Frank Lovett[1] July 2017

Republicanism and the International Rule of Law

Let us accept as our starting point – whether for practical or principled reasons – that the world is divided into states. The existence of state boundaries gives rise to a distinction between municipal and international law: roughly speaking, we may think of the former as law whose jurisdiction is limited within the boundaries of a single state, and the latter as law whose jurisdiction extends across state boundaries. The rule of law is an ideal that has primarily been thought about in relation to municipal law. While there are many disputes as to the meaning of the rule of law and as to the ultimate grounds for its value, it is generally accepted that the municipal rule of law is a good thing. Should we similarly regard the international rule of law as a good thing? This paper aims to address this question.[2]

Three broad theoretical commitments underlie the discussion that follows: positivism, republicanism, and personalism. Legal *positivism* is the view that the existence and content of law ultimately rests on social, not moral, facts: in the words of John Austin, "the existence of law is one thing; its merit or demerit is another."[3] For present purposes *republicanism* refers to any public philosophy or political doctrine that grants some sort of priority to a non-domination principle – that is, a normative principle according to which we ought to design laws, institutions, policies, and so forth so as to promote freedom from domination. Finally, *personalism* is the thought that, in the final analysis, it can only be the rights, interests, or welfare of individual human beings that counts normatively speaking: in other words, things cannot be good or bad for institutions or organizations as such, except derivatively of their being good or bad for actual people.

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[2] In this respect it moves beyond the brief discussion in Frank Lovett, *A Republic of Law* (Cambridge University Press, 2016), 205–207.
[3] John Austin, *The Province of Jurisprudence Determined* (Hackett Publishing, 1998), 184.

Each of these commitments is contestable, and no effort will be made to defend them here. They are relevant in the present context, however, because each might seem to present an obstacle to regarding the international rule of law as a good thing: personalism because it entails that states and other global actors do not have a good of their own to be served by the international rule of law; republicanism because it is committed to a degree of popular democratic control difficult or impossible to realize on an international scale; and positivism because it often regards both international law and the rule of law ideal with a degree of skepticism.[4] This paper argues that the international rule of law is in fact best defended on the unlikely grounds of personalism, republicanism, and positivism.

Section one briefly reviews the standard literature on the rule of law, and shows why it proves unsatisfactory. Section two then offers a better account of the rule of law and its value, built on the republican commitment to freedom from domination. Sections three and four then build an account of the international rule of law and its value under, respectively, ideal and non-ideal conditions. Finally, the conclusion briefly considers the nature and feasibility of the international rule of law.

1. *Standard Accounts of the Rule of Law*

Should we regard the international rule of law as a good thing? This is, obviously, a normative question. We cannot answer it, however, without at least provisionally answering a more basic conceptual question, namely: what do we mean by the rule of law in general? It is harder to answer the latter question than one might suppose, and indeed the standard literature on the rule of law for the most part does so incorrectly. Only with a correct understanding of the rule of law in hand can we properly address our main question.

[4] On these obstacles, see respectively Jeremy Waldron, "Are Sovereigns Entitled to the Benefit of the International Rule of Law?" *European Journal of International Law*, 22 (2011); Francis Cheneval, "Multilateral Dimensions of Republican Thought" in Samantha Besson and José Luis Martí (eds.), *Legal Republicanism: National and International Perspectives* (Oxford University Press, 2009); and H.L.A. Hart, *The Concept of Law* (2nd ed., Clarendon Press, 1994), 206–221, 232–237.

In standard contemporary discussions, the rule of law is characterized as a list of specific virtues applicable to legal systems. While there is no consensus on what this list should or should not include, there is considerable overlap in the virtues proposed: among the most frequently mentioned, for example, are generality, prospectivity, publicity, clarity, consistency, and stability.[5] Some authors attempt to pare down this list to a few fundamentals, while others elaborate or expand the list considerably, but all more or less agree that to enjoy the rule of law is essentially to be subject to a legal system composed of clear and consistent general rules that are published in advance and not changed too often.

