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# Is Rule of Law an Equilibrium Without Private Ordering?

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# Is Rule of Law an Equilibrium Without Private Ordering?

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## I. Introduction

Almost all theorizing about law begins with government. Ellickson (1991) sets out the conventional dividing line between social norms and law: law is the subset of norms that are created and enforced by governments. Political theory takes the idea that law is the province of government for granted and focuses on the processes and principles by which the substance of law is determined. Economic analysis of law focuses on the behavioral incentives created by public sanctions—fines, damages, imprisonment; the relational contracting literature, for example, distinguishes between formal contracting, meaning contracts enforced by the state, and informal contracting, meaning contracts enforced by reputation and repeat play (Hadfield and Bozovic 2015). Dixit (2004) explores the role of non-governmental mechanisms to enforce contracts and property rights, describing this as the study of “lawlessness and economics.”<sup>1</sup>

The idea that law is fundamentally about government is at the core too of both theoretical and pragmatic work on the rule of law (Hadfield and Weingast 2015). The rule of law is widely defined in terms of the control of government. Hayek [1944 (2007), p. 48] defined the rule of law as “government. . . bound by

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<sup>1</sup> See also Ostrom (1990), Skarbek (2013) and Leeson (2014).

rules fixed and announced beforehand.” The World Bank (2003), like other international agencies, defines the rule of law as obtaining when “government itself is bound by the law” and access to justice is routinely defined in international debates as access to the resources needed to obtain the protections of, and protection from, the centralized enforcement agencies of government.

In a series of papers beginning with Hadfield and Weingast (2012) we have challenged this orthodoxy, placing private participation in the enforcement of law at the center of a theory of law. We argue that legal order is a distinctive form of normative social order. The critical public component that distinguishes legal from social order is not public enforcement but rather a public, common knowledge, and stewarded normative classification institution that designates what is and what is not acceptable conduct, by any type of actor, public or private, in a community. Law emerges, we argue, to better coordinate and incentivize decentralized collective punishment (that is, private ordering: sanctions imposed by individuals not in an official capacity.<sup>2</sup>) It emerges in response to the demand for a centralized institution that facilitates deliberate social change in response to changes in the environment, values, and knowledge. It becomes especially important in light of the increased ambiguity about what counts as right and wrong that accompanies the increased economic

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<sup>2</sup> The term “private ordering” is used in a variety of ways in the law and economics literature. Williamson (1985) uses it as we do here to refer to private mechanisms to enforce agreements. Others use the term sometimes to refer to wholly private rules systems, where rule are both written and enforced by private actors (e.g. Bernstein 1992) and sometimes to refer to private enforcement only (e.g. Bernstein 2016).

specialization and social differentiation that growth, mobility, and economic integration generate.

Our work to date shows that the social order produced by a centralized classification institution supported exclusively by decentralized enforcement is characterized by several normatively attractive features. We call these features *legal attributes*. They include features routinely understood in the legal philosophical literature as characteristic of the rule of law: general rules that are published, clear, and stable, applied in processes that are open and unbiased, and which produce results that are consistent with the rules as announced. What is important about this result is that the legal attributes we identify do not arise from normative claims about what features a regime properly called “legal” should possess (Fuller 1969, Waldron 2008, 2011). Nor do they arise from a reliance on intuition to unpack the concept of “law” as it is used in ordinary, or even professional, language (Raz 2009).<sup>3</sup> Rather, they arise from our positive analysis of what it takes to sustain an equilibrium based on centralized classification when enforcement requires the voluntary participation of ordinary citizens. In our “what-is-law” approach, the legal attributes are necessary to secure coordination and incentive compatibility in a regime of fully decentralized enforcement. Without them, the effort to sustain an equilibrium based on centralized classification fails. A regime characterized by rule of law is the only equilibrium, we argue, when enforcement of public classifications relies exclusively on private enforcement.

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<sup>3</sup> “It is a criterion of adequacy of a legal theory that it is true of all the intuitively clear instances of municipal legal systems.” (Raz 2009, p. 104)

The question we ask in this paper is: is rule of law still an equilibrium in a regime in which enforcement is fully centralized, that is, without any role for private ordering? This is the form of enforcement taken for granted in most political and economic theory. But we think the taken-for-granted assumption that a rule of law system is based on a regime that relies exclusively on centralized enforcement—the normal assumption about government—is highly problematic. Indeed, we think the answer to our question is: no. Nothing in the model of equilibrium social order produced by centralized classification and centralized enforcement leads us to predict the achievement of a stable equilibrium characterized by the legal attributes that make up the rule of law. Without the discipline imposed by the need to incentivize and coordinate private enforcers, a government may succeed in using centralized enforcement power to induce people to conform their behavior to its demands. Although this government may in some transient sense attempt to observe rule-of-law limitations, but there is no structural pressure on that government to observe the rule of law in a stable and enduring sense.

