TEMPERING ARBITRARY POWER: A MORAL THEORY OF THE RULE OF LAW

LAW'S RULE: THE NATURE, VALUE, AND VIABILITY OF THE RULE OF LAW. By Gerald J. Postema.* New York: Oxford University Press. 2022. Pp. xii + 381. $110.00 (hardcover).

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The rule of law took center stage in two monumentally significant occurrences this past year, one national and the other international. In the Foreword to the *Final Report of the Congressional January 6th Committee* that examined the violent assault on the American Capitol, Committee Chair Bennie G. Thompson, wrote, "The people who come up short must accept the ultimate results and abide by the will of the voters and *the rule of law*. This faith in our institutions and laws is what upholds our democracy."[2] Vice Chair Liz Cheney wrote, "Faith in our elections and *the rule of law* are paramount to our Republic. Election-deniers—those who refuse to accept lawful election results—purposely attack the *rule of law* and the foundation of our country."[3] The UN General Assembly voted overwhelmingly to condemn Russia's invasion of Ukraine for violating its territorial integrity and political independence: "Reaffirming the paramount importance of the Charter of the United Nations in the promotion of *the rule of law* among nations."[4]

The rule of law is widely and repeatedly invoked around the globe today by politicians, protesters, reformers, jurists, journalists,

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1. John S. Lehmann University Professor, Washington University School of Law. I thank Gerald Postema for responding to questions and commenting on an earlier draft.

2. Bennie G. Thompson, Foreword to FINAL REPORT, SELECT COMMITTEE TO INVESTIGATE JANUARY 6TH, at xi–xii (2022) (emphasis added).

3. Liz Cheney, *Foreword* to FINAL REPORT, SELECT COMMITTEE TO INVESTIGATE JANUARY 6TH, at xvi (2022) (emphasis added).

4. *Aggression Against Ukraine*, UN GEN. ASSEMBLY 1 (Mar. 1, 2022), https://s3.documentcloud.org/documents/21314169/unga-resolution.pdf (emphasis added).

academics, and others, including songwriters.[5] Scholarly writings on the topic have exploded in recent decades addressing the content, origins, requirements, implications, and consequences of this notion—with no agreement in sight. It is a cliché among scholars that the rule of law is an essentially contested concept.

Bringing clarity and moral vision to this intellectual cacophony is *Law's Rule* by Gerald Postema. His account is an unparalleled combination of three characteristics. Postema's elucidation is carefully *analytical*, defining concepts and terms, identifying foundations, drawing distinctions, indicating requirements and implications, and so forth. His account is consummately *holistic*, situating the rule of law within the totality of surrounding historical, cultural, social, political, economic, and legal circumstances, which is rare for philosophical work on the topic. He presents the rule of law as a *moral* ideal, and he articulates and promotes the ideal in unabashedly moral terms. A work of legal philosophy, social theory, and normative political theory, *Law's Rule* is deep and comprehensive.

Postema's aim is to respond to threats to and degradation of the rule of law around the world. "These developments represent a grave threat not just to institutions designed to serve the rule of law but to our very understanding of the ideal," he writes. "To answer fundamental threats to the rule of law we first must return to its foundational principles" (p. x). He "seeks to articulate a coherent framework and foundation for thinking about the rule of law and planning strategies for building and defending it" (p. x). This is not just abstract theory—it is meant to have a real-world impact in bolstering the rule of law.

Part I of *Law's Rule* lays out Postema's theory that the ambition of the rule of law is to temper arbitrary power, identifies the principles that follow therefrom, and formulates its moral grounding. He then addresses rule of law's relationship with human rights and democracy, the conditions necessary for its realization, its limits, and threats to its achievement. Part II examines a series of challenges for the rule of law, including evil law, the role of equity and mercy, the importance of law during crises and legal restraints on pardons, the problematic implications of digital leviathans (Google, Facebook, Twitter, etc.) and artificial intelligence, and transnational rule of law. Postema writes in engaging, lucid prose, citing ancient and modern philosophers,

5. THE PINKERETTES, *REWEAVING THE RAINBOW* (Sept. 3, 2021) (downloaded using Spotify) (ode to the rule of law as an essential part of modern society); UNDISCOVERED COUNTRY, *A Tale of Two Cities*, *on* A TALE OF TWO CITIES (Oct. 9, 2020) (downloaded using Spotify) (rule of law for whites is different from rule of law for blacks in the inner city).

providing illustrative examples, drawing from poetry and novels, and even quoting the popular film, *Thelma and Louise*.

This Review summarizes Postema's theory of the rule of law, indicates how his account bears on major competing theories, and critically engages with his theory. Like Postema, I too believe the rule of law ideal is fundamentally important and beneficial for people across the globe. My primary concern is that he overreaches by extending rule of law ideal to encompass private actors and the entirety of social life. Another concern is that his assertion of law's hegemony is neither necessary nor justified, and has draconian implications. My third concern is that his theory is well-tailored to Western societies, but is not suitable for many other societies or for international law. The common thread of these concerns is that his theory asks too much in the name of the rule of law. Trimming a few claims while leaving his core intact, I argue, would solidify his theory in defense of the rule of law around the globe.

AMBITION, PRINCIPLES, MORAL FOUNDATION, AND LAW'S TOOLBOX

1. *The ambition.* Accounts of the rule of law typically start with recitations of the ideal, frequently mentioning A. V. Dicey as the modern theorist who coined the phrase, and then identify earlier references to this notion, highlighting Greek, Roman, medieval, and early modern accounts (pp. 5–15).[6] Postema's sampling of forebears is intended "to illustrate how writers across time and cultures drew on a constellation of related ideas when thinking about the need for ruling power and for constraints on it. In Anglo-American societies, these ideas have congealed under the rubric 'the rule of law'" (p. 15).

By "reflecting on the intuitive ideas," he derives "a clear view of the motivating concern and ambition lying at the heart of the ideal" (p. 17). Following legal theorist Martin Krygier,[7] he declares the focal aim of the rule of law:

> Throughout its long history, the idea is shaped by the following twofold thought: (1) a polity is well-ordered, and its members are accorded the dignity rightfully demanded by them in the name of

6. I followed a similar approach in BRIAN Z. TAMANAHA, ON THE RULE OF LAW: HISTORY, POLITICS, THEORY (2004).

7. *See* Martin Krygier, *What's the Point of the Rule of Law?*, 67 BUFFALO L. REV. 743 (2019); Martin Krygier, *The Rule of Law: Legality, Teleology, Sociology*, in RE-LOCATING THE RULE OF LAW (Gianluigi Palombella & Neil Walker eds., 2008); Martin Krygier, *The Rule of Law: Pasts, Presents, and Two Possible Futures*, 12 ANN. REV. L & SOC. SCI. 199, 203 (2016).

> their common membership, when its members are secured against the arbitrary exercise of power, and (2) law, because of its distinctive features, is especially and perhaps uniquely capable of providing such security. The rule of law imposes a moral demand upon political communities and their governments. . . . In sum, when law rules in a political community, *it provides protection and recourse against the arbitrary exercise of power through law's distinctive tools.*
>
> The rule of law is a moral ideal, a component of good, decent, and just political community (p. 18).

This is a straightforward, easy-to-grasp, appealing formulation of the rule of law ideal: the arbitrary exercise of power harms the dignity of members of a community, and law is well suited to temper it.

