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THE RULE OF LAW AND FEDERATIVE UNIONS

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THE RULE OF LAW AND FEDERATIVE UNIONS

INTRODUCTION

In the mid-1990s a number of scholars, attempting to explain the remarkable success of the European Court of Justice (ECJ) in constituting the European Union (EU) as a quasi-federation, put forth the idea that this process was greatly influenced by the prevalence of a rule of law culture in the countries involved.¹ A recent book by Leslie Goldstein, which compares the early decades of the EU (as the European Economic Community (EEC; later the European Community, EC) to the formative epochs of three other voluntarily federated unions of the seventeenth through the nineteenth centuries comes to a similar conclusion about the importance of the rule of law.² In each of these works, the assertion appears as an empirical observation, but the authors offer no theoretical foundation for it, no reason for believing that the observed correlation in fact has explanatory value. This essay is an effort to explore the meaning of the rule of law, in order to come up with a theoretical grounding that might make sense of the observations of these EU scholars. This exploration traces Hobbesian, Lockean, Kantian, and Weberian elements in the rule of law, and concludes that for understanding its role in smoothing the transition to federative unions, the Weberian analysis of the rule of law is most useful.

I. EU Integration and the Rule of Law

Awareness of the remarkable story of the role of the European Court of Justice in constituting the European Union into a lawfully federated polity remained for many years limited to a relatively small circle of scholars, those working in the area of European Community law. In the decade of the nineteen nineties political scientists began noticing and attempting to explain the surprising accomplishments of this previously obscure court.³ The story, in brief, is that the ECJ by sheer judicial pronouncements (beginning in the 1960s) "constitutionalized" the treaties that had formed the EC,⁴ turning them from a piece of international law, forming an international organization and binding only in the traditionally limited way that international law binds sovereign states, into an efficacious, higher-law constitution that rendered void any contrary national laws of member states (including clauses of national constitutions), EVEN those adopted after the time of the treaty. In the EC, as in the USA, a normative hierarchy was established: the rule became that the highest law governing member-state judges was the law of the EC treaties, next were the regulations and directives adopted by the EC's official policy-making bodies, and lowest in the hierarchy were the constitutions and laws of the member-nation-states.⁵ In the EC this took place without any express treaty authorization (in contrast to the American supremacy clause) and against the stated intentions of the six

founding member countries.⁶ Judges in the member-countries accepted this power that had been thrust upon them, and started striking down or re-interpreting their national laws accordingly, even in those member states that had previously not accepted the idea of judicial review.⁷

Thus, at a legal level the EC had been re-constituted as a federated polity well before 1980, even though political scientists in the U.S. did not really pay it much heed until the political developments of the Single European Act of 1987 and the Maastricht Treaty negotiations of 1992-3 moved it onto their intellectual radar screens. By now a number of political scientists have joined legal scholars in tackling the intriguing question, Why did this massive legal transformation of the EC from an international treaty organization into a nascent federated polity happen so relatively quickly and easily?

Of those scholars highlighting the significant impact of the rule of law in this transformation, Goldstein's contribution was the most systematic, using a four case comparison of the formative epochs of voluntarily federated unions, in which the evolution of the EC from six independent states into successfully federated polity stands out as the least conflictual of the four cases.⁸ Goldstein found that the degree to which the society in a given union had internalized or routinized the norm of obedience to lawfully constituted authority⁹ was directly correlated

with a relative absence of overt state resistance by member state officialdom to the exercise of central union authority.

To be sure, there was always some resistance: Her volume portrays the histories of these partial transfers of sovereignty toward federated unions as, in a sense, long-term processes of negotiation, where the negotiation not uncommonly took the form of official acts of defiance at the member-state level. ("Official acts of defiance," refers not to the kinds of non-compliance that are more or less routine in any large-scale society--i.e., non-compliance resulting from inertia or inattention or prudential delay, with the intent to comply as promptly as feasible-- but rather to open, official, and public acts of resistance by member-state officials relying on their capacities as such. These included formal public pronouncements by the governing executive, majority decisions of state appellate courts, or official legislative resolutions or statutes.) Despite the ubiquity of this resistance-cum-negotiation, still, compared to the seventeenth-century Dutch Union, the early American union, and the mid-nineteenth-century Swiss union, the transition to a federated polity in the late twentieth century European Union, wrought largely by judges on the ECJ working in tandem with member-state judiciaries, evoked remarkably little resistance by member-state officialdom. And this was so despite the absence of support for this move in the text of the founding documents of this union and in the intent of those who signed these documents.

At first blush, it is not obvious why a rule of law culture should explain this phenomenon at all. There is a sense in which the ECJ, despite its “lawfully constituted authority,” was acting AGAINST law in its pronouncements: It is the same sense in which any judicial ruling that makes new law involves action that violates whatever was previously the law. The member-state officials in each of these unions also held “lawfully constituted authority.” Why should a rule-of-law culture cause one group of authorities to defer to another when law as such gives both groups a valid claim to be correct in their policy choice and when we have much reason to believe that people who have become accustomed to the exercise of power normally attempt to retain their power?