We build our argument as follows. In section II we present the what-is-law model of Hadfield and Weingast (2012), which demonstrates that the presence of the legal attributes that most legal theory has merely asserted are characteristic of legal orders, such as generality, clarity and neutrality, can be derived from a minimal normative premise about what constitutes law in a setting where all enforcement is decentralized and private. That premise is that anything we want to productively define as law must, at a minimum, have the capacity deliberately

to adapt the content of the rules without disrupting equilibrium. In Section III we turn to the question of our title, whether rule of law is an equilibrium in the absence of private ordering. We begin this section with a more careful treatment of the definition of the rule of law. We then consider whether a regime that has the capacity deliberately to adapt the content of rules but is not dependent on private enforcement must implement the rule of law in order to secure equilibrium. We argue that it does not. Section IV concludes our discussion with observations about the implications of this analysis for the project of building rule of law in the poor and developing countries around the world that lack productive legal order.

## **II. Putting the Private at the Center: The What-Is-Law Model**

All human societies are characterized by normative social order. This form of order identifies rules of conduct that partition acceptable conduct from unacceptable. Even the simplest human societies are chock-a-block with rules: about what can be eaten, worn, said, or done (see e.g., Hoebel (1954)). Enforcement of these rules is a matter of collective social behavior. Rulebreaking is penalized through collective criticism, mocking, exclusion from benefits, ostracism and, sometimes, physical punishment (see e.g. Weissner 2005).<sup>4</sup> Even when retaliation appears to be individualized, as when the family of

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<sup>4</sup> Compare this idea of social sanction with Hart's (1961 [2012]) account of the internal aspect of rules: "What is necessary is that there should be a critical reflective attitude to certain patterns of behavior as a common standard, and that

a murder victim seeks revenge by killing the perpetrator, the stability of this form of punishment generally rests on collective participation in the sense that the retaliatory murder is viewed by the community as justified and not itself wrongful; the community participates in the punishment by not interfering (Hadfield and Weingast, 2013).<sup>5</sup>

This form of enforcement is private in the sense that it is carried out by ordinary individuals not acting in any official capacity. Individuals participate in punishing a transgressor as a matter of choice. The transgressions they punish are, however, fundamentally public: the transgressions are the product of social processes for determining what is acceptable and what is not. This process distinguishes the violation of a social norm from conduct that another individual simply objects to. An individual may personally object to men wearing shorts in the workplace because he or she thinks it makes men look weak or not serious. But this objection is based on a social norm only if the individual's community collectively shares the view that men should keep their legs covered on the job and, further, people of this community are willing to undertake costly actions to help police this norm.

In human societies before the development of sophisticated social and governance structures, normative social order is organic. We mean by this that the normative *classification* of conduct as wrongful (warranting punishment) is

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this should display itself in criticism (including self-criticism), demands for conformity, and in acknowledgements that such criticism and demands are justified, all of which find their characteristic expression in the normative terminology of 'ought', 'must', and 'should', 'right' and 'wrong'." (p. 57)

<sup>5</sup> Of course, sometimes this form of punishment is not stable but rather sets off blood feuds that spiral out of control.

emergent, a result of repeated interactions. In a stable organic social order, we can identify what is punishable and what is not, but we cannot identify any formal source of classification. Classification occurs through informal group discussions (Wiessner 2005) or simply as a matter of practice. Thus, the normative social order is not the product of directed enforcement action by public officials.

Normative classification in an organic social order can change in response to changing circumstances or knowledge, but change is itself organic. It emerges, or not, from shifts in informal discussions and changes in practice, often in the face of various forms of shocks (changes in exogenous variables). Given the radical egalitarianism that characterizes much of early human society (Boehm 1993, 2012), no leaders exist who are capable of both announcing new classifications and inducing people to shift their enforcement activities from the old to the new. Classification is for this reason likely to be relatively slow to change and hard to channel. The people of Papua New Guinea, for example, have had for time out of mind a rule that only men can plant and harvest yams; only women plant and harvest sweet potatoes. A woman who plants yams may be beaten. A man who plants sweet potatoes will be ridiculed and shunned (Sillitoe 1981). Even if his family is starving because the yam crop has failed, he will go perhaps a long time before touching the sweet potatoes. And even if the group moves to an area where yams are difficult to grow, it may take generations before the norm changes to accept routine male participation in the production of sweet potatoes.

Both Hart (1961 [2012], p. 92-93) and Fuller (1969, p. 55) attribute the development of formal legal systems to the need for a more deliberate means of adapting normative classification to changing or complex circumstances. They both imagine the possibility that a simple and stable society of homogeneous participants could exist based solely on what Hart calls primary rules of behavior; that is, the rules regulating behavior in a given society. But both scholars propose that such a society would be slow to adapt to changes in the environment or circumstances or population. It is then, they say, that what Hart calls *secondary rules*, are likely to emerge. These are the meta-rules that establish the validity of primary rules, often in the face of dispute—resolving ambiguity and disagreement about which rules are valid ones, how a rule is validly changed, and how it is to be applied in concrete, sometimes novel, circumstances. In a society with a stable legal order in Hart’s sense, the secondary rules are effective: when the legal institutions that determine validity announce a change in rules or their interpretation, enforcement shifts from the old to the new.

In our what-is-law approach to the phenomenon of legal order (Hadfield and Weingast 2012) we focus on the problem of enforcement and in particular what it takes for enforcement to follow an institution that is capable of changing the rules. We build a formal model based on the idea that, as societies move beyond simple stages, the demand grows for more efficient and timely adaptation through some form of official *classification institution* to resolve ambiguity about what is and what is not punishable conduct.