Before continuing, it is useful to ask: *Why* is this *the* ambition rather than some other? Jeremy Waldron (following Friedrich Hayek) unequivocally identifies liberty. "The *whole point* of the ROL [rule of law] is to secure individual freedom. . . . To eliminate uncertainty in the interests of freedom and to furnish an environment conducive to the exercise of individual autonomy—that is the *raison d'être* of the ROL."[8] Postema concedes that "throughout its long history the rule of law has been associated with freedom" (p. 83); nonetheless, he denies that freedom is the point of the rule of law, arguing, among other criticisms, that liberty potentially enhances arbitrariness, and is incomplete and lacks moral depth (pp. 83–86). But why not say that it serves a combination of liberty, restraint on power, and other purposes (bringing order, security, trust, etc.)? The claim that an ideal invoked in different ways in a multitude of settings across two millennia has a particular "purpose" or "ambition" is itself questionable. (Functions or effects or consequences of the rule of law, in contrast, can be identified while eschewing problematic teleological assertions about a singular animating purpose or point.[9]) Plainly, the claim that this contested ideal has a singular *telos* or *raison d'être*—and the particular *telos* one posits—cannot be established through historical evidence or philosophical analysis.

Krygier argues that it is proper to speak of the *telos* of the rule of law if we see it as a "solution-concept"—then ask, "What's the

8. Jeremy Waldron, *Are Sovereigns Entitled to the Benefit of the International Rule of Law?*, 22 EUR. J. INT'L L. 315, 388 (2011) (emphasis added).

9. *See, e.g.*, Brian Z. Tamanaha, *Functions of the Rule of Law*, in THE CAMBRIDGE COMPANION TO THE RULE OF LAW 221 (Jens Meierhenrich & Martin Loughlin, eds. 2021).

problem?" that it solves.[10] He proposes that arbitrary power is *the* problem the rule of law solves. "It is impossible to legislate in these matters, given the currency of the term and the contending confusion, or confusing contention, about what it means. One can only propose and commend," Krygier writes.[11] A theorist stakes out a position grounded on past and present discourse about the rule of law that ultimately turns on what the theorist believes it *should* be about.[12] Postema's account combines conceptual analysis, description, and prescription: identifying the aim of the rule of law and its attendant implications, urging readers to adopt his account as the best moral, political, social, and legal reading of the ideal. Accordingly, his theory must be evaluated in terms of its conceptual soundness, descriptive accuracy, normative attractiveness, and whether it is likely to help achieve the benefits people seek from the ideal—as well as whether it meets his goal to provide a sound foundation for building and defending the rule of law around the globe.

Many rule of law assertions echoing over the ages aimed to temper arbitrary power, so this position is solidly grounded. But little support can be found for a huge and consequential extension of the ideal introduced by Postema, again following Krygier. The bulk of historical quotes Postema recites are about tempering the power of *rulers* through law. He cites Plato, for example: "where law is master [*despotēs*] over rulers and the rulers are slaves [*douloi*] to the law" (p. 9). Matthew Hale observed, "Let [the ruler] temper his power by law, which is the bridle of power" (p. 4). Postema quotes the *Petition of Right* (1610) addressed to King James I by the House of Commons, that the most precious freedom of subjects is to be "governed by the certain rule of the law . . . and not by any uncertain or arbitrary form of government" (p. 18).

Postema's formulation is not limited to restraining the arbitrary power of government. Quoting Krygier, he asserts that tempering arbitrary power "[e]xtends to relations among citizens as much as it does to acts of governments or governance, indeed to the activities of all persons and institutions capable of exercising significant power in a society" (pp. 31–32).[13] Krygier writes, "tempering power, the ideal of

10. Krygier, *What's the Point of the Rule of Law?*, *supra* note 7, at 758–59.

11. *Id.* at 760.

12. Kenneth Minogue points out that talk about telos is conceptual, practical, and normative. "Sometimes it ['democracy as a telos'] is a norm, sometimes a proposal; indeed, exploiting this ambiguity of reference is a hallmark of the genre." Kenneth Minogue, *Democracy as a* Telos, 17 SOCIAL PHIL. & POL'Y 203, 204 (2000).

13. The essay cited is Martin Krygier, *Tempering Power*, in CONSTITUTIONALISM AND THE

the rule of law, is not best thought of as a self-contained ideal *for law* or *for government*. It is also, and in my view primarily and more significantly an ideal *for polity and society*, to be understood in relation to, and as an element in solution of, perennial problems that arise from pathologies of the exercise of power, wherever and in whatever hands it is powerful enough to harm."[14] Postema embraces and carries through the implications of this position. The rule of law not only looks at concrete exercises of arbitrary power, in his theory, but more expansively, it also "focuses on social, political, and legal (and sometimes economic) *structures* that constitute, facilitate, and sustain power" (p. 27). The extension to private actors and the social realm generates severely debilitating problems for his theory, as I later show.

2. *Implied principles.* Postema derives three "immediately implied principles" from the ambition to temper arbitrary power, which in turn spin out additional principles. The first principle is *law's sovereignty* (p. 19, see also pp. 53–54):

> [T]he rule of law is a principle of governance according to which all entities that exercise power, public or private, govern with and are governed by law. We must not fail to appreciate the boldness of the rule of law's claim. Its unequivocal demand is for law alone to rule. Law is sovereign (p. 53).

Law's sovereignty itself entails three further principles: *legality*, *exclusivity*, and *reflexivity*. The principle of *legality* holds that "all governing power must be exercised through or by means of law" (p. 19, see also pp. 54–55). The principle of *exclusivity* "holds that all governing power is derived only from and is ordained exclusively by law" (p. 19, see also pp. 56–60); "institutions and state functionaries operate with legitimate authority only when ordained by law" (p. 56). The principle of *reflexivity* holds that law governs those who govern (p. 19). To appreciate the extensive reach of his position, keep in mind that governing power for Postema is not limited to official government actions; it encompasses public was well as private persons and organizations which exert power over people "that can order them around and impose sanctions for non-compliance" (p. 33, see also pp. 31–39). Sanctions include fines and imprisonment, as well as other negative consequences (termination, withholding desired opportunities or benefits, ostracism or shaming, etc.). "The rule of law focuses on power over others—on *governance*" (p. 53).

RULE OF LAW: BRIDGING IDEALISM AND REALISM 34 (Maurice Adams, Anne Meuwese & Ernst Hirsch Ballin eds., 2017).

14. Krygier, *What's the Point of the Rule of Law*, *supra* note 7, at 785–86.

The second principle is *equality in the eyes of the law* (p. 19)—everyone bound by law is entitled to its protection and recourse. This second principle implies the *recourse principle*, which requires that all subjects with legally recognized claims are entitled to bring an action for relief against government or private actors in a court or other legal process that utilizes fair procedures, is unbiased, considers the evidence, and orders relief when the claim is established (p. 63).

The third principle is *fidelity*—support from society that "comprises a set of relationships and responsibilities rooted in core convictions and commitments, which are essential for the realization of this ideal" (p. 19, see also pp. 65–75). Postema's holistic perspective is evident in fidelity, which depends on a prevailing "culture of lawfulness" (p. 66) and mutual accountability among members within a community. "The fidelity principle maintains that *the rule of law is robust in a polity only when its members, legal officials and subjects alike, take responsibility for holding each other to account under the law*" (p. 20). The commitment of fidelity, of mutual submission to law, is not made by individuals to the government or the state, but is a commitment people make to one another. This involves "a multilateral joint commitment among members of law's commonwealth 'each for the whole'" (p. 73).

3. *Moral foundation in membership.* Postema's rule of law "demands that law *rules*" as both a *mode of governance* and *mode of association* within a community (p. 53), and calls on citizens to hold one another mutually accountable to and through law to realize the sovereignty of law. The normative justification for its demand for our allegiance and commitment to law's rule, Postema explains, lies in the fundamental value of membership in a political community. Membership "captures a certain kind of community, one in which members are bound by history, interdependency, and a deep-rooted mutual regard that respects the distinctive features of each member and their ability to contribute to the whole" (p. 88). His elaboration of "membership" interweaves the values of *freedom*, *dignity*, *equality*, and *community*.