2. Lawlessness and Hobbes

In order to get a handle on what is involved in the phenomenon, “the rule of law,” one might usefully begin with attention to the absence of the rule of law and what that might entail. Illuminating for this inquiry is a story by journalist Helen Epstein that appeared not long ago in the New York Review of Books describing an incident in Uganda in 1995.¹⁰ The context is a discussion of the spread of AIDS in Africa.

An accountant named Matthew related to Epstein that Matthew's niece had been raped by a man known to Matthew. Epstein continued:

In order to press charges, Matthew needed a document that had been signed by the local police

commander requesting that the girl be examined by the police surgeon. Matthew had taken the girl to the police station, but when they got there, they had been asked to wait. He and the girl waited all afternoon. They were eventually told that the commander would not have time to see them (to sign the document) that day.

The next day, Matthew went to the police station with (a) local government official. The police chief now had time to see them. He said, "Gentlemen, we have a problem in Uganda." The government had not paid the police surgeon, so what could they do? The police surgeon could not work without money. The form for the report would cost 50,000 shillings. Matthew refused to pay. He said he would call a lawyer. Rape was a serious crime.

(Epstein) asked Matthew if he needed any help(having in mind) a group of tough women lawyers in town who might take the case. No, Matthew said. He knew what to do.

The following week ...Matthew was in better spirits. The situation has changed, he said. The mother of the boy came and prayed to us. She was worried (because the maximum penalty for rape is death).... The police(, she feared,) would

shoot her son if they caught him. His niece was OK. She had gone back to her father's village, about fifty miles away. She was not hurt so badly. He thought the hymen (had previously been) broken.

(Epstein wondered) but didn't ask, how much Matthew had been paid by the rapist's family. Fifty dollars? A hundred? Matthew was following traditional Ugandan law, according to which a woman is the property of her family. A woman's rights belong to her male relatives, so in cases of rape a woman cannot be wronged by they can demand compensation."

Epstein goes on to say the 40% of women in Uganda have been subjected to violently coerced sex, and that figures are similar throughout East Africa and worse in Southern Africa.¹¹

This dispiriting story illustrates what the absence of the rule of law looks like. In many parts of the world, the sheer security of life and limb, and of the property that enables one to sustain life, remain at the mercy of hoodlums or gangs of marauders. This absence of the rule of law in the raw "law and order" (or "legal order") sense of security for life and limb against outlaw violence or mob violence captures a large part of the phenomenon according to which Goldstein noted differences among the early federative unions.

The emphasis in the literature on the rule of law, however-- whether in the human rights literature, the legal-academic literature, or even (although to a lesser degree) the business-oriented guides for global investment,¹² tends to deal, instead, with another type of absence of the rule of law: the absence of the rule of law as a check on the exercise of power by government officials. In other words, most of the serious analysis of the rule of law at the onset of the third millennium C.E. has turned away from the Hobbesian problematic on the rule of law and speaks in terms of the Lockean.

3. Legal Theory per Contemporary Lockeans

To say that a society is bound by the rule of law to the degree that its members have internalized the norm of obedience to lawfully constituted authority does, granted, reduce "law" to whatever "lawfully constituted authority" -- i.e. the sovereign-- says it is, and this too points to Hobbes, who, as many of us will remember, defined law as the command of the sovereign.¹³ Sometimes, his formula was rules commanded by the sovereign, but since the sovereign was free to alter, including narrow the reach of, the rules at will, the hint of a requisite generality in the rules turns out in Hobbes to be a mirage.¹⁴

Whereas Hobbes emphatically insisted that the ruler(s), in light of this power, had to be above the laws, Locke just as emphatically insisted the contrary. Using the very lingo of contemporary Valley Girls, Locke

expostulated: "**As if** when men quitting the state of nature...agreed that all but one of them should be under the restraint of laws, but that he should still retain all the liberty of the state of nature, increased with power, and made licentious by impunity."¹⁵ Locke, therefore, provided a new description of the rule of law, according to which "every single person became subject, equally with other the meanest men, to those laws, which he himself, as part of the legislative had established: nor could anyone, by his own authority, avoid the force of the law, when once made, nor by any pretence of superiority, plead exemption, thereby to license his own ...miscarriages..."¹⁶

Although there are some modern analysts--positivists in the Hobbesian tradition-- such as H.L.A.Hart¹⁷ or Hans Kelsen,¹⁸ for whom the rule of law can include a regime of a dictator or dictatorial group who wields "absolute" authority, the more prominent tendency in rule of law scholarship is to go with the Lockean concern that the rule of law consist in "the rule of laws not of men."¹⁹ This Lockean paradigm underlines the need for the rulers themselves to function under the law rather than above it, to be bound by its rules: to govern by promulgated, settled, standing, known laws, rather than by "extemporary arbitrary decrees."²⁰ Thus, the more contemporary concern, prompted by the desire to demarcate just what has been lacking in the "regimes of horror" of the fascist and stalinist past as well as in more recent dictatorships of right and

left, stresses the idea of government UNDER law and therefore of the need for judicial independence.²¹ Legal philosophers like Lon Fuller, Joseph Raz, Friedrich Hayek, Margaret Radin, Cass Sunstein, and Richard Fallon have composed lists of those attributes of a legal system that essentially specify the ways in which the rule of law functions to place government officials as well as subjects under the law.²² In Sunstein's list, for instance, the rule-of-law system has to partake of:

1. clear, general, publicly accessible rules laid down in advance;
2. prospectivity and a ban on retroactivity;
3. a measure of conformity between law in the books and law in the world;
4. hearing rights (marked by a fair weighing of evidence) and availability of review by independent adjudicative officials;
5. separation between law-making and law-implementation;
6. no rapid changes in the content of the law;
7. no contradiction or inconsistency in the law.²³

As Margaret Radin summarized her own collection of the attributes of a rule-of-law system, the attributes can be grouped into three overall requirements. The law must function by rules that are general (i.e.

broader than particular cases), that are knowable, and that are performable.²⁴

Locke himself, however, allowed for much violation of legal rules by the sovereign. A good prince, he wrote, "cannot have too much prerogative"--that is, "power to act according to discretion, for the public good, without the prescription of the law, and sometimes even against it."²⁵ In Locke's judgment, governing authorities who sincerely and effectively act to further the public good²⁶ are exercising neither "absolute" nor "arbitrary" rule. The rule of law turns out to be compatible with extemporary decree after all, so long as the decrees promote the reason for which people obey government in the first place, viz. securing the public good.

4. Equality: Kantian Rule of Law

This question of discretion vs. rules turns out to be central for another reason; it is bound up with just how general rules can/should be and therefore with the question that points to a third conception of the rule of law. This conception has its roots in Locke's maxim that laws must apply equally to the most elite members of the legislative body as to "other the meanest men"²⁷; it is the substantive version of the rule of law, as distinguished from the procedural. This version is needed because every police official, administrative officer and judge in fact always operates within a range of discretion.²⁸ Understanding the bounds of that discretion

requires an understanding of the purposes of the legal system, just as the wise and well-meaning executive needs to understand those purposes in order to know when to violate the letter of the law.²⁹

Philosophers of law at least since Aristotle have debated the respective weight to be given to the competing values of rule-governance and human discretion in systems of justice.³⁰ Rules applied even-handedly offer the benefit of impartiality³¹ but no system of rules can cover every case that might arise, and any general rule may pinch with inappropriate severity or leniency in a given set of circumstances. The American legal professoriate displays a particular concern with this question, since it contains the issue of whether strong courts, courts that observably engage in (perforce retroactive) lawmaking as to the case before them are necessarily violating the rule of law.³²

Analysts as diverse as John Rawls, Friedrich Hayek, and Frank Michelman, have argued that the rule of law requires an element of substantive equality in the content of the rules. All three of these writers defend the idea that laws that classify people into groups--such as, for instance the mandate that blind people cannot be licensed drivers--which laws admittedly are necessary in a complex society, need to be justifiable by the test of whether (at least some) persons not inside the advantaged group would agree with the advantaged persons as to the justification for the law.³³ As Justice Stanley Williams of the U.S. Supreme

Court wrote in 1886, even as he cited the Massachusetts Bill of Rights requirement of a "government of laws and not of men," "The equal protection of the law is a pledge of the protection of equal laws."³⁴

Arguably, it is this sense of the rule of law that Americans began to entrench in their Constitution when they banned titles of nobility and bills of attainder (Art.I, Sec.9-10), and further entrenched by banning slavery (13th Amendment) and demanding equal protection of the laws (14th Amendment).

This substantive rendering of the rule of law is criticized by many scholars.³⁵ The argument against it is that it asks too much of the "rule of law" concept, such that one loses the ability to apply the concept for making fruitful distinctions.

While the criticism is understandable, it is not obvious why the spirit of generality and impartiality that is supposed to infuse the **application** of laws in a rule-of-law regime should not also infuse the **legislative** process in such a regime. A law that says a woman is the property of her father until wed and of her husband after that, and is not to be treated as a legal person, is not obviously preferable to a law that says no such thing but is enforced by government officials as though it did. In either case, the supposed benefit of the rule of law--viz., that it can guide people's conduct since they know what to expect from government--is lost to those persons defined or treated as outside law's protection.

At this point we can return to the story with which we began, for it illustrates in fact the absence of all three senses of the rule of law delineated so far, each of which pointed to one of the blessings of the rule of law: law as a safeguard against the anarchy of being victimized by bullies; law as a check on abuses of power by governing officials; and lawfulness as a requirement that legislation equally secure the life, liberty, and property of the non-dominant groups in society, along with the rights of the dominant groups. A police system that will respond to vicious assaults only for those who can pay stiff bribes is not a police system that provides the protection of the rule of law to those who cannot pay.³⁶ Similarly, the power of police officials to extort such fees from desperate people is an abuse of governmental power that is going unchecked by law. Finally, the raped woman, because of the inequitable content of the traditional legal custom to which her family resorted, ended up in effect, at the mercy of any sexual predator willing to pay her family fifty dollars.