So far, so good. Now at this juncture it is natural to pose two questions. The first concerns why the rule of law, so understood, is a good thing. What precisely is the distinctive value served in having a legal system that answers to the rule of law virtues? The second concerns how we are supposed to settle disagreements as to which specific principles should be on the list. What are the criteria for determining whether something counts as a genuine rule of law virtue or not? These questions are connected, it turns out.

For example, suppose we interpret the rule of law virtues strictly as formal requirements, in the sense that we regard them as constraints only on the *form* that legal rules should take, and not on the substantive *content* of those rules – especially, not on their merit or demerit from an ethical or moral point of view. This requires that we exclude from our list of virtues any overtly normative requirements that the law be democratic, that it respect individual rights, and so forth. It also requires that we be careful to define otherwise ambiguous principles in a strictly formal manner. Generality, for instance, might be defined as the mere formal requirement that rules of law not identify persons or groups by their proper names. This approach has the significant advantage that we can derive the correct list of virtues in a relatively uncontroversial manner from the nature of law itself: the virtues can

[5] Standard lists of the rule of law virtues can be found in Lon L. Fuller, *The Morality of Law* (rev. ed., Yale University Press, 1969), 46–91; Joseph Raz, *The Authority of Law: Essays on Law and Morality* (Clarendon Press, 1979), 214–18; and John Finnis, *Natural Law and Natural Rights* (Clarendon Press, 1980), 270–71. For a detailed recent discussion, see Andrei Marmor, "The Rule of Law and Its Limits," *Law and Philosophy*, 63 (2004).

be understood, in Fuller's expression, as pragmatic success conditions for "the enterprise of subjecting human conduct to the governance of rules."[6] It is simply not possible, we might think, to effectively guide human conduct with rules that are unclear, secret, retroactive, and forth. The more rigorously we adhere to the rule of law virtues, other things equal, the more successful the enterprise will be.

There is a serious difficulty with the formal approach, however, for it seems to diminish the value of the rule of law considerably. To be sure, it is widely recognized that it is easier to plan our lives when legal rules are predictable, consistent, and clear. But these benefits are quite limited. They arise as the side effect, so to speak, whenever a given regime happens to employ law as an instrument for achieving its aims, whether those aims be good, bad, or indifferent. As H.L.A. Hart says in his notorious review of Fuller,

> … the crucial objection to the designation of these principles of good legal craftsmanship as morality … is that it perpetrates a confusion between … the notions of purposive activity and morality. Poisoning is no doubt a purposive activity, and reflections on its purpose may show that it has its internal principles. ("Avoid poisons however lethal if they cause the victim to vomit," or "Avoid poisons however lethal if their shape, color, or size is likely to attract notice.") But to call these principles of the poisoner's art "the morality of poisoning" would simply blur the distinction between the notion of efficiency for a purpose and those final judgments about activities and purposes with which morality in its various forms is concerned.[7]

For example, there is no reason a legal regime of slavery could not perfectly well observe the rule of law virtues understood as mere formal requirements: rules permitting the ownership of human beings can be clear, consistent, published in advance, and so forth. No doubt slaves benefit to some extent from there being clear rules, and indeed the law of slavery itself might evince some small degree of respect for slaves as human agents in addressing them as legal subjects at all. But surely the evil of human bondage overwhelms such paltry goods.

To avoid this problem, we might be tempted to reinterpret the rule of law virtues as substantive normative constraints. Generality, for instance, could be thought

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[6] Fuller, *The Morality of Law* (above, n. 5), 91; cf. ibid., 53, 66, and 74.
[7] H.L.A. Hart, review of Lon Fuller's *The Morality of Law* in *Harvard Law Review*, 78 (1965), 1286.