Pared to the core, *freedom* involves not being subject to subordination by others (p. 88); *dignity* is being regarded by others with due "rights and responsibilities in and to the community" (p. 89); *equality* involves relationships among community members in which everyone has an equal footing and no one is excluded (p. 89); and *membership* in a community "is a fellowship of mutuality, an engagement of mutual commitments, rooted in and nourished by deep

interdependency, and structured by a network of mutual responsibilities aimed at maintaining a widely inclusive social order" (p. 90). Membership requires non-subordination of others, and requires that members have mutual responsibilities that fit together with others (*mutuality*); that people are treated and interact as peers *(peerhood*); and that diversity in identities among members is respected even as everyone is submerged in the community with the same status (pp. 90–91). Poetically expressed, his vision of community involves distinct individuals integrated with one another. "Members are not merely parts of, and swallowed up by, a group or collectivity; rather, they are members *of each other"* (p. 90). These are historical communities that extend over time in ways that add meaning, resources, and coherence to the social world within which people work and live (p. 93). Membership relationships are objectively valuable, Postema asserts, and membership is a public good available to all, which requires continuous commitment and efforts by all to be sustained (p. 92).

Although his description of membership comes across as a set of intense connections between individual members, Postema clarifies that political communities do not involve intimate interactions among individuals. These are not face-to-face relationships. "So, if the communities are to approximate the model of membership, the structure of mutual responsibilities and the modes of interaction and regard for equality and individual dignity in them must be embedded in practices and institutions defined by positive norms addressed to the community as a whole" (p. 93). The criteria he specifies for membership should be specified in law, which is the primary source of the positive norms addressed to the whole community, although informal norms also play a major role.

Several observations are in order about Postema's complex notion of membership. In addition to normatively grounding the rule of law, it is a normative aspiration. It also serves as a standard to evaluate, criticize, and reform social and legal arrangements in societies that fail to meet its requirements. Moreover, by wrapping freedom together with dignity and equality, and collectively situating them within community, Postema articulates an alternative to the Hayekian singular emphasis on individual liberty, a major strain of rule of law discourse that he downplays by implication.

Thus understood, membership in a community is what justifies the rule of law and its demands. "Domination of some members in the community by others, and especially by those exercising ruling power, is inconsistent with respect for their standing as peers and their dignity

as members. Our discussion grounds robust opposition to domination in the complex value of membership" (p. 92). The rule of law creates the conditions for and preserves the good of membership:

> As *subjects* of a common body of laws, rather than being *subject to* the unaccountable power of others, members enjoy the law's recognition and protection of their status as peers and their dignity as distinct and valued members of the community. By constituting the polity according to broad, public principles that embrace all members, the law—if it meets the demands of the rule of law—defines a domain of social life in which all are regarded as equals, and whose status as such is protected. This framework of a common law articulates a structure of mutual responsibilities. In the polity, asymmetry of power, especially ruling power, is inevitable, but the rule of law protects members against its arbitrary exercise. According to the demands of the rule of law, ruling power is legitimately exercised only if it is ordained by law and exercised within limits that law defines. Moreover, those who exercise that power are held systematically to account for that exercise, through institutions in which those subject to that power are entitled actively to participate. Being subjects of the law, they are subject to officials of the law but only on the condition that those same officials are accountable and thus subject to them as well. Underwriting the system as a whole is an ethos of fidelity in which members take responsibility for holding each other accountable under the law (p. 94).

Postema's account of the rule of law has three basic planks. The rule of law protects against the arbitrary exercise of public and private power. This entails law's sovereignty (plus legality, exclusivity, reflexivity), equality under law (including protection and recourse), and fidelity to law within the community. This focal ambition of the rule of law and its attendant principles serve the value of membership within a community (relationships of freedom, dignity, equality). Finally, to grasp the import of his theory, it is also necessary to sketch what he calls law's toolbox.

4. *Law's toolbox*. Postema identifies five distinctive qualities or dimensions which make law especially suited for tempering arbitrary power: *positive*, *normative*, *deliberative*, *rights defining and protecting*, and *constitutive*. Law is *positive* in the sense that it is created through human activities (posited), it is made public and addressed to the populace, it consists of formalities (standard formulas to accomplish things), and it operates through institutions (particularly courts) that engage in public legal reasoning and decision making with respect to law (pp. 40–42). Law is *normative* in the sense that it guides

conduct and is taken up by actors in their deliberations about what to do (p. 41). Law is *deliberative* in the sense that the use of law involves reasoning that considers legal norms (statutes, precedents, etc.), evidence, and arguments presented by affected parties; it involves receiving, assessing, challenging, asserting, and defending conclusions, policies, and courses of action in relation to law (pp. 41–43). These first three qualities are held together through the systematic character of law as an interconnected body of norms (p. 43). In totality, this involves "a robust discipline of public practical reasoning, shaped by its practice in a public forum and tethered to an interconnected body of rules, decisions, standards, and examples that are normative for law's particular political community" (p. 43).

Rights-defining and protecting—legally recognized claims that generate obligations—is essential because rights entitle bearers to make legally actionable demands on others (public and private), thereby serving a significant role in legally ordering social life (pp. 44–45). Rights help temper arbitrary power by providing people with recourse against those who abuse power in violation of their rights.

The *constitutive* dimension involves the legal constitution of positions, roles, statuses, bundled together in terms of "rights, duties, powers, liabilities, disabilities, and responsibilities" (p. 45). This gives rise to and structures public and private entities, from government agencies to business corporations, and a multitude of other institutions and contexts in social life.

Postema mentions, though says little about (p. 40), a major component of law's distinctive toolbox: legal dictates are backed by coercive force (the hammer). Law's coercive capacity plays a significant role in providing motivations, accountability, and compliance necessary to the rule of law.

Law's distinctive qualities enable law to temper arbitrary power by *protecting* against the abuse of power ex ante when possible, and by providing *recourse* ex post (p. 46). It also *disciplines* power by requiring officials to internalize law such that it guides their actions normatively (p. 46). The *constitutive* dimension tempers arbitrary power by limiting and distributing power at the same time that it enables power through constituting it, as well as by imposing sanctions when the limitations are transgressed. (p. 47). Law's discursive reasoning process in *public* fora enables law to hold accountable public and private actors, as well as law itself, in a transparent public manner, which allows decisions and actions to be scrutinized (p. 47).

In closing this sketch, it must be emphasized that there is *much* more to Postema's closely argued, nuanced account (and additional details will be added shortly). These basic elements are sufficient to grasp and engage his theory.

HUMAN RIGHTS AND DEMOCRACY

The meaning and implications of Postema's account of the rule of law can be filled in by examining his take on a longstanding debate among theorists over whether the rule of law includes human rights and democracy. Thin or formal versions of the rule of law limit its requirements to formal characteristics of legality: that law be set forth in general terms, publicly declared in advance, applied equally to all according to its terms, and so forth. Thick or substantive versions add further requirements, usually including that law must be created through democratic mechanisms and respect individual rights, and in some cases more.[15] Postema's account is *very* thick, though markedly distinct owing to his centering on tempering arbitrary public and private power.