We develop this model without any shift in the enforcement mechanisms of organic social order. Our model identifies legal order as a normative social order in which classification of behavior is supplied by a centralized classification institution that has the capacity to supply deliberate content to classifications. Importantly, we do not assume that law necessitates a shift to centralized enforcement authority: transgressions continue to be punished by decentralized collective punishment – the same sanctions that support organic social order. We examine the conditions under which a candidate classification institution is capable of sustaining an equilibrium in which there is exclusively decentralized collective enforcement of the behavioral rules it articulates.

Our approach frames the analysis in terms of the need to coordinate and incentivize individuals—whom we model as ordinary economic agents with standard preferences (that is, not pro-social preferences)—to engage in the costly activity of third-party punishment.<sup>6</sup> In particular, individuals have to be willing to orient their punishment behavior around the classifications announced (and potentially changed from time-to-time) by the classification institution.

Meeting the constraints of coordination and incentive-compatibility, we show, requires that the classification institution possess several features. The overall classification scheme has to be sufficiently convergent with the

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<sup>6</sup> We make this assumption for methodological reasons, not because we think it is the most accurate account of the psychology of actual human beings. Building models based on this minimal assumption about human motivation increases the robustness of our approach and allows us to avoid limiting ourselves to explaining law in settings in which humans possess the pro-social preferences that obviate any need to discipline their behavior to achieve pro-social goals. See Hadfield and Weingast (2015) for a discussion of the limitations we perceive in models based on pro-social preferences.

classifications preferred by individuals who are required for enforcement. That is, potential enforcers have to conclude that life for them in an equilibrium coordinated by the classification institution is at least as good as life in the alternative if equilibrium is not achieved.<sup>7</sup> We call this feature *qualified universality*.<sup>8</sup> In the absence of qualified universality, a classification institution fails to sustain equilibrium because enforcers won't enforce. Other features of the content of classifications and their application that we argue are necessary to sustain induce enforcers to enforce and hence sustain equilibrium are: *publicity; clarity, non-contradiction and uniqueness; stability; prospectivity and congruence* (between classifications as announced and classifications as enforced); *generality; impersonal, neutral, and independent reasoning; and openness* (to new arguments about how conduct should be classified).

We call these features *legal attributes*.

In a recent paper (Carugati, Hadfield and Weingast 2015) we use a thought experiment in the context of the legal system in Ancient Athens to demonstrate the relationship between decentralized enforcement by ordinary (non-official) individuals and the legal attributes. During the Classical period (508-322 BCE), Athens possessed a centralized classification institution consisting of a legislative assembly, written laws, unwritten customs, and popular

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<sup>7</sup> The alternative could be disorder or it could be some other form of normative social order.

<sup>8</sup> We describe a set of rules as "universal" if they address the needs and interests of everyone in society. Our model predicts that universality will be qualified, in the sense of not necessarily extending to everyone in society; in particular, we expect that only the needs and interests of those people who are needed for effective collective punishment will be reflected in the rules.

courts. Citizens—native Athenian males—could bring suit if they felt they had been the victim of wrongdoing or if they sought to prosecute for a wrongdoing that caused harm to others or the public at large.

To bring a suit, Athenians had to identify written laws that were allegedly violated. The case was heard by a jury—ranging in size from 201 to 6000—of randomly selected citizens who voted on a verdict in a secret ballot, without discussion, after hearing each party make his case. These procedures took place in public and in particular were matters of common knowledge—spectacles in the agora.

Enforcement of a verdict—an order for a defendant to pay damages or a fine, for example—was decentralized and collective, a form of private ordering. Athens did not maintain a centralized enforcement agency; no officials had both the responsibility and the means to execute a judgment. The plaintiff who secured the verdict was responsible for carrying out the judgment—going to collect the money owed or seize sufficient property to satisfy the order. To collect was a collective act, we argue, because a successful plaintiff likely needed the support of other ordinary individuals to take what was (now) his. At a minimum, he needed others to voluntarily acquiesce in his efforts—not to interfere if he was required to use force to get what he was owed. For some—notably the friends and supporters of the losing defendant—acquiescence may have been costly. Indeed, we emphasize that the Athenians were aware that encouraging people to condition their judgments and efforts to help or hinder collection efforts on the jury verdict required them to ignore personal

assessments and affinities; to choose to act neither on the basis of enmity nor favor but rather on the basis of the law alone—the jurors' oath said as much (Harris 2006).

To achieve effective private collective enforcement of jury verdicts required both coordination and incentive compatibility. Coordination is necessary because we presume that an individual will only participate in helping to enforce legal rules if others are also going to help. This coordination may have been a consequence of the nature of the necessary enforcement efforts: taking the property of a robust owner, for example, probably required a little ganging up. But more generally enforcement required confidence that even unilateral enforcement efforts would not themselves be deemed to be violations of the law (against theft, for example). This coordination required that a punisher had confidence that fellow citizens would use the same classification scheme as he was. Coordination was achieved by the existence of a unique, formal, common knowledge system with clear judgments—conditions that the Athenian verdicts clearly satisfied.

The more subtle issue is incentive compatibility. Our thought experiment seeks to illuminate the problem of incentive compatibility by asking, what would you do? Suppose you are a friend of the successful plaintiff. Will you help him to collect, taking the risk that the defendant will fight back or retaliate? Suppose you are a friend of the losing defendant. Will you aid your friend even if doing so entails interfering with the successful plaintiff who asks no more of the losing party than that he honor the court's judgment?