to require some degree of substantive legal equality. This would perhaps follow if we defined it, as Hayek suggests, so as to require that legal distinctions be acceptable to a majority of persons in each distinguished class.[8] The basic list of principles noted above might also be supplemented with other, even more explicitly normative requirements. Thus we might claim that the rule of law includes a requirement that the legislative process be open and democratic, or that the legal system recognize and respect individual rights. On a substantive understanding of the rule of law, it is perfectly clear why we should regard it as valuable: normative requirements of this sort would significantly constrain the purposes to which evil regimes might direct the legal system. Slavery, for example, would obviously be ruled out. On this view it is also clear, at least in theory, how disagreements concerning the rule of law virtues should be settled: the correct list of principles would be the one that properly answers to the criteria of good laws given by our preferred account of social justice, whatever that turns out to be. Thus, as Dworkin observes, the substantive approach "does not distinguish" in any fundamental sense "between the rule of law and substantive justice."[9]

Unfortunately, there is an important difficulty with the substantive approach as well. Raz expresses the difficulty succinctly as follows:

> If the rule of law is the rule of good law then to explain its nature is to propound a complete social philosophy. But if so the term lacks any useful function. We have no need to be converted to the rule of law just in order to discover that to believe in it is to believe that good should triumph.[10]

In other words, on the substantive approach the rule of law virtues simply represent a view about what sorts of laws it would be good to have: to argue that the rule of law is a good thing would thus be to argue, redundantly, that good laws are a good thing. The concept of the rule of law, on this view, might perhaps serve as some more or less useful shorthand for that aspect of social justice which applies to the design of legal systems, but it would perform no independent work of its own. What

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[8] Friedrich A. Hayek, *The Constitution of Liberty* (University of Chicago Press, 1960), 153–54.
[9] Ronald Dworkin, *A Matter of Principle* (Harvard University Press, 1985), 12.
[10] Raz, *The Authority of Law* (above, n. 5), 211.

is more, in tethering our account of the rule of law to an account of social justice, we ensure that disagreements about the former cannot firmly be settled until we agree about the latter, and alas agreement on the nature of social justice is not soon to be expected.

Thus we seem to have arrived at an impasse: neither approach in the standard contemporary literature seems satisfactory. On the substantive view, it is clear why the rule of law is valuable, but only at the cost of rendering that ideal redundant, while on the formal view, the rule of law may stand as a distinctive value in its own right, but only a very limited one.

2. *Republicanism and the Rule of Law*

To clear the way for a fresh start, let us set aside the standard rule of law literature for a moment, and approach the problem from a new starting point. Republicanism, we noted earlier, is a public philosophy or political doctrine that regards the promotion of freedom from domination as a central desideratum in the design of laws, institutions, policies, and so forth. More precisely, let us define the sort of freedom republicans are concerned with as follows:

> **F**: A is free to ϕ provide there is no B having the uncontrolled ability to intentionally frustrate A's ϕ–ing.[11]

Here we may suppose that A is a person, while B might be another person or a group agent. It is reasonable to suppose that enjoying some range of freedom from domination is an important condition of human flourishing: when subject to domination people are among other things materially exploited, hindered from developing autonomous life plans, and deprived of self-respect.[12] To be sure, freedom from

[11] On the republican conception of freedom see especially Philip Pettit, *Republicanism: A Theory of Freedom and Government* (Oxford University Press, 1997), chapter 2; Quentin Skinner, *Liberty Before Liberalism* (Cambridge University Press, 1998), chapters 1–2; and Philip Pettit, *On The People's Terms: A Republican Theory and Model of Democracy* (Cambridge University Press, 2012), chapter 1. For a recent review, see Frank Lovett, "Non-Domination," in David Schmidtz and Carmen Pavel (eds.) *The Oxford Handbook of Freedom* (Oxford University Press, forthcoming).

[12] For further discussion, see Pettit, *Republicanism* (above, n. 11), 85–89; John Maynor, *Republicanism in the Modern World* (Polity Press, 2003), 52–59; and Frank Lovett, *A General Theory of Domination and Justice* (Oxford University Press, 2010), 130–34.

domination is not the only condition of human flourishing. It follows that we may sometimes face difficult choices in which we need to balance the need for freedom from domination against other important needs. Such issues are temporarily set aside, however.