Recognition of the various benefits of the rule of law, however, still leaves unanswered critical questions. How does it happen that members of a society come to internalize the norm that law as such is something they ought to go out of their way to obey? And once they have done so, why would such routinization of this obedience norm facilitate the formation of federative unions?

5. Internalization of the Rule of Law: Weber's Contribution

All of these familiar scholarly analyses of the rule of law have treated it, as it were, from the suppliers' perspective. For Hobbes, the lawgiver is expected to provide order; for Locke, officials who make and apply law are to follow the rules laid down (usually); for Kantians like Rawls lawmakers no less than law-enforcers are to supply equality before the law. If forty percent of a societal population, however, are being victimized by violent crime, the problem reaches far more deeply and widely than the ranks of officialdom. This topic of how/why the rule of law comes to be internalized has been largely neglected until quite recently. As Martin Krygier recently put it, "(T)he law must actually and be widely expected and assumed to, *matter, count*, (to) ...frame... social power, both by those who exercise it...and by those who are affected by its exercise. ... But...the literature of the rule of law has almost nothing useful to say about (what is involved when the law counts)."³⁷ Its importance in the past several years has been repeatedly acknowledged, as western scholars have confronted the degree of its absence in the collapsed Soviet Union and former Yugoslavia and former Soviet bloc countries, as well as in those third world countries attempting democratization.³⁸

No thinker has reflected more deeply or more thoroughly on what ~~cases~~ the rule of law to take hold as a set of relatively effective cultural norms than Max Weber. His answer to this question should then provide

guidance for understanding why a rule of law culture might work as it has with respect to smoothing the way for federative unions.

In Weber's account³⁹ law-based and law-constrained authority comes into being after human societies have been led by alternations of traditional and charismatic (whether religious or military) forces. Weber links the rise of law-based authority with the rise of cities, commerce, capitalism,⁴⁰ and of the modern state,⁴¹ and with an increase in the secularization of life --the guidance of human affairs by reason as distinguished from magic, superstition, or religion.⁴² He also links it to the increased bureaucratization of modern society⁴³ and to the imposition of imperial conquest.⁴⁴

A military conqueror can lead the troops by means of charisma but then needs to redistribute land and privileges to reward the troops. The new distribution, by definition cannot be based on tradition, so purposefully created rules are the alternative. Moreover, some unifying system of rules will facilitate both the goal of keeping order in the conquered territories and providing an element of unity among the conquered people that will eventually enhance defense.⁴⁵ By appointing a body of officials whose job is to enforce these unifying rules, the imperial ("princely") power can usurp the previous, traditional (generally inherited) ruling prerogatives of the local or provincial notables.⁴⁶ (Observably, the struggle for power between provincial

holders of “estatist” prerogatives and the centralizing authority of the imperial prince, for whom the rule of law proves useful, parallels the later acts of resistance by provincial/cantonal/member-state officialdom against central federal authorities in even voluntarily federated unions. Weber, however, does not address the topic of federations in this context.)

If there were not an enduring benefit from these new, imperially imposed, rules, the provincial powers might well rise up in revolt and reassert their traditional way of life. But as cities and commerce come into being, the trading and nascent industrial classes appreciate the benefits of uniform rules and of the stability and predictability of living under rationally comprehensible rules.⁴⁷ It is true that tradition offers stability, but it does not offer the opportunity to change the rules as needed for a rational adaptation to changed circumstances, as, for instance, by getting rid of “obsolete traditions.”⁴⁸ Also tradition-bound societies tend to appoint people to power by inherited privilege, rather than by demonstrated expertise for the job. As society becomes increasingly commercial, it becomes correspondingly bureaucratized, so that experts can be appointed to jobs for which they are suited and this includes jobs performed by the state such as law creation and application.⁴⁹ Thus, in Weber’s (persuasive) account, societies move toward the rule of law as they cast off feudal ways of life and move

toward modernity, capitalism, and bureaucratization. Decision-making by a despot, even a wise despot who can hand down “Solomonic judgments,” is not as congenial to capitalists as is a rule-bound, stable way of life, in which the outcome of investments is more or less predictable, and where the rules have been rationally selected with an eye toward promotion of a secure investment climate. As rational-legal authority comes to replace traditional and/or charismatic authority, so rational and rule-guided technocratic bureaucracy comes to replace tradition-bound hierarchies of inherited privilege and charismatically-led followings of inspired leaders.