We don't have direct evidence about what people in fact did in Ancient Athens. But we have good reason to believe that, systematically, people helped successful plaintiffs to carry out the judgments they secured from the jury. We infer this from two things. First, the Athenians frequently litigated—some estimates suggest Athenian courts heard between 2000 and 8000 cases a year, which is a litigation rate for a population of 250,000 (of whom only 30,000 were citizens with direct access to courts) comparable to modern-day Germany, France, and England.<sup>9</sup> A high rate of litigation doesn't prove that litigation was routinely effective in securing redress, but it is hard to understand why the Athenians continued to make use of this costly institution if it was all theater that failed to produce redress.

Second, the Athenians enjoyed extraordinary levels of prosperity and stability in the ancient world. A basic premise of the economic analysis of growth and development is that a successful economy requires a reasonably reliable mechanism for enforcing contracts and property rights (North 1981); and it is a basic premise of political theory that a stable political regime requires confidence that the structures of governance and norms of behavior are reasonably well observed. For these reasons we think that the Athenian system routinely provided redress, and that Athenians must have been willing to bear the costs and risks of helping to enforce jury verdicts.

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<sup>9</sup> Rates in these modern-day settings vary between five and nine per 100 persons (Hadfield and Heine 2016). In Athens the rate was between 7 and 27 per 100 citizens and between 1 and 3 per 100 persons (including women, slaves, and foreigners who had no direct access to regular courts—claims on their behalf had to be brought by citizens.)

Using the model of Hadfield and Weingast (2012) as a guide, we argue that ordinary Athenians were willing to participate in the private enforcement of jury verdicts based on public classification of wrongdoing by the jury because they looked to the equilibrium order secured by their classification institution (the laws, the assembly, the jury, the procedures all followed) and saw in that order a better life for themselves than the alternative. That alternative was the chaos and bloodshed of the previous several hundred years, a history of tyrants, warring factions, and elite rule. If ordinary citizens were not willing to help enforce the laws, the equilibrium they enjoyed would fail.<sup>10</sup>

This point was not lost on the Athenians. The great Athenian orator, Demosthenes, urged the point upon the juries he addressed:

*And what is the power of the laws? Is it that, if any of you is attacked and gives a shout, they'll come running to your aid? No, they are just inscribed letters and have no ability to do that. What then is their motive power? You are, if you secure them and make them authoritative whenever anyone asks for aid. So the laws are powerful through you and you through the laws. You must therefore stand up for them in just the same way as any individual would stand up for himself if attacked; you must take the view that offenses against the law are common concerns.*<sup>11</sup>

We argue that it was not blind absorption of this call to help with enforcing the democratic legal order that led to its stability. Individual Athenians had to

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<sup>10</sup> There is a free-rider challenge in this equilibrium, which we do not address here. In Hadfield and Weingast (2012) the challenge is overcome in a small punishment group because participation in punishment in equilibrium is a signal of the ongoing acceptability of the classification institution to an individual necessary for the stability of equilibrium. In larger populations, we conjecture, punishment groups are often small (the small subset who are on hand at collection time, for example). As Demosthenes' statement quoted in the text also shows, there were sustained efforts to inculcate the belief that failing to help out with democratic institutions would render them ineffective.

<sup>11</sup> Demosthenes, *Against Meidias*, 223-225.

believe that the order would provide benefits for themselves. And it is this need to satisfy the ordinary individual that participating in enforcement secures the stability of something individually beneficial that generates, we argue, the constraints on the classification institution that we identify as legal attributes.

Consider, for example, a feature of the Athenian system that puzzles classical scholars and leads them to question the extent to which the Athenians achieved the rule of law: the openness of the rules of argument. Unlike modern courts in the Western tradition, Athenian legal procedures placed no limits on the evidence or arguments that could be marshaled to convince a jury to convict or not. Although a specific written law had to be identified to get the matter before a jury—violation of the rule against lying to a trading partner in the agora, for example—once you were there you could ask the jury to find in your favor for reasons completely irrelevant to the written charge: the defendant was a prostitute in his youth, he doesn't take care of his aging parents, he doesn't contribute to public festivals. Classical scholars such as Lanni (2009) argue that the jury system as a result did not reliably enforce 'the law,' although the law did serve to buttress enforcement of social norms (against promiscuity or neglect of one's family, for example.)

We argue, however, that openness to these arguments was an important part of securing the participation of ordinary citizens in enforcing jury verdicts. Openness reassured Athenians that the system they supported was responsive to the norms they cared about. The written laws might have been the product of initially novel procedures—emerging from large-scale assemblies in which

thousands of ordinary citizens participated—but those laws did not displace the rules they had long come to treat as relevant in deciding who to punish and who to forgive.

For similar reasons, it was important for the Athenians to have the confidence that the verdicts that emerged from the jury could not be corrupted by elite influence or alliances between factions. Otherwise, the jury system would be no better than the elite rule and factional conflict they were trying to replace. For this reason, we argue, the classification institution needed to display neutrality and independence. To achieve neutrality and independence the Athenians employed several devices. The ballots for assessing verdicts and punishments were cast in secret, helping to reduce social pressure and make bribery difficult. The large scale of juries also made bribery difficult. The random selection of jurors using a mechanism that ensured that juries were representative of the diversity of Athenian citizens helped to minimize the risk that a jury came to the case aligned with one of the litigants. The lack of deliberation among the jurors reduced the likelihood that influential voices could sway the jurors or exercise subtle control over the case. Even the absence of professional lawyers (litigants could hire speechwriters but they had to deliver their speeches on their own) can be understood as a feature that helped to secure confidence in the neutrality and independence of the system: rich and poor, educated and not, were largely on equal footing before the court.