Joseph Raz's jarring statement of the implications of his formal version bears repeating:

> A non-democratic legal system, based on the denial of human rights, on extensive poverty, on racial segregation, sexual inequalities, and religious persecutions may, in principle, conform to the requirements of the rule of law better than any of the legal systems of the more enlightened Western democracies. . . . It will be an immeasurably worse legal system, but it will excel in one respect: in its conformity to the rule of law.[16]

> The law may . . . institute slavery without violating the rule of law.[17]

By Postema's lights, the legal system Raz describes is an evil mockery of the rule of law. He writes:

> The rule of law, we have learned, sets its face against the abuse of power over people, not only abuse by government actors but also by nongovernmental actors, and it seeks through law to provide protection and recourse for those who are vulnerable to abuse. Some of the most morally appalling forms of abuse and domination are singled out for condemnation by universally acknowledged human rights, among them torture, slavery, servitude, arbitrary arrest and detention,

15. *See* TAMANAHA, ON THE RULE OF LAW, *supra* note 6, at 91–113.
16. JOSEPH RAZ, THE AUTHORITY OF LAW 211, 221 (2d ed., 2009).
17. *Id*. at 221.

> manipulation of thought, and systematic invidious discrimination on the basis of race, religion, ethnic origin, gender, and sexual orientation. . . . The rule of law's focused campaign with law's tools to protect against the abuse of power would be incomplete and defective if it did not include a concerted effort to name and protect these fundamental rights and provide effective recourse against their violation. . . . [R]ecognition of them by law lies at the heart of the motivating ambition of the rule of law (pp. 107–08).

His theory provides a basis for incorporating (certain) human rights that is more direct and powerful than arguments put forth by theorists that the rule of law has an affinity with the good or that governments that follow the rule of law are unlikely to violate the rights of their citizens (pp. 101–05). Human rights and the rule of law are symbiotic and overlap—each requires the other, neither can fully exist when the other does not, and both have a number of the same requirements. "The two are interdependent, each having its own nature and function, as it were, but depending on the other to fulfill that function adequately" (p. 106).

That human rights require maintenance and protection through the rule of law is obvious. What Postema's account adds is that the rule of law itself cannot be achieved when (certain) human rights are systematically violated. A comparison of the UN Universal Declaration of Rights with his theory reveals significant commonalities.[18] Being free and equal in dignity and rights (Article 1) is a human right and integral to the rule of law. Slavery and torture are human rights violations (Articles 4, 5) and gross abuses of power. The right to equal treatment and non-discrimination before the law is both a human right and a rule of law requirement (Article 7). The right to a remedy in court for a violation of fundamental rights (Article 8); not being subject to arbitrary arrest, detention, or exile (Article 9); a right to a fair, public hearing in an independent tribunal for criminal charges (Article 10); not being subject to arbitrary interference in one's privacy, family, and home (Article 12): these are all human rights violations as well as derogations of the rule of law. (Other rights might also be included, particularly equal marital rights (Article 16).) Hence, a number of human rights and Postema's account of the rule of law share substantive notions and legal processes, and his core rule of law aim of tempering arbitrary power is explicitly mentioned in Articles 9 and 12. He articulates a coherent case that the rule of law, oriented to tempering arbitrary power, requires recognition and enforcement of (certain)

18. *See* UN Universal Declaration of Human Rights, https://www.un.org/en/about-us/universal-declaration-of-human-rights.

human rights, for they are "thickly interwoven and morally inextricable" (p. 108).

Democracy is altogether different, however, although Postema asserts similarly, "Democracy and the rule of law exist in a unique relationship of *interdependence*, of symbiosis" (p. 112). His argument shows that this relationship is more one-sided. Democracy requires a legal infrastructure to maintain open political competition, elections, and to give rise to and carry through democratically enacted legislation: "a *people* can exist as a coherent social unit only insofar as it is constituted by law, and it can *rule* only if its will is articulated in law" (p. 111). The statements by Representatives Thompson and Cheney quoted at the outset condemning the insurrectionists' betrayal of democracy and the rule of law refer to this connection.

That said, "the rule of law may exist in a political community that is not constituted as a democracy" (p. 111). The rule of law is about how power is exercised, whereas democracy is about who governs (p. 110), and the former can operate in conjunction with various answers to the latter. The connection of the rule of law with democracy is manifested as an embrace of similar values. Postema's rule of law incorporates intertwined values of equality, diversity, dignity, and liberty; democracy advances the same (p. 111). Both treat people as equals whose different views must be respected and considered in public fora when deciding policy and enacting legislation. "Both require support and protection of freedoms of speech, association, and assembly, and robust and independent institutions of education, universities, non-governmental organizations, and the like" (p.112). Democracy requires these conditions to effectively function as self-rule by the populace, while they provide support to give rise to fidelity to law (pp. 123–25). "The *rule of law is the infrastructure of democrac*y, and *democracy is the natural completion of the ambitions that motivate the rule of law,"* Postema writes (p. 112). Under this combination, the values incorporated by the rule of law determine both how power is exercised as well as who governs.

Conservative political theorist Kenneth Minogue, approaching from the other direction and analyzing the *telos* of democracy as equality, also saw a tight connection with the rule of law. "The project of democracy as a *telos* lies in equalizing society by removing arbitrary power wherever it might be found, subjecting everything to what looks a bit like the rule of law."[19] However, Minogue expressed concern

19. Minogue, *supra* note 12, at 223.

about this project. Inequalities are ubiquitous and arise continuously, he argued, so attempts at equalization require constant management by bureaucrats and pervasive penetration into social relations by law. Postema's rule of law theory extends law in the same way. What Minogue lamented about law's penetration, Postema promotes it, as I now explain.

PROBLEMS WITH TEMPERING ARBITRARY POWER IN SOCIAL LIFE

The rule of law ideal, simply put, stands for the proposition that government officials and citizens are bound by and must abide by the law. This has a vertical (government to citizen) and a horizontal (citizen to citizen) dimension. The vertical dimension holds that government officials must act pursuant to legal authorization and subject to legal limitations in actions that affect citizens. The horizontal dimension holds that legal rules govern social intercourse among citizens (contracts, property, torts, marriage, inheritance, transactions, employment, etc.), whatever the content of the law might be. These contrasting orientations match a generally recognized asymmetry in what the rule of law requires of citizens and government: "From law's point of view, ordinary citizens in a polity may do *whatever is not prohibited* by law; government officials, however, *may do only what is permitted or authorized by law*. For the citizen, anything not prohibited is permitted, but for officials nothing is permitted, unless it is explicitly authorized by law" (p. 60).

Postema's theory significantly redraws both dimensions. Although the vertical dimension typically addresses government officials in their actions toward citizens, Postema adds private parties (like businesses) which exercise governance over others. Now, the actions of private parties exercising governance must be authorized by law. He also dramatically alters the horizontal dimension. The rule of law, in his rendering, specifies that people and private entities may not arbitrarily exercise power over others. This is a substantive standard about what is *socially* and *legally* permissible in horizontal relations, setting restrictions on social interaction in situations of asymmetrical power and dictating that the law establish these limits. Here is the key difference: under the traditional understanding, the horizontal rule of law is offended when people violate the law; whereas, in Postema's account, the rule of law is offended when people arbitrarily exercise power over others (*even if applicable law permits the actions*). His theory thus profoundly changes how the standard asymmetry treats

citizens (and private entities): now even actions within legal limits may constitute derogations of the rule of law. Extending the restraint of arbitrary power to the private realm adds a source of legal restrictions beyond positive law on interaction between citizens.

To appreciate the extraordinary implications of this extension we must understand how Postema defines power and identifies arbitrary. Power, he explains, can be understood in terms of capacity or position. "Power as *capacity* is the ability of certain agents to influence or control the decisions or actions of other agents;" power as position is "created or sustained by law or social norms" (p. 23). "[W]hen the rule of law is concerned with power as capacity, it is concerned with the ways *agents* can *influence* or *control* the behavior of other *agents* (either with physical means or through exercise of its normative powers)" (p. 24). This involves "capacities of agents that exist over time and are embedded in social, moral, or legal relations," often arising in social relations where the persons subject to power are dependent in some way on the power wielder (p. 25).