According to Weber, the checks on arbitrary power offered by rational-legal authority and a bureaucratized way of life are enhanced to the degree that the rationality of the law is “formal” as distinguished from substantive. Substantive rationality pursues a substantive moral or societal goal via means-end rationality, but it might emanate from an enlightened and non-rule-bound monarch (thus failing to offer stable predictability). Formal rationality, in his terminology, presents geometric-type logic, proceeding from fixed (formal) definitions. For instance: Contracts are characterized by x, y, and z, and will be enforced by law; this bond between Smith and Jones has characteristics x, y, and z; therefore, the law will enforce this bond (even if it seems morally imperfect as judged by some substantive standard). Weber acknowledged that by the early

twentieth century the legal systems of the welfare states of the West were all moderating the rigor of strict formal rationality out of a variety of competing concerns, including the desire for substantive justice.⁵⁰ Still, he seems to see formal rationality, that is, rule-boundedness, as the essence of law. And he characterizes the import of this formal legal rationality as one of pacification, as a “means of pacifying conflicts of interest.”⁵¹ Legal formalism, he wrote, “guarantees to individuals and groups within the system a relative maximum of freedom, and greatly increases for them the possibility of predicting the legal consequences of their actions. Procedure become a specific type of pacified contest, bound to fixed and inviolable ‘rules of the game.’ ”⁵² As societies increasingly possess “goods used for consumption,” and attain a concomitant elevation in the standard of living, they increasingly, Weber tells us, become “accustomed to absolute pacification (and demand) order and protection (‘police’) in all fields,” which facts push toward further bureaucratization.⁵³

In sum, a close look at Weber’s analysis of societal evolution in the direction of rational, legal authority, highlights the extent to which societal tendencies to embrace the rule of law in the modern sense, are linked to concerns for the comforts of life in a commercial society and to the pacification of existence that is available in a largely bureaucratized world.

6. CONCLUSION

In my view, it is this Weberian insight that enables one to make theoretical sense of the correlation between societies permeated by the internalization of the norm of obedience to lawfully constituted authority and the willingness of sovereign state authorities to hand over significant portions of their erstwhile powers to federal authorities. These are officials fully familiar with the comforts of life under the rule of law. Government officials in the six original EEC countries not only knew that a plausible legal case could be made for a contrary outcome in the early cases where the ECJ asserted the primacy of EEC law over member-state law; they themselves, in the voice of their attorneys at the ECJ, had argued that the contrary outcomes were demanded by "law." Still, they realized, as members of societies with centuries of experience of judicial interpretation of legal documents, that legal documents present a range of plausible meanings, and that what judges do is select within that range. The rule of law pushes one to accept that judicial interpretation, unless one is able to overturn it by the lawfully prescribed procedures. This acceptance is what happened in the EEC, where by the late twentieth century, western capitalist societies were indeed as pacified and bureaucratized as Weber might ever have imagined.

NOTES

1. J.L.Seurin, "Towards a European Constitution? Problems of Political Integration," Public Law 1994: 625-636, at 633-4; Leslie Friedman Goldstein, "Centripetal Courts and Centrifugal States: U.S. Supreme Court (1790-1860) and European Court of Justice (1958-1994)," presented at Conference of Comparative Judicial Studies Assoc. of the IPSA, August 16-18, 1994 and American Political Science Association Annual Meeting, Sept. 1-4, 1994; Jo Shaw, "European Union: Legal Studies in Crisis? Towards a New Dynamic," Oxford Journal of Legal Studies 16 (1996): 231-254; Karen Alter, "The European Court's Political Power," West European Politics 19(1996): 458-487, at p.476. This timing coincidence with respect to the rule of law hypothesis may well be related to the brutal chaos that ensued after the breakup of Yugoslavia; the negative consequences of the absence of a rule of law culture featured prominently in news coverage for years.
2. Leslie F. Goldstein, Constituting Federal Sovereignty: The European Union in Comparative Context (Baltimore: Johns Hopkins University Press, 2001), pp.148-160, hereafter Constituting.
3. Alec Stone Sweet's March 1998 APSR article on this phenomenon, "Constructing a Supranational Constitution" contains references to twenty-one articles on EC politics in political science journals (including the Journal of Common Market Studies); of these, one was published in 1961, one in 1989, and the rest in the nineteen nineties.
4. Originally and technically, there were three separate but overlapping European Communities, formed by three distinct treaties, the European Coal and Steel Treaty, which formed the European Coal and Steel Community in 1952, and two 1957 treaties which set up organizations that began functioning in 1958: the Euratom Treaty of the European Atomic Energy Community, and the Treaty for the European Economic Community (or Common Market). (The latter is often referred to as the Treaty of Rome.) By interpretive practice of the European Court of Justice, the three treaties and the three communities have been fused into one. The resulting European Community took the title European Union at the end of 1993, as a result of the Treaty of Maastricht. Stuart A. Scheingold, The Law in Political Integration. (Cambridge, Mass.: Center for International Affairs of Harvard University, 1971), p. 49; Hjalte Rasmussen, "Towards a Normative Theory of Interpretation of Community Law," University of Chicago Legal Forum 1992: 135-178 (hereafter "Towards"), pp. 135-36.
5. The US/EC parallels are: US--national Constitution above national laws and Presidential orders above state laws and state constitutional provisions. EC--EC treaties above EC regulations and directives and Commission rulings above member-state laws and constitutional provisions.
4. Eric Stein, "Lawyers, Judges, and the Making of a Transnational Constitution." American Journal of International Law 75 (1981): 1-27; Karen Alter, Establishing the

Supremacy of European Law: The Making of an International Rule of Law in Europe (Oxford and New York: Oxford University Press, 2001), especially ch. 1.