Last, although the Athenian system did not reflect modern norms of equality—women and slaves and foreigners lacked complete, direct access to

courts and, especially, the institutional system of governance—the rules the Athenians did put in place had to have been ones that displayed the kind of qualified universality that Hadfield and Weingast (2012) predicts. We can see this in the general form in which rules were composed—rights and duties attached to the status of citizen and not individual identity.<sup>12</sup> We would also predict that the Athenian rules achieved universality because of the broad-based participation in lawmaking in the Assembly, as well as broad-based participation in the jury’s ultimate determination of the content of the legal rules.

The what-is-law approach thus relies on a positive model to derive the normatively attractive features that legal philosophers identify as characteristic of law/the rule of law—generality, clarity, independence, neutrality, and so on. The positive model shows that these legal attributes emerge as part of the incentives necessary to coordinate participation in private enforcement of the classifications of conduct reached by a public institution by ordinary self-interested individuals.

### **III. Is Rule of Law an equilibrium without private enforcement?**

We have so far focused on the question of what constitutes law in a regime with fully decentralized enforcement—the type of enforcement we find in organic social orders. Our answer is that law emerges when there is a shift from organic classification to formal classification by an institution capable of

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<sup>12</sup> As an example: “And if anyone give away an alien woman in marriage to an Athenian man, as if she were related to him, let him be disenfranchised, and let his property be forfeited to the state, and let a third part of it belong to the successful prosecutor.” MacDowell (1978, p. 56) (quoting Demosthenes 59.52)

articulating and adapting the content of classifications. We then derive the normatively attractive legal attributes from the positive imperative to coordinate and incentivize voluntary participation in decentralized enforcement.

The question we now confront is this: if the legal attributes ordinarily associated with the rule of law and principles of legality are attributable in a regime with fully decentralized enforcement to the need to coordinate and incentivize private actors to participate in enforcement, what, if anything, secures legal attributes in a regime with fully centralized enforcement? We suggest there is a simple answer: nothing. That is, it is not obvious that fully centralized enforcement is capable of sustaining an equilibrium characterized by rule of law.

To see the logic of this claim, we first provide a more formal definition of what we mean by “rule of law” and how our usage compares with the literature in legal philosophy. We then consider the characteristics of the equilibria that can be achieved in a regime in which enforcement is fully centralized.

### **A. What is Rule of Law?**

The effort to define the concepts of law and the rule of law have long preoccupied legal theory. According to legal positivists, the existence of law depends on facts about the system of governance in place. Austin (1832) asserts that law exists where a sovereign issues and enforces commands. Hart (1961) claims that law exists where, as a matter of social fact, there exists a set of secondary rules that officials treat as obligatory (whether they actually follow them or not) to determine what is a valid primary rule of behavior. Raz (2009) follows Hart, but draws a more careful distinction between the existence of law—

which is a matter of fact—and the ideal of the rule of law. For Raz, law exists when there is an institutionalized normative system that claims to be both comprehensive and supreme with respect to other systems of norms and which, at a minimum, consists of norm-applying institutions such as courts that are obligated to follow secondary rules in adjudicating particular cases. The ideal of the rule of law exists in a legal system, according to Raz, when people are obligated to use, and are capable of using, legal rules to guide their behavior. Raz argues that, for practical reasons, to achieve the rule of law a legal system must be characterized by the normatively attractive features we associate with rule of law: publicity, stability, neutrality, generality etc. If law is not characterized by these features, people cannot look to it as a guide to behavior and hence cannot fulfill their obligation to obey it. This, he emphasizes, does not mean that law does not exist, only that not all legal systems are characterized by the rule of law.

Raz's primary target is Fuller (1969), who argued that it made sense only to identify as a legal system a regime in which people could, in fact, follow the law. For Fuller also, achieving such a regime implies practical constraints on how government carries out its legal function. For Fuller, a legal order only exists when governance is sufficiently characterized by normatively attractive legal attributes, which he identified as the following list: publicity, generality, clarity, stability, prospectivity, non-contradiction, feasibility and congruence (between rules as announced and rules as applied.)

We recognize that a key project for these philosophers is to investigate the relationship between law and morality and the nature of the obligation to obey the law; the program among legal philosophers differs from ours. But the philosophers do claim to be saying something about real-world legal systems and how they behave, without paying careful attention to the behavioral elements of those claims. As social scientists and not legal philosophers, we confess to finding the appeal to “social facts” and behavioral claims in legal positivism a bit muddled. Hart (1961) as elaborated by Raz (2009) suggests that law can exist as a matter of social fact—there are secondary rules that officials are supposed to use to assess the validity of primary rules when they are applying rules—even if the law is so secretive and volatile that no-one can in practice use the law as a guide to behavior. This seems like positing the existence of a social “fact” in concept that does not exist in practice. And to a social scientist the much-maligned Fuller (1969) seems to be conducting the same type of casual behavioral analysis that Raz (2009) conducts: assessing what is necessary, in a practical sense, for people to use the law to guide their behavior. The only difference appears to be that Fuller calls this “law” and Raz calls this “rule of law.”