Domination can take many forms, corresponding to the many different methods by which persons or group agents might frustrate our choices. Surely among the most worrisome, however, arises specifically whenever we are exposed to coercive force. Here we may take coercive force to mean roughly the use or imminent threat of violence or physical restraint. Among the most pressing of political issues therefore must be the issue of how to control the use of coercive force – who may employ it, to what extent, and on which occasions. In the absence of clear expectations concerning when we are likely to be exposed to violence or physical restraint, hardly any of the other benefits of human association are possible. When people "live without other security, than what their own strength, and their own invention shall furnish," Hobbes famously observed,

> … there is no place for industry; because the fruit thereof is uncertain: and consequently no culture of the earth; no navigation, nor use of the commodities that may be imported by sea; no commodious building; no instruments of moving, and removing such things as require much force; no knowledge of the face of the earth; no account of time; no arts; no letters; no society; and which is worst of all, continual fear, and danger of violent death ….[13]

It is thus crucially important that we establish firm public controls on the use of coercive force, and sufficiently motivate the relevant parties to effectively implement those controls. Doing so is necessary to secure an absolutely central aspect of our freedom from domination.

What I want to suggest is that the rule of law is best understood as precisely the solution to this challenge. Detailing a complete argument to this effect is beyond the scope of this paper, but the basic intuition can be sketched easily enough.[14] Let us suppose that B has the ability to employ coercive force against A, and then ask our-

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[13] Thomas Hobbes, *Leviathan* (Oxford University Press, 1998), 85.

[14] For a more complete version of the argument, however, see Lovett, *A Republic of Law* (above, n. 2), chapter 4; and Frank Lovett, "A Republican Argument for the Rule of Law" (paper presented at ….)

selves what A must do in order to avoid being subjected to that coercive force. One possibility is that she might ingratiate herself to B in the hopes that he will become benevolently disposed towards her. Even supposing her strategy succeeds, however, this would not meet the standard set by our republican definition of freedom above, for B retains the *ability* to employ coercive force against A even if he benevolently declines to do so. Put another way, A depends on the continued good will of B to avoid being subjected to coercive force at his hands. Now suppose there in a law that reliably controls B's ability to employ coercive force: perhaps the law permits B to use coercive force only when necessary to prevent people from physically harming one another. In this case, A knows what she must do to avoid being subjected to coercive force at B's hands: namely, she must refrain from attempting to physically harm other people. Provided she adheres to this rule, she no longer depends on B's continued good will to avoid being subjected to coercive force at his hands. She enjoys, to that extent, republican freedom.

Thus we have a straight-forward test for determining the extent to which the rule of law obtains in any given situation or context. Taking any person A, we must simply ask ourselves whether there exists a set of legally valid prescriptive rules known to her such that, provided she undertake a reasonable effort to observe those rules, she will not ordinarily be subjected to violence or physical restraint at the hands of others. To the extent that our answer is yes, we may then say that she enjoys the rule of law, and not otherwise. Significantly, the law of slavery fails this test: so long as slave owners retain the right to buy, sell, and transport human beings at discretion, there will not exist a set of legal rules the slave can follow to ensure she will not be subjected to violence or physical restraint at the hands of her master. So too would many other legal regimes that might appear to pose challenges to the rule of law ideal. Traditional family law, for example, permitted the discretionary use of coercive force by husbands and fathers. Such laws as there were might have been perfectly clear, consistent, prospective and so forth, but this was neither here nor there: from the point of view of wives and children there were no legal rules the following of which reliably ensured their security from domestic violence.

The fundamental error underlying most accounts of the rule of law in the standard literature can now be understood. It is a simple error, but a subtle one: namely, those accounts incorrectly regard the rule of law as a virtue of legal systems – that is, they hold that the point of the ideal is to demand that laws be clear, consistent, prospective, and so forth. The correct account, in contrast, regards the rule of law as a virtue of social orderings – that is, it holds that the point of the ideal is to demand that all public and private uses of coercive force be controlled by law.