7. To be sure, the transition from six separate countries in 1957 to six members of a quasi-polity with a higher law constitution within less than a decade did not occur with equal ease in all of the six original EC members, nor with equal speed in every one of the courts within them. These details have been described by others; see Slaughter, Anne-Marie [Burley] et al. The European Court and the National Courts--Doctrine and Jurisprudence: Legal Change in its Social Context. Project directed by Anne-Marie Slaughter, Martin Shapiro, Alec Stone, and Joseph H.H. Weiler. Published as EUI Working Papers, Florence, Italy: European University Institute, 1995. Later published in a single volume by Anne-Marie [Burley] Slaughter, Alec Stone Sweet, and Joseph Weiler, eds. Oxford, UK: Hart; Evanston, Illinois: Northwestern University Press, 1997. See also Alter, Establishing.

6. Leslie F. Goldstein, Constituting, 148-160. Considering intensity and frequency of official resistance, she found the order of most resistant to least resistant to be Dutch, American, Swiss, European; and the order from least entrenched rule of law to most, the same.

⁹ This operational definition for "rule of law culture" is attentive to the Legal Realist insight that when judges decide cases they often, or perhaps even usually, are making new law. Thus one cannot naively assert that the rule of law is obedience to rules promulgated in advance, widely known, etc. I return to this issue below.

10. Helen Epstein, "AIDS: The Lesson of Uganda," The New York Review of Books (July 5, 2001) XLVIII, 11: 18-23.

11. *Ibid.*, 20.

12. It is true that a dimension of the Hobbesian version of the rule of law, does get some attention from the investment-climate analyses of the rule of law, to the extent that bribery ("irregular payments" in the survey jargon) to judges or to police officials is rated as a negative. See, e.g., World Economic Forum, The Global Competitiveness Report 2000 (New York: Oxford University Press, 2000) 74, 249. To the extent that police and judges obey whoever bribes them, the "command of the sovereign" (Hobbes's definition of law) is not prevailing to settle disputes, and the bribing party can get away with murder (or rape). Similarly, assessment of the degree to which private businesses feel that "organized crime does not impose significant costs on businesses" or that they "can rely on the police for protection" also reflects a concern with the Hobbesian version of the rule of law. *Ibid.*, 252. The 1999 version of this ranking report phrased the latter inquiry in an even more directly Hobbesian way, measuring whether "the police effectively safeguard personal security so that it is not an important consideration for business." World Economic Forum, The Global Competitiveness Report 1999 (New York: Oxford University Press, 1999), 324. Still, the overall thrust of this report and

ones similar to it is to measure the more Lockean question, does law function to restrain government itself from using power in undesired ways, especially to interfere with property rights.

13. "Lawfully constituted" does not mean that government had to come to power by means of law, for that would eliminate all regimes that started by revolution, including the American. "Lawfully constituted" should be taken to mean "recognized by the public as wielder of sovereign authority," agents of the sovereign being those who bear a legitimate share of the societal monopoly on violence. If people obey the sovereign simply out of terror, they are not acting on a rule of law norm; if, by contrast, they obey because they view its commands as law, then they are.

14. Leviathan, ed. Michael Oakeshott (NY: Collier, 1962) Ch.26 cf. p.198 with 199 and 204: "law ... consisteth in the command of the sovereign only."

15. Second Treatise of Government, ed. Richard Cox (Arlington Heights, IL: Harlan Davidson, 1982), Para.93, p.56.

16. Ibid., Para.94, p.57

17. The Concept of Law (NY: Oxford, 1961). The rule of law, Hart insists, is compatible with great iniquity, and the evil rules propounded by Nazis, were nonetheless "rules of law," 202-207.

18. General Theory of Law and the State (Birmingham, AL:Legal Classics Library, 1990, reprinted of 1945). The section on various forms of autocracy, for instance, including fascist or Stalinist ones, characterizes them as permeated by a "legal order," 300-303.

19. To be fair, I should note that the concern of analysts like Hart and Kelsen was to define "law" as such, not to define "the rule of law." For a historic account of this maxim about the rule of laws, see, generally, A. Goodheart, "The Rule of Law and Absolute Sovereignty," University of Pennsylvania Law Review 106 (1958): 943- .

20. Locke, 2d Treatise, Para.136-37, pp.83-84.

21. E.g., William Prillaman traces declining confidence in the rule of law within Latin America to the inability of its judiciary to use law to check abuses of power by government officials. The Judiciary and Democratic Decay in Latin America: Declining Confidence in the Rule of Law (NY: Praeger, 2000). Franz Neumann, concluded his book, The Rule of Law, with the assertion, "We cannot, therefore, ascribe to the National Socialist State the basic principles of a Rechtsstaat [rule of law state]" (Dover, NH:Berg Pub., 1986, originally written as thesis at London School of Economics, 1936), 296-98.