Our approach is organized by more formal attention to the positive analysis of what it takes to sustain an equilibrium in behavior. We use the terms “law” and “rule of law” to mean the same thing as “legal order,” which we define in terms of equilibrium as follows:

*A normative social order is an equilibrium characterized by conduct in a relevant community that is systematically patterned on community-based*

*normative classifications of behavior. A legal order is a normative social order in which behavioral classifications are articulated and subject to modification by a centralized classification institution that possesses legal attributes.*

We thus will say that a regime is characterized by the rule of law when it is in equilibrium, with behavior systematically patterned on the classifications established and applied by a centralized classification institution, but only if the content and processes of that classification institution display legal attributes: universality; publicity; clarity, non-contradiction and uniqueness; stability; prospectivity and congruence; generality; impersonal, neutral, and independent reasoning; and openness.

In our approach, then, a classification institution that makes rules in secret, applies them in a biased, personalized or contradictory fashion, or ignores them all together, does not generate rule of law.

A few observations about the relationship between our definition and those found in the legal philosophical literature. First, we use the concept of “classification” where the legal philosophical literature uses “rules.” Classification in our model refers only to the normative evaluation of whether a particular behavior is, within a normative system, on the “positive” (right, valid, desired, permissible, not punishable) side of a binary partition or the “negative” (wrong, invalid, undesirable, impermissible, punishable.) The concept of “rules” goes beyond normative classification, to describe a way in which classifications might be used. A rule implies classification—the rule requires the positive action and punishes or invalidates the negative. Our approach reveals why the use of

“rules” as a primary category is problematic. If we define law as a system of governance by rules (as all the legal philosophers do), then we are led to say “law” must have the attributes of “rules,” by definition. Fuller (1969 p. 46) struggles, then, to avoid circularity in explaining why “generality” is a necessary feature of a legal system: “the first desideratum of a system for subjecting human conduct to the governance of rules is an obvious one: there must be rules. This may be stated as the requirement of generality.” We avoid this problem with the concept of classification. Raz similarly seems brought up short by the concept of rules. Although he rejects Fuller’s claim that principles of legality such as generality, prospectivity, clarity and so on are necessary for a system to properly be called legal, he does concede that

[i]t is, of course, true that most of the principles. . . cannot be violated altogether by any legal system. Legal systems are based on judicial institutions. There cannot be institutions of any kind unless there are general rules setting them up. . . Similarly, retroactive laws can exist only because there are institutions enforcing them. This entails that there must be prospective laws instructing those institutions to apply the retroactive laws if the retroactive laws are to be valid. (Raz 2009, p. 223)

Second, note that our list of legal attributes includes those that Fuller (1969) and Raz (2009) propose are necessary as a practical matter for people to use law to guide their behavior. The equilibrium in our model requires that those living under a law are able to guide their behavior on the basis of the law and hence also requires some of these features for that purpose. But the core of our analysis looks not at what people need in order to comply with the law but, more fundamentally, what they require in order to decide, voluntarily, to participate in helping to enforce the law. As we explain more fully in Hadfield and Weingast

(2012), this is a demanding requirement. It requires, for example, stability over a much longer time horizon than does a model that looks only at what it takes for people, as a practical matter, to be able to comply with the law. Moreover, our model produces a more drastic consequence for failures to achieve legal attributes than the legal philosophers anticipate. In our approach, legality can collapse entirely, perhaps rapidly, if people begin to worry that no-one else is willing to help enforce. Even small deviations could trigger that result, given the coordination aspect of private ordering enforcement. In the legal philosophical approach, marginal—even substantial—failure to achieve generality or prospectivity, for example, could interfere with the effort by individuals to comply, injecting noise into the translation of rules into conduct. But a regime—and this is Raz’s principal point—could continue to operate as a stable legal system even in the presence of gross failures of legality.<sup>13</sup>

Last, note that our list of legal attributes goes beyond what Fuller and Raz say is necessary from a practical point of view if the basic idea of governance by rules is to make sense. It also includes some of the overtly normative features that Waldron (2008, 2011) urges should also be a part of our understanding of the concept of law. Our concept of universality is comparable to Waldron’s idea that law should have an orientation to the public good. Openness, in our sense of openness to evidence and argument from parties, captures his idea that there must be opportunities for fair hearing for both sides to a dispute.

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<sup>13</sup> “I have been treating the rule of law as an ideal, as a standard to which the law ought to conform but which it can and sometimes does violate most radically and systematically.” Raz (2009, 223)

## B. Are equilibria supported by fully centralized enforcement characterized by Rule of Law?

Hadfield and Weingast (2012) shows that if a centralized institution is dependent entirely on private decentralized enforcement to induce people to behave in accordance with its classifications then, if it achieves equilibrium, it must be that the institution is characterized by legal attributes. We now turn to ask whether the same is true when the centralized classification institution also has full control of a centralized enforcement authority.

Let's first consider the direct analog of the reasoning in the model with decentralized enforcement. In that model, the legal attributes arise in order to induce decentralized enforcers to enforce. How does a fully centralized enforcement regime induce officials to act in accordance with the central institution's classifications?

