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Privatizing Law: Is Rule of Law an Equilibrium Without Private Ordering?

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Abstract

Almost all theorizing about law, including the rule of law, begins with government. Analysts from a wide variety of perspectives make this presumption. We contest this presumption. In this paper, we ask whether rule of law is an equilibrium in the absence of private ordering. To address this question, we rely on the what-is-law model of Hadfield and Weingast (2012). Most legal theory has asserted that legal attributes are characteristic of legal orders, such as generality, clarity and neutrality. In contrast, we show that they 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. 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. We end with some implications for building rule of law in the poor and developing countries around the world that lack productive legal order.

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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. Positive 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 (McNollgast 2007). 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 2016). Dixit (2004) explores the role of non-governmental mechanisms to enforce contracts and property rights, describing this as the study of "lawlessness and economics."[1]

[1] See also Ostrom (1990), Skarbek (2013) and Leeson (2014).

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 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.

The widespread presumption that law is quintessentially the product of government makes law both a surprising and an ideal candidate for analysis through the lens of privatization. The concept of privatization is, at its core, paradoxical—it is defined as the transfer of government functions to the private sector, and yet it puts into play precisely the question of what is a government function. Privatization, both politically and as a matter of theory, grows out of a challenge to orthodoxy about what governments can, or should, do. It sends us back to first principles, to derive rather than assume the proper allocation of functions between public and private sector.

In a series of papers beginning with Hadfield and Weingast (2012) we have engaged this challenge in law. We develop the what-is-law framework for analyzing law that begins not with government but with the question of how

equilibrium social orders, in which behavior in a community is reliably patterned on shared rules, can be generated and sustained.

We take as our starting point the idea that the key feature that distinguishes legal order from other normative social orders such as systems based on cultural norms is that the rules can be authoritatively clarified, and changed. This authoritative system distinguishes legal from other social orders of interest from an analytical point of view: in organic social orders, change is emergent; if law is established, there is an entity capable of changing rules and thereby shaping collective behavior to achieve some public (or private) end. By starting with this premise about the distinctive -- and interesting – characteristics about law, we derive rather than presume what must be supplied by a centralized institution like a government. And we show that an equilibrium in which rules articulated by a centralized institution are effective—meaning people observe them—does not require a centralized enforcement authority. Presume that the institution that articulates the rules displays a set of features that coordinate and incentivize ordinary individuals to bear the costs of delivering social punishments for transgressions of the rules (such as criticism or exclusions, the primary methods by which ordinary social norms are enforced). Then the what-is-law framework shows that enforcement can left to private, rather than public, ordering.

We use the term *legal attributes* to call those features that support an equilibrium in which enforcement is exclusively supplied by individual decisions to voluntarily help enforce the rules announced by a centralized institution.

These attributes 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. But unlike the legal philosophical literature, 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).[2] Rather, they arise from our positive analysis of how a community sustains an equilibrium based on centralized classification of conduct (determining punishable from non-punishable actions) 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. A failure to observe the rule of law destroys the equilibrium by destroying the incentives of individuals to enforce and their ability to coordinate.

[2] "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)

Specifically, we ask is there an equilibrium characterized by rule of law in a regime in which enforcement is fully centralized, that is, without any role for private ordering? Most political and economic theories of law take this form of enforcement for granted. But we think the taken-for-granted assumption—the normal assumption about government—is highly problematic. Indeed, we argue that the answer to our question is: no. With the power to authoritatively articulate and change the rules, any centralized classification institution faces an obvious and well-known moral hazard problem; namely, the persistent temptation to announce classifications that benefit those in charge. This is the basic premise of the economic model of behavior and the challenge of government: those granted the authority to govern face an incentive to turn that authority to their benefit.

Adam Smith illustrated this point in the *Wealth of Nations*. Smith explains that when the executive also serves as judge, he is unlikely to take an impartial view of cases in which he has a direct interest:

> When the judicial is united to the executive power, it is scarce possible that justice should not frequently be sacrificed to, what is vulgarly called, politics. The persons entrusted with the great interests of the state may, even without any corrupt views, sometimes imagine it necessary to sacrifice to those interests the rights of a private man. But upon the impartial administration of justice depends the liberty of every individual, the sense which he has of his own security. In order to make every individual feel himself perfectly secure in the possession of every right which belongs to him, it is not only necessary that the judicial should be separated from the executive power, but that it should be rendered as much as possible independent of that power (Smith 1776, p. 570).

Our framework shows that, when those with control over classification entirely depend on voluntary private enforcement, an equilibrium in which

classifications are implemented (rules are followed) is achieved only if those in charge of classification honor the rule of law. But if those in charge of classification also wield a monopoly over the legitimate use of force and are capable of securing compliance for *any* rule they announce—which is the presumption of centralized enforcement models of law—then there is no strategic reason for them to observe the rule of law. When the incentive arises, as it predictably will, to announce classifications at odds with announced rules or to engage in closed procedures or to announce a result driven not by impersonal reasoning but by personal favor or ambition, rulers can act on those incentives without sacrificing compliance. There will be an equilibrium in which individuals follow the rules, but it will not be characterized by the rule of law because the ruler can do better: secure compliance *and* take advantage of any private benefits available.