Power in his account goes beyond coercive physical, social (ostracism, shaming), economic (offering rewards or withholding benefits), psychological (pressure, enticement, manipulation), or legal threats or pressure, to include influencing opportunities, choices, information, and even *thoughts* others might have:

> Wealth and social standing are sources of social power, so too are differential access to technology and command over information. The means of power may also be psychological by which wielders manipulate the desires or wishes of agents or shape the parameters of their practical deliberation. The use of these means can be especially worrisome, because often the wielder can exercise the power without the subject's awareness of it and sometimes even with their (unwitting) agreement or participation (p. 25).

Postema emphasizes that power relations "reside in the social meanings and the formal or informal norms that structure interactions between the parties;" and the rule of law is not just concerned with (dyadic) interaction between parties, but also "focuses on social, political, and legal (and sometimes, economic) *structures* that constitute, facilitate, and sustain power" (p. 27).

Power should not be completely shackled, Postema says, following Krygier, since power is necessary and exercised in beneficial ways; rule of law requires that it be "tempered" (pp. 39, 46–48). What tempering involves is left vague. Krygier characterizes tempering as a judicious mixture of restraint, moderation, and awareness or self-

knowledge.[20]

In sum, power involves influencing the decisions and actions of others, drawing on social meanings, informal and formal norms, and institutions and structures, and the rule of law critically evaluates the interaction between agents as well as the institutions that structure the social world within which actions take place. Since influence on others is ubiquitous, virtually the entirety of social life is subject to the scrutiny of the rule of law (though Postema issues caveats, summarized below).

Now let us see what arbitrary power is. Postema admits this is hard to pin down, and offers three declamations (plus examples). "Arbitrary power is capricious and arrogant," actions at the whim or pleasure of the wielder (p. 29). "Arbitrary power is *unilateral,*" involving the subordination of the subject to the will, whim, or pleasure of the wielder (p. 29). "Arbitrary power is *unaccountable*," that is, not answerable to a third party or the subject (p. 30).[21] He clarifies, furthermore, that arbitrary power is not synonymous with discretion, which can be exercised within parameters and subject to accountability. "Discretion is arbitrary only when it is not accountable" (p. 30).

Arbitrary power meeting Postema's description shows up at all scales from local to global in myriad contexts. Bullying in schools, online, or within social groups is capricious, arrogant, for the pleasure of bully, unilateral, and unaccountable. Investment funds, for their own benefit and without accountability, can coerce businesses desperate for cash to hand over an inordinate share of ownership in exchange for funding. In the name of *building the rule of law,* Western development agencies have unilaterally coerced debt-ridden countries seeking international aid to implement significant (neoliberal) legal and economic regimes as conditions for receiving loans.[22]

Families are a hotbed of asymmetrical relations—between spouses and between parents and children—and arbitrary actions. Postema recognizes, though, the "[m]uch of our domestic lives we think is or should be off limits to the law" (p. 144). He articulates two guidelines to help determine when it is appropriate for the rule of law

20. Krygier, *Tempering Power*, *supra* note 13, at 46–48.

21. Krygier describes arbitrary power in terms of taking actions without subject to any regular accountability, power exercised in ways that are unpredictable to those affected, and when those affected have no opportunity to question or be heard, or otherwise affect the exercise of power. *Id.* at 40–42.

22. *See* Brian Z. Tamanaha, *The Dark Side of the Relationship Between the Rule of Law and Liberalism*, 3 NYU J. L. & LIBERTY 516, 536–41 (2008).

to intervene in social abuses of power:

> (1) Is deployment of the law necessary or rationally indicated in order to serve the rule of law's core aim, its immediate principles, or principles or norms of the machinery that seek to realize it? And (2) is it appropriate, in light of general principles of political morality, to deploy law to regulate the governmental action or aspect of social or economic life under consideration? (p. 144).

As part of this evaluation, one must consider whether law has the capacity to intervene and the costs and adverse social consequences of intervention. He excludes the rule of law restriction on arbitrary power within the family—except for instances of serious abuse—on the grounds that it would be unwelcome and potentially distort valuable loving relationships (p. 147).

Employment is an asymmetrical power relation in the sense that one person controls a job and the other person wants a job. Employers in the United States generally are free to hire at will, to unilaterally alter benefits packages, to offer promotions and opportunities at will, and to fire at will (subject to contractual limits, if any, written by employers). The broad freedom of employers to control the terms of employment is one way in which the exercise of liberty can produce abuses of power. Postema asserts, "the rule of law may legitimately seek to protect employees from the arbitrary exercise of employer power" (p. 145). "[T]o determine the extent to which the law may intervene in the relationship between employers and employee *on rule-of-law grounds*, we must look to general political theory to locate the ground of rights of property, the value and limits of markets in labor, the possibility of fair bargaining among parties, and many other like issues" (p. 146, emphasis added).

This position is hard to accept, for two reasons. First, the assertion that the rule of law dictates protections for employees is scarcely to be found in the lengthy rule of law tradition. Plato and Aristotle, cited by Postema for the core idea (p. 19), saw no inconsistency between the rule of law and slavery[23]—an extreme system of arbitrary power over laborers. Neither Dicey, nor Fuller, and certainly not Hayek, claimed that *the rule of law requires* protection for employees. The second reason is that, even if one supports greater protection for employees, the rule of law ideal lacks content to identify what protections suffice. Postema's supplemental guidelines are too broad and indeterminate, and require resort to *political* and *economic theory*, courting

23. *See* Gregory Vlastos, *Slavery in Plato's Thought*, 50 PHIL. REV. 289 (1941).

irresolvable controversies. Decades ago, Joseph Raz opposed substantively rich theories of the rule of law on the grounds that "to explain its nature is to propound a complete social philosophy."[24] That is what Postema's rule of law invites and indeed requires.

To be clear, my objection is not to his assertion that employees should be legally protected, but to the claim that *rule of law ideal* is the source of these protections. His expansion of its reach brings complex and contested political, economic, and social policy choices under the aegis of what the rule of law requires, while leaving details to be worked out. Consequently, the debate shifts from centering exclusively on the immediate policy issues and their consequences to a secondary debate over *what the rule of law has to say* on the matter (if anything).

Similar objections apply to other applications of his theory. The digital realm—Google, Facebook, Twitter, Instagram, Amazon, etc.—is another arena of ubiquitous asymmetrical relations rife with the arbitrary exercise of power, addressed at length by Postema (pp. 267–92). This power operates in insidious ways:

> [C]ontrol of mass data gives digital actors vast power *over* persons and communities. This power involves neither coercive force nor manipulations of incentives and disincentives. Rather, wielders of digital power work further out of view of our deliberation and choice, limiting or channeling our access to information, removing options from our awareness, shaping our preferences, manipulating our emotional vulnerabilities, and altering our means of communication with each other . . . .
>
> With little legal resistance, digital platforms extract vast amounts of personal information from our computers, from our interactions on the web, from our phones, and from our movement through public spaces (pp. 38–39).

They surveil us, channel what we see, shape our tastes and desires, create siloed "virtual ghettos," spread false information, get us "hooked" to a platform by creating addictive inducements, take us way from richer physical communities, and more (pp. 272–77). "Through our participation in the digital realm, we are subjected to the arbitrary will of others, a subjection that is shrouded by an algorithmic veil" (p. 275). The fact that people willingly participate in online activities provided by these "New Leviathans" of digital domination does not diminish the harm to individuals and communities caused by its manipulation and control (p. 277). "They have the resources,

24. *See* RAZ, *supra* note 16, at 211.

opportunities, and motivations to exercise the kind of domination that lies at the center of the rule of law's concern" (p. 277).