One mechanism is monetary incentives: enforcement officials are paid a wage above their next best alternative by the central institution and keep their jobs if and only if they enforce appropriately. A less (financially) expensive mechanism would be to rely on threats of violence directed to enforcement officials who fail to enforce as directed.<sup>14</sup> Threats of violence, in fact, could be

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<sup>14</sup> Threats of violence of this type have a famous pedigree, often called the "right of rebellion." This mechanism for policing public officials was made famous by Locke in his *Second Treatise* (1689), Montesquieu in his *Spirit of the Law* (1748), and in the American founding (e.g, in the third paragraph of the Declaration of Independence; and in various *Federalist Papers*, such as F26 and F46). Most successful constitutions rely in part on the right of rebellion, whether explicit or not (Mittal and Weingast, 2012).

used to “deputize” the entire citizenry, requiring them to participate in punishments as directed by the center.<sup>15</sup>

Both of these mechanisms impose constraints on what the central institution can achieve. Financial incentives may be very expensive, indeed exponentially so, since official incentives must be implemented by another layer of enforcement officials, who also must be appropriately incentivized, implying yet a further layer of enforcement, and so on. And so a poorer country—the kind, in fact, that still routinely lacks reliable legal systems—may be unable to implement fully centralized enforcement that is not thoroughly undermined by poor training, corruption, or other failures among officials. Using violence to induce officials, and perhaps ordinary citizens, to carry out punishment of transgressions as classified by the central institution may also be expensive.<sup>16</sup> Violence imposes both financial and moral costs. A central government seeking to improve the welfare of its people through better rules may well conclude that its welfare-improving effort would be a failure on net if it required outrageous punishment visited upon enforcers who fail to enforce.

So the constraints imposed by the need to activate an enforcement apparatus through monetary incentives or threats of violence are likely to

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<sup>15</sup>We would characterize a system in which individual citizens are required, on threat of punishment from the center, to participate in punishment “centralized.” This is in contrast to a regime of decentralized enforcement in which individual citizens are motivated to participate in punishment, or not, on the basis of a comparison between the value of the equilibrium coordinated by the central classification institution and the alternative.

<sup>16</sup> Although the more violent the threats, the less intensively the center has to monitor enforcers. This makes the mechanism less expensive for the center (although it also implies increasingly grotesque methods.)

compromise the efficacy with which the central institution translates its classifications into actual behavior. But -- and this is our key observation -- those constraints do not induce a classification institution to produce rules and processes characterized by legal attributes. If enforcement officials are motivated only by money or fear, it does not matter to them whether the rules they are asked to enforce are promulgated prospectively, in public and general terms, coherently applied in adjudication, implemented in neutral and open processes, and so on. Decentralized enforcement requires legal attributes to induce ordinary individuals to participate in enforcement as they are not under threat of punishment if they choose not to participate in enforcement. No such incentive compels centralized enforcement to ensure that their rules are characterized by legal attributes. Put another way, the legal attributes are not implied by equilibrium in the case in which enforcement is fully centralized.

Nor does the classification institution have to rely on rules to govern conduct—and hence adopt a system that, minimally, has the features of rules that Fuller (1969) and Raz (2009) urge that are necessary, in practice, in order for people to follow rules. Providing a stable system of rules might produce benefits for the regime, but so might using force to punish opponents, direct benefits to favored individuals, or achieve policy goals peculiar to the ruler. If an enforcement regime is set up to implement classifications, then classifications can be manipulated to achieve whatever direction of force the ruler desires. Even if “rules” are announced, if everyone in the regime knows that the ruling authority has complete power to implement any result it wants, at any time it

wants, then those announcements will not be treated like rules by the targets of enforcement. Even enforcers within the enforcement institution will not see their jobs as rule-governed. They will have routines they follow but they will understand that the routines can be displaced by contrary instructions at any time.

The only case in which the order in a regime with fully centralized enforcement will be characterized by legal attributes is when the person or coalition that controls the institution chooses to implement them. It's possible. But it's not predictable. But that, of course, is the very problem of a "government of men, not laws." Most regimes with fully centralized enforcement do not predictably achieve rule of law as a consequence of the structure of the regime itself. It only achieves it, if at all, based on the particular characteristics of the person or coalition in charge. Put differently, the empirical and prescriptive projects of determining why and how societies achieve the rule of law cannot ascribe causation to a system of governance relying on fully centralized enforcement power. The independent variables in that causation story are the peculiar, historical and contingent facts of individual identity or the balance of power, not the institutions of governance.

Here's another way of understanding our claim. If a classification institution capable of providing deliberate content to rules is established and it is supported exclusively by decentralized enforcement by private individuals, then an equilibrium is achieved in which behavior is predictably patterned on the classifications only if the institution displays legal attributes: the rules are

sufficiently congruent with the interests of enforcers to induce them participate, the rules are promulgated in public (indeed, common knowledge) way, they are sufficiently clear, they are applied on the basis of impersonal and neutral reasoning in a process that is open to argument and evidence from the parties involved, and so on. If the institution lacks these attributes, then the classification institution has no impact on decentralized behavior; it is a dead letter.