Notice that on the correct view, the rule of law virtues so central to the standard accounts are revealed to be conceptually derivative. We may retain the thought that the virtues represent pragmatic success conditions for the implementation of a legal system, but their normative role is now secondary. This can be illustrated as follows. Suppose that within some regime of slave law, a new set of legal restrictions are introduced significantly reducing the discretionary authority of slave owners. Further suppose that these new regulations are partially effective, but less so than they might otherwise be because they score rather poorly on clarity, consistency, publicity, and so forth. On the standard view, we should say that the rule of law has declined somewhat, insofar as the average degree of clarity, consistency, publicity, and so forth in the legal system as a whole has decreased. On the correct view, we should say that the rule of law has improved somewhat, insofar as more potential uses of coercive force are now controlled, albeit imperfectly, by law.

Let us take stock of the argument to this point. The *reason* for controlling all public and private uses of coercive force by law is that doing so is necessary to secure a central aspect of our freedom from domination. In this respect, our account is republican. It is personalist in the sense that we care about freedom from domination because it is necessary for the flourishing of actual people. So understood, the rule of law is not a minor value. Finally, in what sense is our account positivist? It is positivist in the sense that it relies on our conceiving of the law as a descriptive social fact – specifically, as a set of rules whose general reliability is common knowledge. Provided the law presents us with a set of rules the following of which does in fact permit us to avoid experiencing coercive force, the rule of law has been satisfied, re-

gardless of the moral or ethical merits of those rules.[15] So understood, the rule of law will not be a redundant ideal, merely a disguised view about what laws it would be good to have.

3. *The International Rule of Law: Ideal Theory*

To this point we have discussed the rule of law in general, without explicitly stating whether the ideal referred to municipal or international law. Now that we have a proper understanding of the rule of law and its value in hand, we are prepared to address the main question of this paper, namely, whether we should regard both the municipal and the international rule of law as similarly valuable.

Here it is useful to distinguish the *international* rule of law on the one hand, from what might be termed the *global* rule of law on the other.[16] The former refers, roughly speaking, to the application of the rule of law ideal to the international, as opposed to a domestic, social order. The latter, in contrast, refers to the extension of the rule of law ideal to each domestic social order around the world. Supposing our argument in the previous section is valid, it would seem that we have good reasons to promote the global rule of law – that is, good reasons to want every person in the world to live in a society that has successfully realized the rule of law domestically.[17] Supposing the global rule of law in this sense were fully realized, however, would there be any further need for the international rule of law? Or, is the international

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[15] Enormously complex questions regarding the nature of rules are glossed over here, of course, but see Lovett, *A Republic of Law* (above, n. 2), chapter 2 for further discussion. For the purposes of the argument sketch above, rules should be understood quite broadly: to do its job, all a rule needs to do is create a common knowledge partition in the space of possible action paths, such that there exists some range of realistic opportunities for avoiding coercive force by selecting a path on the appropriate side of the partition.

[16] See Simon Chesterman, "An International Rule of Law," *American Journal of Comparative Law* 56 (2008), 355–56 for this helpful distinction. Note that he reserves the expression "rule of international law" for a third idea, namely, that international law should trump municipal law in cases of conflict.

[17] This is emphatically *not* the claim that every society around the world must establish the particular institutions by which western nations have typically implemented the rule of law – constitutional courts, the separation of powers, jury trials, professional lawyers, etc. Which particular institutions best serve the rule of law ideal in given socio-cultural contexts is an empirical question, unfortunately often ignored in international development practice.

rule of law merely a remedial good, necessary only in a world that falls well short of the global rule of law?

To answer this question, we must first consider just how far the global rule of law can carry us. The value of the rule of law, we have argued, lies in its ability to secure a central aspect of our freedom from domination. It accomplishes this by imposing controls on public and private uses of coercive force. Let us consider for a moment all the possible sources of coercive force to which we might be vulnerable in the absence of the security that law provides.

In the first instance, of course, we are vulnerable to the use of violence and physical restraint by other people: as Hobbes says, in the proverbial state of nature even "the weakest has strength enough to kill the strongest, either by secret machination, or by confederacy with others."[18] The usual strategy in the modern world for overcoming this primary vulnerability involves reserving to the state alone a monopoly on the legitimate use of violence and physical restraint within its territory. When successful, this deprives non-state domestic actors of the ability to use coercive force against their fellow citizens. Laws against murder, assault, robbery, rape, and so forth obviously serve this purpose. It is also important, however, to eliminate all the various pockets of legally authorized private uses of coercive force – laws permitting the private use of coercive force in the context of slavery, the family, employment relations, and so forth.[19] Only then will our primary freedom from domination by coercive force be realized.