No doubt, the digital domain that looms large in modern society raises many concerns. A number of laws have been enacted to deal with some of these issues, particularly by the European Union (pp. 279–90).[25] Politicians and legal scholars have put forth various proposals for legal regulation of digital platforms. The problems are real and society would benefit from legal restrictions. What is questionable about Postema's position is his claim that *the rule of law ideal* tells us that private companies should be restricted in how they manipulate what people buy, or how they selectively funnel information to people, or the techniques they utilize to keep people returning, and the rest. This travels unrecognizably far afield of the rule of law tradition, asking way too much of the ideal.

He goes further still:

> If a radically unequal distribution of economic and political power threatens both the principles of the rule of law and the deeper values that underwrite them, then we have *reason from within the rule of law ideal itself to condemn these inequalities and seek a more equitable distribution*, or rather a distribution that does not uphold widespread structures of domination. *That is to say, the rule of law has important normative implications for not only the structures, institutions, and practices of law itself, but also the distribution of power within society and its economy* (pp. 137–38, emphasis added).

Vast inequalities in wealth magnify asymmetries and abuse of power, and provide fertile soil for a plutocracy in which law advances the interests of the wealthy, and perhaps for violent class conflict. These are genuine concerns.

Yet economic conservatives may well protest that this position, along with protections for employees, injects Postema's progressive views into the rule of law. The ideal does not incorporate leftist political views. To the contrary, Hayek asserted: "It cannot be denied that *the Rule of Law produces economic inequality*—all that can be claimed for it is that this inequality is not designed to affect particular people in a particular way."[26] Inequalities in capitalist economic systems are justifiable, economic conservatives say, because the greater overall

25. Dealing with one of Postema's major concerns, European regulators recently fined Meta (Facebook) in excess of $400 million for coercing users to accept ads tailored to individual users. Adam Satariano, *Meta's Ad Practices Ruled Illegal Under E.U. Law,* N.Y. TIMES (Jan. 4, 2023), https://www.nytimes.com/2023/01/04/technology/meta-facebook-eu-gdpr.html.

26. FRIEDRICH A HAYEK, THE ROAD TO SERFDOM 82 (1944) (emphasis added).

wealth society produces makes the poor better off. The invocation of the rule of law by theorists on opposing sides of the very same issue, conservative and progressive, sows confusion and generates skepticism that the ideal is being utilized to advance a theorist's particular social, economic, and political views.

I will not belabor objections that the rule of law tradition makes no mention of restraining wealth inequalities, and that the ideal lacks sufficient content to address how much inequality is too much and what should be done about it. Instead, let me suggest why Postema's analysis went awry and why it does not advance the rule of law. He identifies *the* focal aim of the rule of law as tempering arbitrary power no matter what its source; and he defines power in such broad terms that arbitrary power and asymmetrical relations exist nigh everywhere; consequently, the rule of law scrutinizes virtually all aspects of social interaction and all sources of power (meaning, norms, institutions, structures, etc.). What drives the analysis are occasions for arbitrary power, with the rule of law in the back seat taken along wherever it leads. Postema purports to limit the reach of his account: "the rule of law demands that law rules over the exercise of power, not over all behavior or over all domains of life" (p. 53). Notwithstanding his caveat, its reach inevitably spans social life because contexts of asymmetrical power relations rife with abuse are ubiquitous. One may decide to abstain from applying rule of law principles to certain situations of arbitrary power (like the family), but the basis for making this decision is obscure.

Placing too many tasks on the rule of law plate engenders irresolvable disagreement and backlash, all the more so when the purported demands of the rule of law appear to align with a particular set of political-economic views over others. When it is construed to be against a broad assortment of bad things one opposes and in favor good things one desires, the rule of law ideal will have difficulty securing widespread support.

DOUBTS ABOUT LAW'S HEGEMONY

A principle that immediately follows from the focal aim of tempering arbitrary power, according to Postema, is the sovereignty of law: "We must not fail to appreciate the boldness of the rule of law's claim. Its unequivocal demand is for law alone to rule. Law is Sovereign" (p. 53). Contemporary legal philosophers commonly assume that law by nature requires supremacy, comprehensiveness, and exclusivity. "Since all legal systems claim to be supreme with respect

to their subject-community," Joseph Raz asserts, "none can acknowledge any claim to supremacy over the same community which may be made by another legal system."[27] "By making these claims the law claims to provide the general framework for the conduct of all aspects of social life and sets itself up as the supreme guardian of society."[28] This is the image of the monist law state.[29]

Postema does not explain why the sovereignty of law principle immediately follows from the rule of law. Just as the rule of law existed "for centuries before the modern emergence of full-fledged democracies" (p. 111), the rule of law existed prior to the modern emergence of states with a monopoly over law, which gradually consolidated over the course of the last four-plus centuries.[30] Before this, across Europe (and elsewhere), multiple forms of law coexisted, including regal law of kings and Emperors, local customary law, Church canon law, Roman law of jurists, feudal law, law of municipalities, and guild law. Since manifestations of the rule of law coexisted with legal pluralism, it does not necessarily require that law alone rule.

Even following the consolidation of law in the state, legal pluralism continued in various manifestations, particularly the coexistence of religious law and state law. Over half of Muslim marriages in the United Kingdom are exclusively religious marriages, not registered as civil marriages under state law,[31] and Sharia Tribunals render legal decisions outside the purview of state law. Islamic law allows polygamy, prohibits charging interest on loans, prohibits alcohol consumption, requires daily prayer, requires women to cover their heads when in public, and other legal provisions. Muslims across Europe live under state law as well as Islamic law, choosing which to follow when they conflict.[32] Allegiance to religious law over state law is not exclusive to devout Muslims. In Israel, for example, in response to the question—"If a contradiction arose between religious law and a state court ruling, which would you follow?"—97 percent of ultra-Orthodox Jews and 56 percent of Muslims said they would follow their

27. *See* RAZ, *supra* note 16, at 119.

28. *Id*. at 121.

29. *See* BRIAN Z. TAMANAHA, LEGAL PLURALISM EXPLAINED: HISTORY, THEORY, CONSEQUENCES 4–10 (2021).

30. *Id*. at 26–36.

31. *See* Gillian Douglas, Norman Doe, Sophie Gillate-Ray, Russell Sandberg & Asama Khan, *The Role of Religious Tribunals in Regulating Marriage and Divorce*, 24 CHILD & FAMILY L.Q. 139 (2012).

32. *See* TAMANAHA, LEGAL PLURALISM EXPLAINED, *supra* note 29, at 116–27.

religious law.[33]

Native indigenous law exists in New Zealand, Australia, Canada, and the United States, as well as across the Americas and other areas of the globe; in certain instances it is recognized by the state, but in other instances it is carried on within native communities without state recognition.[34] A stark form of legal pluralism exists in formerly colonized areas across Africa, Asia, and the Pacific. A World Bank study reports:

> In many developing countries, customary systems operating outside of the state regime are often the dominant form of regulation and dispute resolution, covering up to 90% of the population in parts of Africa. In Sierra Leone, for example, approximately 85% of the population falls under the jurisdiction of customary law, defined under the Constitution as "the rules of law which, by custom, are applicable to particular communities in Sierra Leone." Customary tenure covers 75% of land in most African countries, affecting 90% of land transactions in countries like Mozambique and Ghana. . . . In many of these countries, systems of justice seem to operate almost completely independently of the official state system.[35]

In many of these locations, state law operates mainly in the cities, whereas in rural areas people largely live by customary law; state law is often distant, costly, and slow, and applies norms and processes rural populations do not know or identify with.[36] Many of these countries have inadequately functioning state legal systems owing to various factors, including insufficient numbers of lawyers and judges, poor education systems, corruption, and lack of economic resources; and their societies are fragmented along ethnic, religious, economic, legal, and political lines.[37] A legacy of colonization, legal pluralism—which is a functional arrangement in contexts of fragmentation—is not itself to blame for struggles to develop the rule of law.[38]

Postema briefly mentions legal pluralism in a discussion of alienation from state law. He recognizes that people may have fidelity to other forms of law within a community:

33. Tamar Mermann, Ella Heller, Chanan Cohen, Dana Bublil, and Faid Omar, THE ISRAELI DEMOCRACY INDEX 2016 at 84–85, 176 (Jerusalem: The Democracy Institute 2016).