We build our argument as follows. In section II we recap 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 and what we mean by a rule of law equilibrium. 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).[3] Even when retaliation appears to be individualized, as when the family of a murder victim seeks revenge by killing the perpetrator, the stability of this form

[3] 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 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)

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).[4]

This form of enforcement is private in the sense that it is carried out by ordinary individuals not under the direction of an official. 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 one individual simply objects to in another. 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 emergent, a result of repeated interactions of many members of a community. In a stable organic social order, we can identify what is punishable and what is not,

[4] Of course, sometimes this form of punishment is not stable but rather sets off blood feuds that spiral out of control.

but we cannot identify any formal or institutionalized 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 Hart's *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.

The model we develop adds the classification institutions 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.[5] 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 classifications preferred by the (often, many) individuals who are required for

[5] 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.

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.[6] We call this convergent feature *qualified universality.*[7] 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 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).[8]

We call these features *legal attributes*.

In a recent paper (Carugati, Hadfield and Weingast 2015; see also Carugati 20**) we use a thought experiment in the context of the legal system in

[6] The alternative could be disorder or it could be some other form of normative social order.

[7] 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.

[8] Note that these features do not include many of the values of democratic systems; rule of law is not the only desirable feature of a legal political regime. We emphasize in particular that generality refers only to the form of a rule—it is based on categories rather than personal identity, but categories could be narrowly, and discriminatorily, drawn. Impersonal reasoning refers only to the fact that ex post classifications of specific events and behaviors are derived from ex ante rules and principles that can in principle be replicated by any individual; classification is not a function of the identity of the classifier. It does not mean that all persons are treated equally by the law.

Ancient Athens to demonstrate the relationship between decentralized enforcement by ordinary individuals and the legal attributes.[9] During the Classical period (508-322 BCE), Athens possessed a centralized classification institution consisting of a legislative assembly, written laws, unwritten customs, and popular 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. Although all citizens were authorized to assist in enforcement—and hence could be deemed to be acting in an 'official' capacity—Athens did not maintain a centralized enforcement agency. No officials had both the responsibility and the means to execute a judgment under the direction and control of a central agency. 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

[9] For other historical examples of legal orders without fully centralized enforcement see Hadfield and Weingast (2013).

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.[10] 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.

[10] 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.)

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.

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 alternatives. These alternatives included 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.[11]

[11] 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.

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*.[12]

We argue that stability did not arise from blind absorption of this call to help with enforcing the democratic legal order. Individual Athenians had to believe that the order would provide benefits for themselves. The need to satisfy the ordinary individual participation in enforcement secures the stability of something individually beneficial; this, in turn, generates 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

[12] Demosthenes, *Against Meidias,* 223-225.

prostitute in his youth, he doesn't take care of his aging parents, he doesn't contribute to public festivals (Carugati 20**). 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 a wide variety of community 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 Athenian rules put in place had to display the kind of qualified universality that Hadfield and Weingast (2012) predicts—that is, it was beneficial to those whose *voluntary* participation was required for stability.[13] 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.[14] We would also predict that the Athenian rules

[13] We emphasize, as do most legal philosophers, that even systems that are oppressive, intrusive, and which discriminate against even large segments of the population can follow the rule of law. Although the concept of the rule of law is often used in the literature to mean democratic values such as equality and personal freedom, we restrict the term to mean only that the classification institution possesses the legal attributes of clarity, generality, impersonal reasoning and so on. See Hadfield and Weingast (2015) for further discussion.

[14] 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)

achieved universality among citizens 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 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 that the answer is simple: nothing. That is, fully centralized enforcement is incapable of sustaining an equilibrium characterized by rule of law.

To see the logic of this claim, we first provide a more formal definition of the "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. In Fuller's view, 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 central 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 as Raz (2009): assessing what is necessary, in a practical sense, for people to use the law to guide their behavior. The principal difference appears to be that Fuller calls this "law" while 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 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. Equilibrium with rule of law requires both that individuals have an incentive to pattern their behavior in accordance with the classifications announced by the classification institution and that those who control the classification institution have an incentive to operate the institution in a manner consistent with the legal attributes.

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 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 the equilibrium 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.[15]

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.

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

[15] "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)

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 those operating the institution choose to abide 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.

To approach this question we need to pay explicit attention to the incentives of those who control the classification institution. This is something we do not yet model in our work to date. Although we do not develop a formal model here, we can provide a more careful informal treatment in order to explain the logic of our claim that rule of law is not an equilibrium with fully centralized enforcement authority.

We call the person or group of people who control the classification institution the authoritative steward; this is the unique entity capable of articulating classifications that the community of enforcers, as a matter of common knowledge, all treat as authoritative. What are the incentives of this steward? We do not fully characterize the utility function of the steward, but we make the following assumption: the steward has some private interests that can diverge from public interest. We think this assumption is an empirically grounded one and consistent with the animating assumption most political theory, beginning with Locke (1689), Montesquieu (1748), Smith (1762), and Madison and continuing in the modern literature with Acemoglu and Robinson (2006), Besley (2006), Ferejohn (1986) and Persson and Tabellini (2003). Moral hazard

in the executive frames the challenge of governance: how to achieve alignment between the decisions of the central authority and the interests of citizens. As Madison put it in *Federalist* 41, "possible abuses must be incident to every power or trust, of which a beneficial use can be made."