Martin Shapiro spends many pages in Courts A Comparative and Political Analysis (Chicago:University of Chicago Press, 1981) debunking the idea that judges can be fully independent from the political powers-that-be, because there is plenty of

evidence that once judges show too much independence, political forces handcuff them in one way or another. On the other hand, honest scholar that he is, he concedes that these attacks themselves function as "testimony to the real independence of judiciaries," p.34. One can conclude that in this dimension as elsewhere, it is a matter of degree.

The phrase, "regimes of horror," is from Kim Scheppele, "Constitutional Interpretation after Regimes of Horror," Law and Society Meeting (May 2000), adapted from Julia Kristeva, Powers of Horror (NY:Columbia University Press, 1982).

22. Except in the case of Fuller, these authors understand the rule of law as a normative ideal for legal systems, an ideal whose realization is never perfect but always a matter of degree. Fuller famously argues that the attributes he describes form the "inner morality of law," and therefore every legal system necessarily to some degree partakes of them, and thereby of morality. The Morality of Law (New Haven: Yale University Press, 1969). Joseph Raz makes the helpful point that there are aspects of laws and of legal systems that comprise its "virtue": these make up the attributes of "the rule of law." But not every legal order, not every system of functioning laws, recognized as such both by the inhabitants and by outside observers exhibits these attributes to a substantial degree. The Authority of Law (Oxford: Clarendon Press, 1979), Chapter 11, "The Rule of Law and Its Virtue." Raz's reply to Lon Fuller, therefore, is to acknowledge the importance of the matter of degree, and to insist that conformity to the rule of law values in a given legal system may be so small as to be negligible. Ibid., 223-6. Margaret Radin's list (actually, lists,) appear in "Reconsidering the Rule of Law," Wittgenstein and Legal Theory, ed. Dennis Patterson (Boulder, CO: Westview Press, 1992), 125-155. Friedrich Hayek's, in The Road to Serfdom (Chicago: University of Chicago Press, 1944), 54. Richard Fallon's, in "'The Rule of Law' as a Concept in Constitutional Discourse," Columbia Law Review 97(1997):1-56. Cass Sunstein's, in "Problems With Rules," California Law Review 83(1995): 953-1023, 968.

While it is true that Joseph Raz, like H.L.A.Hart. makes the point, that the rule of law is compatible with regimes of great iniquity, Raz seems to have in mind not utter dictatorships where the government would behave as above the law, but rather what Judith Shklar has dubbed "dual regimes" -- regimes that offer protection of the rule of law to the dominant in group but not to the tyrannically treated out-group(s). Judith Shklar, Legalism: Law, Morals, and Political Trials ((Cambridge, MA: Harvard University Press, 1986), 208; see also 17, 20, 22.

23. Ibid.

24. Radin, "Reconsidering" at 127-132.

25. Locke, 2d Treatise, Ch.XIV, 99-104. Quotations at pp.99-101.

26. Locke understood the public good to consist in the securing of life, liberty and property of the people, and in fostering prosperity, 2d Treatise, Ch. 5, Para.42, p.27.

27. 2d Treatise, Para.94, p.57.

28. Philip Selznick, an astute student of bureaucratic implementation of law, has analyzed this point at length. See The Moral Commonwealth (Berkeley: University of California Press, 1992); TVA and the Grassroots: A Study in the Sociology of Formal Organization (Berkeley: University of California Press, 1949) and Leadership in Administration (New York: Harper & Row, 1957). For an overview of his legal theory, see Robert Kagan, "On Responsive Law" (pp.85-98) in Robert Kagan, Martin Krygier, and Kenneth Winston, Legality and Community: On the Intellectual Legacy of Philip Selznick (Lanham MD: Rowman & Littlefield, 2002).

29. For a fruitful analysis of the role of purpose in constraining American constitutional jurisprudence, see Michael Zuckert, "Hobbes, Locke, and the Problem of the Rule of Law," NOMOS XXXVI (1994):63-79.

30. The Politics, III, 15; 1286a7-38.

31. Impartiality, that is, at least as among those to whom the rules apply. General rules can, of course, single out whole groups for mistreatment (whether women, Jews, blacks, Bosnians, gypsies, etc.) in which case impartial application cannot overcome invidious partiality in the content of the rule.

32. E.g., Fallon (1997); Radin (1992); Lawrence Solum, "Equity and the Rule of Law," in NOMOS XXXVI (1994):120-147; Steven Burt, "Particularism, Discretion, and the Rule of Law," in *ibid.*, 178-201; William N. Eskridge and John Ferejohn, "Politics, Interpretation, and the Rule of Law" in *ibid.*, 265-294. Antonin Scalia stresses the role of rules in the idea of the rule of law precisely to check the range of discretion of government officials, including lower court judges. "The Rule of Law as a Law of Rules," University of Chicago Law Review 56 (1989): 1175-1188.

Gordon Tullock, not a legal academic, has argued that the degree of [retroactive] lawmaking by judges that is encouraged by the Anglo-American common law system, is, precisely for this reason, less admirable than the civil law systems, on rule of law grounds. "Courts as Legislators," in Liberty and the Rule of Law, ed. Robert Cunningham (College Station TX: Texas A&M University Press, 1979) 132-145.