34. *See* TAMANAHA, LEGAL PLURALISM EXPLAINED, *supra* note 29, at 100–15.

35. LEILA CHIRAYATH, CAROLINE SAGE, MICHAEL WOOLCOCK, CUSTOMARY LAW AND POLICY REFORM: ENGAGING WITH THE PLURALITY OF JUSTICE SYSTEMS 3 (World Bank Legal Department Paper 2005).

36. TAMANAHA, LEGAL PLURALISM EXPLAINED, *supra* note 29, at 55–96.

37. *See* Brian Z. Tamanaha, *The Primacy of Society and the Failures of Law and Development*, 44 CORNELL INT'L L.J. 209 (2011).

38. TAMANAHA, LEGAL PLURALISM EXPLAINED, *supra* note 29, at 87–96.

> Thus, widespread alienation from government's law in a community many not signal *anomy*—the lack of law or the failure of law to count—but *polynomy*—the existence of more than one set of relatively autonomous sets of law—and commitment of the bulk of the polity to norms other than government's law. In some cases, a more accurate characterization of the community would not be that law fails to rule but that a *different law* rules (pp. 74–75).

Under his account of the rule of law, law exerts exclusive rule—"Its unequivocal demand is for law alone to rule" (p. 53)—so *either* state law rules *or* non-state law rules. Thus, he concludes, a *different law* from state law rules. But this is not fully accurate.

In these situations, multiple forms of law *simultaneously* exert normative force among people in society, coexisting independently, while also intertwined, interacting in ways that can be complementary as well as contrasting and competitive. People in legally plural situations frequently live under *both* state law and non-state law (religious, indigenous, customary). Moslems living in Europe, for example, may follow Islamic law on certain matters (like marriage) and state law on other matters (like employment or property disputes), resorting to religious tribunals or state law tribunals as the case may be. In the Global South, clashes regularly arise between people who claim property under state law pitted against people who hold customary rights, and many people strive to secure their property rights under *both* customary and state law.[39]

Postema declares the principle that *law alone must rule* (law must rule alone) as essential to the rule of law without providing support or justification, although legal pluralism is a common occurrence throughout history and today.[40] Absent a convincing justification, law's demand that it alone must rule smacks of jealousy, arrogance, and perhaps legal totalitarianism, calling for exclusive allegiance that requires stamping out all legal rivals. In many societies around the

39. *Id*. at 76–81.

40. It is worth noting that when constructing his account Postema repeatedly refers on key points to Johannes Althusius (1557–1638) (pp. 7, 8, 12–13, 14–15, 30. 64–65, 90). Althusius is known for articulating a pluralistic vision of society comprised of organic independent associations (mainly family, corporation, guild). *See* OTTO VON GIERKE, THE DEVELOPMENT OF POLITICAL THEORY 266 (1966); Sanford Lakoff, *Althusius, Johannes*, POLITICAL PHIL. 221–22 (2001). Althusius's pluralistic position was seen as a major counter to Bodin's theory of total sovereignty, aspects of which Postema echoes in his claim for law's exclusive sovereignty (though Postema limits the sovereign in ways Bodin did not). Otto von Gierke, in contrast, built on Althusius's account to argue that society is filled with multiple legal orders based on social associations. *See* TAMANAHA, LEGAL PLURALISM EXPLAINED, *supra* note 29, at 33–34 (Bodin), 182–86 (Gierke).

world, law's hegemonic sovereignty is not practically achievable, nor normatively desirable under existing conditions.

THE PROBLEMS WITH MEMBERSHIP IN COMMUNITY

Postema's criteria for membership in community—the moral foundation of the rule of law—also does not travel well. "'Membership' represents the interwoven complex of freedom, dignity, equality, and community" (p. 88). Elaborating further, he adds treating each other as peers, as well as inclusion and respecting diversity. Collectively, these values create modes of association among members of the community that bind them together in relationships of nonsubordination. The rule of law deserves our allegiance because it supports values of membership.

Dignity and community have broad appeal globally—although their meanings vary across cultures—but freedom and equality are quintessential liberal values. Postema's description of equality is particularly Western:

> "single status society"—a domain of social life in which all members relate to each other on the footing of equality, from which no member or resident is excluded. . . . Equality of this kind does not entail the obliteration of all differences and distinctions, all hierarchies or asymmetries, but it permits such differences only if they can be justified starting from this standpoint of equality and can only take forms that sustain this fundamental status, only if they pass the "eyeball test" (p. 89).

Centuries-old caste systems—people born into hereditary groups based on rank and occupation—in countries in Asia and Africa do not meet the equality requirement.[41] Islamic societies that restrict the activities of women and subject them to the authority of males,[42] carried to an extreme in Afghanistan under Taliban rule,[43] do not meet the equality requirement. The 66 countries that criminalize homosexual acts (12

41. *See* Jasmine Rao, *The Caste System: Effects on Poverty in India, Nepal, and Sri Lanka*, 1 GLOBAL MAJORITY E-J. 97 (2010); Tal Tamari, *The Development of Caste Systems in West Africa*, 32 J AFRICAN HIST. 221 (1991). *See generally Caste System*, NEW WORLD ENCYCLOPEDIA, https://www.newworldencyclopedia.org/entry/Caste_system.

42. *See* Carla Bleiker, *Women's Rights in the Islamic World*, DEUTSCHE WELLE GLOBAL MEDIA F. (Sept. 27, 2017), https://www.dw.com/en/womens-rights-in-the-islamic-world/a-40714427 (last visited Jun. 24, 2023).

43. *See* Amnesty International, *Death in Slow Motion: Women and Girls Under Taliban Rule*, AMNESTY INT'L (Jul. 27, 2022), https://www.amnesty.org/en/documents/asa11/5685/2022/en/.

impose the death penalty) do not meet equality, inclusion, and diversity.[44]

The subtitle of the book, *The Nature, Value, and Viability of the Rule of Law*, and Postema's analysis and stated goal, indicate that his theory has general application. However, he grounds the moral authority of the rule of law in values largely derived from Western liberal societies, which many societies around the globe do not share. This complex of membership values not only provides the moral foundation for the rule of law, but it also serves as a moral aspiration, and as a critical standard with which to evaluate societies. Although Postema allows cultural variation in the instantiation of these values, its irreducible moral touchstone requires that individual members associate in ways free of subordination and domination.

He presents the rule of law is an integrated package:

> Understood in this way, the notion of membership brings under one normative roof the values of freedom, dignity, equality and community. This moral-political value stands alongside justice, peace, democracy, and respect for human rights. It explains our deep concern about and objection to subjection to arbitrary power of another. Domination of some members in the community by others, and especially by those exercising ruling power, is inconsistent with respect for their standing as peers and their dignity as members. Our discussion grounds robust opposition to domination in the complex value of membership. Yet, if we are to account for the value and normative force of the rule of law, we must explain law's role in efforts to protect against such domination (p. 92).