Now define a rule-of-law equilibrium. We have two (groups of) actors in our model: the authoritative steward and ordinary individuals. The steward chooseswhat classifications to announce and, relatedly, the procedures that will be followed in reaching those classifications. (In the parlance of conventional legal systems, the steward decides the content of laws and adjudicates results in particular cases.) Ordinary individuals choose whether to take actions that are classified as punishable (whether to break the rules) and, if the regime depends on decentralized punishment, whether to participate in collective punishment of those who do violate the rules.

In a rule-of-law equilibrium ordinary individuals choose to comply with the classification scheme announced by the central authority; and that the central authority announces classifications in a manner that is consistent with the legal attributes. Moreover, as in any equilibrium, all actors must be making choices that maximize their utility, given the equilibrium choices made by other actors. This means that ordinary individuals cannot do better, if the authoritative steward is observing legal attributes, by deviating and choosing to violate the rules; and that the authoritative steward cannot do better by deviating to a classification scheme that violates one or more of the legal attributes (announcing a law or

deciding a case in order to reap private benefits and in doing so violating the requirements of prospectivity or publicity or impartial reasoning, for example.)

The gist of the result in Hadfield and Weingast (2012) is that in equilibrium the authoritative steward has no incentive to deviate from classifications (and procedures) that are consistent with the rule of law because deviations by the steward will be met with deviations by ordinary individuals in their *punishment* behavior: without assurance that the classification institution is observing the rule of law, individuals do not expect their contributions to punishment today to pay off tomorrow, because they either cannot predict or do not trust what the regime will allow and what it will deter in the future. Compliance with the announced classification scheme then collapses because the punishment threat is no longer credible. As long as the utility benefits to the steward depend on continuation of enforcement system, it has the incentives to maintain the characteristics necessary to maintain the voluntary enforcement; namely, the legal attributes.

This equilibrium logic fails if we now assume that the authoritative steward controls not only the classification institution but also a centralized enforcement apparatus. If that apparatus is fully capable, as standard accounts of law assume, of inducing compliance with *any* classification (rule) that it announces, then the authoritative steward can, whenever the opportunity arises, deviate from the rule of law to announce classifications that secure private benefits for the steward *without* disrupting the incentive of ordinary individuals to continue to comply with the law. Equilibrium reasoning then says that observance of the rule

of law is not an equilibrium: because, given equilibrium behavior by the individuals subject to the rules (compliance), the authoritative steward can do better by deviating from the rule of law.

Our point is this: if a classification institution capable of providing deliberate content to rules is established and if 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.[16] Finally, the regime can use the violence potential of the state to target specific individuals – typically perceived opponents of the regime.[17] 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

[16] 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.

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

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 may produce a some form of 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.[18]

Are there other constraints arising from the need to preserve enforcement that might generate incentives for the authoritative steward to observe the rule of law ? To answer that question we need to explore the question of how a fully centralized enforcement regime induces officials to act in accordance with the central institution's classifications. How is Weber's (1956) "staff" of enforcers motivated?[19]

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

[18] 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.

[19] In distinguishing law from convention, Weber proposes that "the concept of *law* will be made to turn on the presence of a staff engaged in enforcement." Weber ([1956] 1978, 34)

mechanism would be to rely on threats of violence directed to enforcement officials who fail to enforce as directed.[20] Threats of violence, in fact, could be used to "deputize" the entire citizenry, requiring them to participate in punishments as directed by the center.[21]

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.[22] It

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[20] 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).

[21] 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.

[22] 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.)

also requires a means of controlling the organization of violence (North, Wallis and Weingast 2009). The more critical violence is to maintaining centralized enforcement of law, the more powerful it must be, but also, the more difficult to prevent subunits from attempting coups.

Violence therefore 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 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 produces 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.

To be clear, we are not claiming that rule of law requires *exclusive* dedication of the enforcement function to private actors. We have no doubt that centralized enforcement is both a necessary and ab efficient component of legal enforcement in societies of substantial scale. Our point is that under standard assumptions about the risk of moral hazard for those wielding power, it is only if

the central authority is dependent on voluntary participation in the enforcement of its rules (perhaps in addition to other forms of enforcement) that rule of law is an equilibrium.

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

Against this background, we make a stark claim. A legal system cannot achieve rule of law, we argue, 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 the rule of law that focus on what is desirable in a governance regime. In addition, we ask the positive question typically ignored by legal philosophers; namely, "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. Generality and universality therefore contribute to the standard enforcement mechanisms of repeat play: I'll participate in today's enforcement that benefits you because I know that I can rely on your participation in punishment that benefits me tomorrow. More broadly, our framework demonstrates how these normatively attractive legal attributes emerge as part of an equilibrium of decentralized enforcement of law. In so doing, 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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