Hobbes of course had a conception of liberty very different from the republican one, and thus he would vehemently disagree with the republican claim that our freedom is institutionally constituted: as Blackstone observed, "laws, when prudently framed, are by no means subversive but rather introductive of liberty," and

[18] Hobbes, *Leviathan* (above, n. 13), 82.

[19] Certain exceptions are inevitable, of course, for at least two reasons: first, the rule of law will never in practice be perfect; and second, other values may impinge at the margin on our wanting to press the rule of law even so far as we are able. The independent values of privacy and intimacy, for example, may impose principled limits on our efforts to absolutely purge coercive force from the family.

thus "where there is no law, there is no freedom."[20] This brings us to a secondary aspect of the rule of law – namely, imposing effective legal control over the state itself, for it will not do to eliminate one source of vulnerability only to leave ourselves exposed to another as bad or worse. Thus the rule of law will not be complete until we also ensure that no citizen is ever subjected to public coercion except as the consequence of her having failed to observe some legally valid prescriptive rule. Hobbes notoriously believed this impossible, and thus regarded the notion that state authority should be subordinate to law a dangerous incoherence. It is perhaps ironic, then, that many contemporary discussions of the rule of law apparently have its secondary aspect alone in mind. A.V. Dicey, for example, understands the rule of law to mean that

> … no man is punishable or can be made to suffer in body or goods except for a distinct breach of law established in the ordinary legal manner before the ordinary courts of the law.[21]

Even more explicitly, Raz goes so far as to claim that the "rule of law is designed to minimize the danger created by the law itself," as if we could satisfy the ideal by simply having no law.[22] Surely, however, the primary aspect of the rule of law is no less vital: we cannot plausibly claim that people enjoy the rule of law in a society where they are regularly exposed to uncontrolled violence and physical restraint at the hands of their fellow citizens. Only a society which secures in some reasonable measure both aspects of the rule of law can be described, following James Harrington, as an "empire of laws and not of men."[23]

So far, so good. Now let us suppose we have fully achieved the rule of law in both aspects domestically. Is our vulnerability to coercive force at an end? Certainly not,

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[20] William Blackstone, *Commentaries on the Laws of England*, vol. 1 (University of Chicago Press, 1979), 122.
[21] A.V. Dicey, *Introduction to the Study of the Law of the Constitution* (Liberty Fund, 1982), 110. Note that his definition cannot be precisely correct even as to the secondary aspect of the rule of law, since there are many ways in which perfectly ordinary state activities unavoidably cause people to suffer in body or goods: for instance, when the state transfers medical research funding to one disease to another.
[22] Raz, *The Authority of Law* (above, n. 5) 224.
[23] James Harrington, *The Political Works of James Harrington* (J.G.A. Pocock, ed. Cambridge University Press, 1977), 161.

for the simple reason that many potential sources of coercive force arise from beyond the borders of our state. In practice, of course, it will be unusual for mere individuals in other parts of the world to pose much danger, but there are a wide variety of group agents that might. Powerful criminal cartels, multinational corporations, terrorist groups, various non-governmental organizations, and so forth might all have the capacity to employ coercive force across state boundaries. Presumably, however, the state that actually succeeds in securing a monopoly on the legitimate use of violence and physical restraint will deprive external as well as internal actors of the ability employ coercive force within its territory. Thus, insofar as we are imagining a world in which the global rule of law has been fully realized, we find as yet no further need for the international rule of law.