There are two alternative ways to read his theory: particular and universal. It is built on, captures, and provides a foundation specifically for Western liberal democracies and societies with similar institutions and values. Or it is about the *nature* of the rule of law, applicable to all societies. The latter reading of the theory, in effect, tells a large swath of people around the globe that they must adopt the total liberal package to achieve the rule of law. This conception of the rule of law is not likely to secure universal support.

Both alternatives, moreover, raise a significant problem when his theory of the rule of law is applied to the international level. Postema argues that the rule of law tempering of arbitrary power applies to states, international organizations, and private actors in the global

44. *See Maps of Countries that Criminalise LGBT People*, Human Dignity Trust, https://www.humandignitytrust.org/lgbt-the-law/map-of-criminalisation/ (last visited Jun. 24, 2023).

domain (pp. 307–33). It must operate differently at the international level owing to the absence of centralized lawmaking and law enforcing institutions, and the absence of centralized, hierarchically structured tribunals for the resolution of disputes (pp. 310–11). In the past few decades, an enormous proliferation of international and transnational lawmaking organizations and public and private regulatory agencies has occurred, as well as an increase in subject-matter-specific tribunals; nation states incorporate and enforce international law and human rights in domestic tribunals; many states comply with and participate in international and transnational law on many matters; international actors regularly engage in discourse and processes invoking international and transnational law (pp. 311–14).[45] Even when state actors violate the law, as in Russia's invasion of Ukraine, the normative weight of the rule of law is still demonstrated through the felt need to justify their actions as legal (i.e., to defend ethnic Russians, to defend against NATO's aggression); and resort to fatuous justifications merely underscores their illegal conduct. Cautiously optimistic, Postema paints the rule of law as an ongoing project that will help temper arbitrary power on the global level (pp. 330–31).

Since Postema normatively grounds the rule of law in membership in a community, he must somehow extend his analysis to ground the rule of law at the global level. He cannot create membership in a community of humanity writ large because humanity does not associate in the ways he requires. Nor can he transpose membership directly onto the international community of states. States have equal sovereign status under international law, but his interwoven notions of freedom, dignity, and equality specifically apply to individual persons. Following Waldron,[46] Postema asserts that states do not have independent moral value, but rather are trustees for serving individuals. He presents "the moral value of benefitting states and other international institutions as largely contingent on their being fit to serve or respect the good of individuals" (p. 328).

"The measure of the value of the [global] rule of law must be, then, its promised service to the well-being, freedom, and dignity of individuals" (p. 328). The global rule of law advances individuals in four ways:

(1) It promotes and enhances the capacity of integral political

45. *See* BRIAN Z. TAMANAHA, A REALISTIC THEORY OF LAW 171–78 (2017).

46. *See* Waldron, *supra* note 8; Jeremy Waldron, *The Rule of International Law*, 30 HARV. J. L & PUB. POL'Y 15 (2006).

> communities (primarily, states) to respect and protect *the good of membership for their members*. (2) It protects the security of *these political communities* and promotes peace and cooperation among them. (3) It provides institutional resources with which to articulate and defend fundamental human rights on a global scale. Finally, (4) it tempers the power of nonstate transnational actors in order to promote one or more of *these interrelated ends*. (p. 328).

All of the ways Postema identifies tie the value of the global rule of law to promoting and enhancing membership within a community, which he characterizes as the moral grounding for the rule of law.

A serious problem arises because, as I mentioned above, many societies across the globe do not embrace the complex of liberal values Postema specifies as characteristic of membership in a community that grounds the rule of law. If the global rule of law is valuable insofar as it advances the good of individuals in societies that advance this complex of Western liberal values, then it is valuable for certain countries but not others. A global rule of law for all cannot be grounded on a partial basis that rejects complexes of values that prevail in many societies.

CONCLUSION

Law's Rule is a tour de force—the most penetrating book I have read on the rule of law, standing out among piles of books on the subject. It is a compelling, sophisticated, comprehensive, moral theory of the rule of law as tempering arbitrary power. The criticisms I have presented do not question its strengths, and additional valuable insights are conveyed in the book that I have not been able to address.

However, to meet his goal of articulating a coherent basis to defend the rule of law in the face of challenges around the world today, I believe, his theory must be conditioned and trimmed in several respects to a more defensible and widely acceptable core. First, his theory is not about the *nature* of the rule of law, nor does it have universal application. Rather, it is a comprehensive foundation for the rule of law in liberal democratic societies. In the Epilogue, he writes: "The aim of this book has been to reclaim, articulate, and ground a fundamental ideal of political morality and foundation of constitutional democracies" (p. 333). The bulk of the discussions and examples in the book relate most immediately to liberal democracies. *Law's Rule* is a rich theoretical resource that advances this aim.

Secondly, the theory is most powerful when addressing tempering arbitrary power of rulers, government officials, states, and law itself,

and it should be restricted to this narrower scope. Extending the rule of law's purview to private actors and the entire social realm leaps into a morass that sinks the theory in undecidable controversies; and current difficulties with enforcing the rule of law on governments and states are hard enough without the additional daunting challenges that would come from vastly expanding its reach. We must not forget that, as harmful as private power can be, the awesome power of the state to seize assets, fine, imprison, draft, enslave, or execute people is an order of magnitude worse for individuals. Gangs, mafia, private militia, and school shooters with automatic rifles can also kill, injure, and enslave, to be sure, and digital leviathans exert immense influence in ways that harm people and communities, but those harms are for *law* to address, not *the rule of law ideal*. The universal good that the rule of law ideal is best suited to deliver is to restrain arbitrary exercises of power of the state and the law itself, which has always been the focus of the rule of law tradition.

Third, the rule of law does not require that law alone rules or that law rules alone. Legal pluralism can coexist with the rule of law, though it creates complications. At a minimum, what is required is that law rules the actions of rulers, government officials, and states (the vertical dimension). This can effectively protect the populace against arbitrary exercises of governmental power even when groups within society follow aspects of religious and community-based law on certain matters in social life (the horizontal dimension). In societies where significant numbers of the population follow customary law, then customary law helps bind the community, providing security and predictability for people in their everyday affairs.

These friendly amendments leave intact the overwhelming bulk of Postema's arguments in the book, particularly Part II, which addresses perennial challenges familiar to jurists and contains many insights for legal and political theorists. His discussions of arbitrary power in the social realm are astute, informative, and thought-provoking, and undiminished by relinquishing the separate assertion that the rule of law ideal itself addresses these situations. An unproblematic way to describe the connection is that *arbitrary power*, which the rule of law strives to restrain for government officials and the state, exists in a multitude of social contexts as well, which the law should address when appropriate—full stop—no further mention of the rule of law necessary.

The fulsome theory Postema espouses is a maximalist account of the rule of law for liberal democratic societies. A minimalist derivation

can be extracted from his theory to articulate a rule of law ideal based on fundamentals capable of securing broader acceptance. A supreme benefit the rule of law provides for individuals across the globe and at the international level is to restrain the arbitrary exercise of power on others by rulers, government officials, and states. At the domestic level, this entails that government actions must be authorized by law and limited by law; at the international and transnational level, this entails that states and international organizations with public power (United Nations, international tribunals, peacekeeping troops, etc.) must comply with international law and human rights. The moral foundation for the rule of law is that arbitrary power by state actors can inflict unlawful, grievous, unpredictable, and unjustified harms on people, so preventing this is morally good. Since arbitrary power by governments and states is a widely shared concern across societies, this conception of the rule of law can secure universal assent.