In contrast, if a classification institution capable of providing deliberate content to rules is established and it is supported exclusively by centralized enforcement, then behavior will be patterned, as much as possible, on the basis of the announced classifications regardless of whether the institution displays legal attributes or not. A ruler with control over a fully effective enforcement apparatus can put that apparatus to work for any reason. Nothing compels the ruler to produce classifications characterized by legal attributes. Classification in the form of legislation can be issued in secret. Classification in the form of adjudication can be based on rules that are retroactive or vague or applied in biased fashion; indeed, results may be completely incongruent with the announced classifications.<sup>17</sup> Finally, the regime can use the violence potential of the state to target specific individuals – typically perceived opponents of the

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<sup>17</sup> An interesting question, a topic for further work in our project, is why authoritarian regimes bother with the trappings of legislation and adjudication—that is, formal adjudication—if they are only going to manipulate classification. Why bother aligning classification, generating secret or retroactive legislation and conducting show trials, with the exercise of force at all? We suspect it is because such regimes depend to some extent on decentralized enforcement efforts among citizens and so need to at least appear to be implementing legal attributes.

regime.<sup>18</sup> The ruler's decision to exercise force in a particular way is presumably informed by the prediction that it will change behavior in ways that the ruler wants. Behavior will be patterned on the classifications—even if ex post—announced by the classification institution. But it will not necessarily be based on rules that are public, prospective, coherently applied, and so on. The system overseen by a centralized institution with complete control over both classification and enforcement will produce some order, but not legal order. It might produce a stable equilibrium—the world does not lack for examples of long-lived dictatorial regimes—but the equilibrium will not be characterized by the rule of law. Put differently, rule of law is not among the equilibria we can expect to emerge under the standard definition of government: a single body with the power to both make and enforce the law.<sup>19</sup>

## IV. Conclusion

Virtually all discussions of the rule of law assume that rule of law is a product of government. Governments are defined as the entities that both make and enforce the rules in a country. Although there is ample recognition of the presence of pockets of private ordering within regimes operating under the rule of

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<sup>18</sup> Executive abuse of his powers was widely understood among early political theorists as a principal impediment to achieving the rule of law, including Locke (1689), Montesquieu (1748), Adam Smith (1763), and James Madison (1788).

<sup>19</sup> The case of a classification institution supported in part by centralized enforcement but which relies for efficacy on decentralized participation in enforcement follows the logic of the fully decentralized case. The need to induce decentralized participation in enforcement requires legal attributes.

law, private ordering is presumed to be governed by the regime's overarching framework of publicly-enforced laws.

Against this background, we have made a stark claim. A legal system cannot achieve rule of law, we have argued, unless there is an essential role for private, decentralized, enforcement of law. We emphasize that private enforcement does not mean private security forces or mafia goons; it does not mean spontaneous and undisciplined mob violence. Decentralized enforcement of law, like the decentralized enforcement of social norms, generally involves social sanctions such as criticism (generating bad reputations) and exclusion (from valuable relationships and opportunities.) When it does involve the private use of force, it is disciplined force, limited to the type and extent of force authorized by law. Private individuals also participate in enforcement when they cooperate with, or at least do not interfere with, those (whether private individuals or officials) who are authorized to enforce law.

In making this claim, we draw from the legal philosophy literature's approach to the rule of law, especially the characterization of rule of law as embodying a series of normatively attractive legal attributes. Yet our approach differs from the literature in that we go beyond normative considerations of what is desirable in a governance regime by asking how the rule of law is sustained. Put another way, what are the characteristics that lead a community to produce and sustain law? We begin with the idea that law does not necessarily involve centralized coercion. We next ask, what conditions are necessary for a legal system to emerge. To participate in enforcement, most individuals have to

believe they are better off under the legal system. Thus, if one group gains valuable privileges, then those outside the group have little incentive to participate in enforcement. In contrast, when the rules are characterized by generality and universality, then citizens know that the law protects them as well. More broadly, we show how these normatively attractive legal attributes emerge as part of an equilibrium of decentralized enforcement of law. In short, our approach provides a positive model about how normative principles can be sustained in practice.

Our claim is not of merely theoretical interest. It is widely recognized that economic and political development require stable legal systems that reliably implement basic rules of property and contract, regulate markets to overcome externalities and market failures, and protect basic human rights, autonomy and dignity. Thus the project of building rule of law in the many countries around the globe that lack legal order is one of the major challenges of our time. But as we emphasize elsewhere (Hadfield and Weingast 2015), most rule-of-law building projects have failed miserably, despite billions of dollars spent to promote this goal. We believe this failure is in part a result of the theoretically poorly informed and exclusive focus on reproducing the visible institutions of our highly stable and successful advanced Western legal systems. Poor and developing countries are encouraged (sometimes required, for WTO membership for example) to adopt the legislation and regulatory regimes of wealthy nations. The focus in the international community then shifts to achieving effective public enforcement of the resulting laws and regulations—equipping and training police

and security forces, educating judges and regulators, weeding out corruption—and then attempting to force governments to observe limits on their use of their enforcement tools.

Our analysis suggests that the aid community's approach misses an important piece of the story, namely the need to fashion a regime that is dependent to some significant extent on private ordering and then to coordinate and incentivize the participation of ordinary individuals in enforcement efforts. We have no doubt that this too is an enormous challenge. But our work suggests that it is one that scholars and policymakers should be taking on.

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