One very important external source of coercive force remains unaccounted for, however: namely, other states. For both practical and principled reasons, we can assume that the world will continue to be divided into states, each with a considerable capacity, either by itself or in coalition with other states, to project coercive force across borders.[24] Such projections might take the form of hostile aggression, or benevolent intervention, but this does not matter from a republican point of view. Referring once again to our stipulated definition of freedom, the mere fact that we are vulnerable to the use of coercive force by others states potentially threatens that freedom. It follows, from a normative point of view, that we have good reasons to want the ability of states to project coercive force across borders to be controlled by international law.[25] Exactly what this entails is beyond the scope of this paper to discuss in detail, but at a minimum it would include prohibitions on aggression and strict rules governing coercive intervention (about which we will have more to say in the following section).

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[24] A complete analysis would also have to consider the capacity of states to employ coercive force *at* their border, for instance when someone wants to migrate across it. See Iseult Honohan, "Domination and Migration: An Alternative Approach to the Legitimacy of Migration Controls," *Critical Review of International Social and Political Philosophy*, 17 (2014).

[25] In this respect, the discussion here concurs with the analysis in Philip Pettit, *Just Freedom: A Moral Compass for A Complex World* (W.W. Norton, 2014), 160–174.

Thus the international rule of law would have independent value even in a world where the global rule of law has been fully realized. Notice that our discussion has remained firmly grounded on personalist considerations: no assertions about things being good or bad for states, nations, communities, etc. as such were necessary to complete the argument.

4. *The International Rule of Law: Non-ideal Theory*

The previous section argued that even under ideal conditions – even in a world where every community has successfully realized the rule of law in its domestic social order – there would nevertheless exist further reasons to promote the international rule of law as well. Our world is of course very far from this ideal, however, and under non-ideal conditions both the scope and that value of the international rule of law grows considerably.

Here again let us begin by considering the various group agents that might have the capacity to project coercive force across the borders of our state: these include powerful criminal cartels, multinational corporations, terrorist groups, various non-governmental organizations, and most importantly other states. We have already registered the need for international law to control states, but under non-ideal conditions there are compelling reasons to extend the reach of international law to cover other sorts of organizations as well. Those of us privileged to live in especially powerful states may have less to fear from such weaker organizations, but importantly this cannot be taken for granted, globally speaking. Many states lack the competence or capacity to fully protect their own citizens. The vulnerability thus created is dramatically illustrated by the historical example of colonial India, whose domestic political organizations proved incapable of protecting people from domination at the hands of the rapacious East India Company. Edmund Burke railed against the injustices perpetrated by the company to little immediate effect. Partly this was because, in the absence of effective international legal controls over the activities of such merchant companies, he saw no alternative but for Britain to govern India directly, a solution with its own obvious disadvantages. Contemporary examples no

doubt abound. In a world of weak and failed states, the need to impose international controls over organizations with the capacity to project coercive force across borders should thus be apparent.

A second compelling reason to extend the reach of international law under non-ideal conditions is the existence of stateless persons and others living under illegal conditions such as undocumented migrants, squatters, and so forth.[26] Such people often lack legal protections even when they happen to reside in states that have otherwise successfully realized the rule of law. No doubt the ideal solution would be to fully integrate all such persons into some decent domestic legal order, but to the extent that this does not happen we must rely on international law to secure their freedom from domination.

Finally, a third reason to extend the reach of international law arises not from the inability of some states to fully implement the rule of law within their borders, but rather from their refusal to do so. Here we might imagine an autocratic regime that wields extensive discretionary police powers uncontrolled by law. The regime may deploy these powers infrequently, relying on the threat of their use to maintain obedience, but on the republican view discussed earlier this would nevertheless count as domination. Alternatively, we might imagine a deeply patriarchal society in which women are regarded as the property of their parents or husbands, and are thus vulnerable to the discretionary use of violence or physical restraint in their private lives. On the account sketched in this paper, both examples represent a failure of municipal rule of law, and thus would not arise under ideal conditions in which the global rule of law has been fully realized. Clearly many societies have failed and continue to fail to fully implement the rule of law, however, and thus international law might serve an important remedial function: perhaps it should include provisions in effect mandating the municipal rule of law.

