to. These are norms

24. *See* Matthew Lister, *Immigration, Association, and the Family*, 29 LAW & PHIL. 717, 735 (2010); Matthew Lister, *The Rights of Families and Children at the Border*, *in* PHILOSOPHICAL FOUNDATIONS OF FAMILY AND CHILDREN'S LAW 153–70 (Lucinda Ferguson & Elizabeth Brake eds.) (2018).

25. Luara Ferracioli has argued that many ties of this sort—she considers in particular friendships and creative collaborations—should ground rights as strong as those applied to the family. *See* Luara Ferracioli, *Family Migration Schemes and Liberal Neutrality: A Dilemma*, 13 J. MORAL PHIL. 553, 568–70 (2016). I argue against this claim in Lister, *The Rights of Families and Children at the Border*, *supra* note 24, at 159–64, but will not rehearse that argument here. Even if I am correct, the important point is that there is some tie here, and it can be enough to justify extending the rule of law to cases where these ties are found.

26. The United States Supreme Court rejected such grounds in *Kleindienst v. Mandel*. 408 U.S. 753, 765–70 (1972). The bare possibility that such grounds might be recognized was revived in the controversy surrounding the denial of a non-immigrant visa to Tariq Ramadan when he was to take up a position as a visiting professor at Notre Dame, a case which arguably fits within the paradigm of the lack of the rule of law at the border, and which is especially relevant in relation to the doctrine of consular non-reviewability discussed below. *See* American Acd. Religion v. Chertoff, No. 06 CV 588 (PAC), 2007 U.S. Dist. LEXIS 93424, at *3 (S.D.N.Y. Dec. 20, 2007).

27. Interestingly, though this is not by design on my part, this list of connections bears a strong resemblance to the exceptions to the Trump Administration's "travel ban" put in place by the Supreme Court, providing some further reason to think that connections of this sort can establish enough of a connection to a political community to ground some degree of rule of law protections, even if not the full panoply. *See* Trump v. Int'l Refugee Assistance Project, Nos. 16-1436 (16A1190), 16-1540 (16A1191), 2017 U.S. LEXIS 4266, at *12 (U.S. June 26, 2017).

extending the rule of law to the border. Furthermore, the tendency that comes from adopting universal norms has not only a self-interested aspect (each of us might benefit from these norms being applied in some cases) but also trains us to see the law as even more general than before, applying to all people, at least

false or misleading statements or does not have the correct documents.[33] Currently, only extremely limited review of an order of expedited removal is available—to see if the person ordered removed is a U.S. citizen, a permanent resident, or has a well-founded fear of persecution.[34] Hearings on the merits are not available, even if the officer is acting arbitrarily.[35] This policy clearly violates the rule of law. Good grounds for reform lie along similar paths as noted above. Some minimal form of review—a requirement to clearly state and provide reasons, ones which can be articulated and understood—flow from general principles of law found in universal instruments accepted by all decent states. When there are ties to current members, more ought to be required, including at least a modest degree of review by decision-makers independent of the Customs and Border Patrol, even if not full administrative trials of the sort typically found in immigration hearings. Making these reforms would go a significant way toward changing the border from a lawless to a lawful zone.

IV. AMNESTY FOR UNAUTHORIZED IMMIGRANTS AND THE RULE OF LAW

As part of the 1986 immigration reforms undertaken by the Reagan administration, several million migrants living in the United States without authorization were made eligible for an amnesty program, leading to their eventual access to permanent residency.[37] While the benefits of bringing a large number of people out of the shadows and the grey or black economy is clear, opposition to future regularization or amnesty programs has proven to be one of the largest stumbling blocks in attempting to further reform the U.S. immigration system.[38] One particularly important argument is that granting amnesty to unauthorized immigrants both rewards lawbreaking and encourages future lawbreaking.[39] These arguments, assuming they are made in good faith, suggest an incompatibility between such amnesty or regularization programs and the rule of law.[40]

Even if an amnesty for unauthorized migrants presented worries for the rule orCo43 (i)5.l5ea58 </o(th)5.l5ese4 -0.001 Tcumi-1.22092 Tw -1.1.220925en i-s1 Tl fen0 3.z n tw ( )Tj -.4
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