33. In Hayek's words, "This does not mean that there must be unanimity as to the desirability of the distinction, but merely that individual views will not depend on whether the individual is in the group or not." The Constitution of Liberty (Chicago: University of Chicago Press, 1960), 153-4. Frank Michelman makes the same claim in "Law's Republic," Yale Law Journal 97(1988): 1493-1537, 1500-05. John Rawls includes in his requirements of the rule of law that similar cases be treated similarly and that laws be general, with bills of attainder prohibited. A Theory of Justice (1971), 239. Although she makes the argument in different terms, Kim Scheppelle makes, in effect, the same point when she insists that the rule of law properly contains the principle that law itself cannot be used as a tool of abuse against persons subject to the law. "When the Law Doesn't Count: The 2000 Election and the Failure of the Rule of Law," forthcoming May 2000 University of Pennsylvania Law Review (ms.p.7). (I disagree with her view that this principle is implied in Fuller).

34. Yick Wo v. Hopkins, 118 U.S.356, 369-370 (1886).

35. E.g., both Joseph Raz and Judith Shklar insist that the rule of law in the sense of a regime that binds its officials by rules even-handedly applied is nonetheless compatible with the greatest tyranny toward groups defined in the laws as unworthy of full protection. Raz (1979), at 211, and Shklar, "Political Theory and the Rule of Law" in The Rule of Law: Ideal or Ideology, ed. Allan Hutchinson and Patrick Monahan (Toronto: Carswell, 1987), 13-14.

36. One reads often in rule of law analyses that the rule of law is "a matter of degree," and this would seem to be true also with respect to a legal system permeated by bribery. It is imaginable that such a system, if the bribes were kept to a token level such that virtually everyone could pay, might function as a sort of user-fee taxing system to supplement inadequate police salaries, much as tips do for servers in restaurants.

37. Martin Krygier, "False Dichotomies, True Perplexities, and the Rule of Law," paper presented at the Center for the Study of Law and Society, University of California at Berkeley, March 14, 2003, p.11

38. E.g., Martin Krygier and Adam Czarnota, ed., The Rule of Law after Communism Problems and Prospects in East-Central Europe (Aldershot, England: Ashgate, Dartmouth Pub., 1999). One of the contributors to that volume writes:

As a distinctive legal culture the rule of law must affect conduct and consciousness at many levels. A community committed to the rule of law will be marked by respect for legitimate authority, and it will accept obedience to law as a moral obligation. ...Thus the rule of law requires a culture of lawfulness, that is of routine respect, self-restraint, and deference....Furthermore, the rule of law requires public confidence in its premises as well as in its virtues... (Philip Selznick, "Legal Cultures and the Rule of Law," 21-38, at 37)

See also, Kathryn Hendley, Stephen Holmes, Anders Aslund, Andras Sajó, "Debate: Demand for Law," East European Constitutional Review 8, no.4 (1999): 88-108; Holmes et al., "Citizen and Law after Communism," East European Constitutional Review 7, no.1 (winter 1998): 70-88; and Ilan Cashu and Mitchell Orenstein, "The Pensioners' Court Campaign: Making Law Matter in Russia," and comment thereon by Kathryn Hendley, "'Demand' for Law – A Mixed Picture," East European Constitutional Review 10, no.4 (fall 2001), available at www.law.nyu.edu/eecr/vol10num4

39. These conclusions are drawn from two collections of Weber's writings: H.H. Gerth and C.Wright Mills, trans. and ed. From Max Weber: Essays in Sociology (New York: Oxford University Press, 1958) (hereinafter G&W); and Max Rheinstein, ed. and annot., trans. Edward Shils and Max Rheinstein, Max Weber on Law in Economy and Society (Cambridge, MA.: Harvard university Press, 1954) (hereinafter R).

40. G&M 196, 212-6, 218, 224, 279, 283-4, 293, 295; R 88, 109, 122, 191-2, 225, 231, 267, 305, 318, 341, 349-351; see also Shapiro, Courts 14.

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41. G&M 79, 94, 196, 212, 214, 219, 224, 294, 299; R 341, 354-5.
42. G&M 78-9, 93-94, 139, 149, 155, 275, 282; R 109, 219, 232
43. In Weber's formulation, "Bureaucratic rule was not and is not the only variety of legal authority, but it is the purest." G&M 299. See also, 196, 216, 219, 224, 239, 294; R xxxix-xliii, 222, 337, 349-351, 354-5.
44. G&M 161-62; 212, 298-9; R 91-4, 222, 224, 225, 266, 268; see also Shapiro, Courts, 24.
45. R 91-4.
46. G&M 298-9; R 222, 224, 266; see also Shapiro, Courts, 24.
47. G&M 212-6, 218; R 88, 122, 225, 227, 231, 267, 305, 349-351.
48. G&M 284, 299; R 122, 231, 267.
49. G&M 198, 215-6, 224-5; R xliii, 350-1.
50. R 306-321.
51. R 321.
52. R 227.
53. G&M 212-3.