Here we must tread carefully, however, for we are easily misled by the analogy of states to persons. Recall our simple test for determining the extent to which the

[26] For a detailed discussion, see James Bohman, "Cosmopolitan Republicanism and the Rule of Law," in Samantha Besson and José Luis Martí (eds.), *Legal Republicanism: National and International Perspectives* (Oxford University Press, 2009).

rule of law has been achieved: do there exist rules the following of which ensures that a person will not ordinarily be subjected to violence or physical restraint at the hands of others? Municipal laws governing contracts, for example, satisfy the test insofar as people know what they must do to avoid being forced to pay damages – namely, perform their contractual obligations. Now suppose we have international laws governing the municipal rule of law. At first pass, these may seem to pass the test as well, insofar as states know what they must do to avoid being coerced by other states – namely, realize the rule of law in their own domestic social order. Unfortunately, there are two problems.

The first arises from our commitment to positivism. To avoid redundancy, the rule of law ideal must not simply be a roundabout account of what sort of laws it would be good to have. It may or may not be a good idea for international law to include provisions mandating the implementation of the rule of law in every domestic social order, but that is a question properly concerning the ideal substantive content of international law, an issue here set aside. Our question is more basic: we simply want to know whether it is good for the international social order to be governed by law. More particularly, in this context, we want to know whether the ability of states to coercively intervene in the affairs of others states should be controlled by law, and if so, for what reasons.

This leads to the second problem. Why should we care that a state know what it must do to avoid being coerced by other states? States as such have no moral claim to freedom from domination. Indeed, as Jeremy Waldron points out, states can perversely use the rule of law ideal as cover for their own evil policies: the autocratic regime threatened with intervention can protest that international laws governing human rights abuses are vague, retroactive, and so forth.[27] Whatever our reasons for governing intervention by international law, they ought to be reasons grounded on the rights, interests, or welfare of individual human beings. Pointing out that many perfectly innocent people are inevitably subject to violence and physical re-

[27] Waldron, "Are Sovereigns Entitled to the Benefit of the International Rule of Law?" (above, n. 4), 326–327.

straint in the course of interventions helps, but only carries us part way. The problem is that those people are for the most part third party bystanders: there were no rules *they* might have followed to avoid experiencing coercive force at the hands of the intervening state. Rather, they are the unfortunate victims of their regime's failure to observe the rules. A more reliable analogy might be coercing the children of parents who break the law, which is surely inconsistent with the rule of law ideal. Should international law then simply prohibit coercive intervention?

Presumably not. Supposing there are going to be dire situations in which coercive intervention is indeed appropriate, all things considered, it intuitively seems like a good idea to govern when and how that will happen by international law. Perhaps this is for reasons unrelated to the rule of law ideal. For example, legal controls might serve to restrain the self-interested motivations of intervening states. But there may be one rule of law reason as well, for the person-state analogy may have some plausibility when it comes to democratic regimes. When a state is sufficiently democratic that its people are properly held morally responsible for its policies, we might then say that international law should ensure its immunity from coercive intervention provided it respect the rules of international law, whatever those may be. Here we will refrain from speculating as to the conditions under which such requirements would properly be met.

5. *Conclusion*

This paper has rather narrowly addressed the normative question as to whether the international social order should be governed by law. It has argued affirmatively, that we do have reasons for regarding the international rule of law as a good thing, and that these reasons are similar to those we have for regarding the municipal rule of law as a good thing: namely, in both cases, the rule of law serves to secure an especially important aspect of our freedom from domination. It has further argued that we can find our way to this conclusion even if we adhere to positivism in our legal theory, and personalism in our moral theory.

Is the international rule of law possible, however? Our worry might be conceptual or practical. Conceptually, we might wonder whether it is possible for there to be something called law at the international level. This worry need not detain us long. Certainly, legal positivism presents no obstacle to our recognizing the possibility of international law.

The practical worry is more pressing, however. To begin with, the usual two-part strategy for implementing the municipal rule of law is not going to work at the international level. There are insurmountable practical and principled barriers to creating a world state with a monopoly on the legitimate use of violence and physical restraint. Even if a world state somehow came into being, there would be serious challenges in forcing it to submit its own powers to the governance of law. It follows that the rule of law will have to be implemented in a very different manner at the international level. It will necessarily have a more decentralized system of norm-creation and application.