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What we ask of law

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Aziz Z. Huq*

Abstract

A minimal, reasonably uncontroversial, demand of a legal system is that it should stabilize a polity against the chance hazards of ordinary violence and soften the blows of extraordinary, destabilizing misfortune. Law in the contemporary United States, however, has not abated the lethal toll of violent crime, the serial mass shootings of children, the endless flow of racialized police violence, or even the toll of insurrectionary violence that shadows democratic politics. The gap between law's operation in practice and its ultimate aspirations toward social order offers a hint that something in our dominant working model of law, and its relation to an ideal of the rule of law, is awry.

*This review essay reconsiders the presently dominant assumptions about a well-functioning legal system to in light of new evidence of how law operates across a wider historical and geographic panorama. This exercise in historically contextualization has implications for the choice of a sound working definition of law, a clear understanding of the latter's relationship to the rule of law, and an accurate sense of whether law is likely to advance or retard emancipatory projects of social reform, especially pertaining to racial injustice. The occasion for this reconsideration is Professor Fernanda Pirie's book *The Rule of Laws: A 4,000-Year Quest to Order the World*, an extraordinary and ambitious effort to fuse historical, anthropological, sociological, and legal learning across continents and eras into a single narrative arc. Starting with the historical materials eloquently marshalled by Pirie, I refine a new 'polythetic' definition of law that is distinct from the demotic definition of law commonly used in both popular and juristic discourse. To illuminate its distinctive form and implications, I bring this 'polythetic' definition into conversation with the leading jurisprudential theories of H.L.A. Hart and Lon Fuller. This sparks new ways of thinking about the relation of law to the state on the one hand, and about legalistic aspirations of the rule of law on the other. In concluding, I consider the implications of the polythetic definition of law for the pressing contemporary problem of how law relates to projects of racial hierarchy or reform.*

* Frank and Bernice Greenberg Professor of Law, University of Chicago Law School. I am grateful to Fernanda Pirie, who graciously commented on a draft. Claudia Brittenham, Tom Ginsburg, Brian Leiter and Fred Schauer gave me invaluable comments on issues outside my very limited domain of expertise. Eric Eisner and Aaron Liskov both improved the piece with close reads and comments. All errors are mine.

What we ask of law

(reviewing *The Rule of Laws: A 4,000-Year Quest to Order the World*,
By FERNANDA PIRIE, BASIC BOOKS 2021)

Introduction

Much is asked of law, even if we seem of late to reap dismayingly scant returns. Take a minimal, reasonably uncontroversial, demand: In its totality, a legal system should realize the Hobbesian sovereign's prerogative of establishing civil order.¹ It should stabilize a polity against the chance hazards of ordinary violence, and soften the blows of extraordinary, destabilizing misfortune. But, in the contemporary United States, has law succeeded at this modest task? It has not had a visible constraining effect on serial mass shootings of children.² It has not abated the lethal toll of violent crime, which is balefully associated in the public mind with racial minorities.³ As a correlative, it has done little to stanch the seemingly endless flow of racialized police violence paid for and directed by the state.⁴ And the insurrection at the U.S. Capitol on January 6, 2021 suggests that law no longer “break[s] the irregular rule of the street” to create space for the tedious civility of representative, democratic politics.⁵ Look beyond violence to larger threats to public order, and law's ambitions fare little better. It played a questionable role in responses to the global financial crisis.⁶ Nor could it sustain a public consensus robust enough to combat the respiratory plague that had (as of early 2022) taken more than a million American lives.⁷ Neither state nor private violence and disorder, in short, is firmly circumscribed by the institutions fashioned of American law. To be sure, we no longer reside in a Hobbesian state of nature. But for those most vulnerable to the predictable crush of private and state violence—especially racialized minorities in the United States—that thought might well come as cold

¹ THOMAS HOBBS, *LEVIATHAN* (Richard Tuck ed., Cambridge Univ. Press 1996) (1651).

² For a vivid statement of this point, see Alex Kingsbury, *Gunman in ___ Kills ___*, N.Y. TIMES (May 27, 2022), <https://www.nytimes.com/2022/05/27/opinion/editorials/american-mass-shootings-texas.html?action=click&module=Well&pgtype=Homepage§ion=Editorials>

³ Jeffrey P. Brantingham, Jeremy Carter, John MacDonald, Chris Melde, and George Mohler, *Is the recent surge in violence in American cities due to contagion?*, 76 J. CRIM. JUST. 101848, 101848 (2021) (noting 30 percent rise in homicide rates in 34 American cities between 2019 and 2020). On the association of race and criminality, see Jennifer L. Eberhardt et al., *Seeing Black: Race, Crime, and Visual Processing*, 87 J. PERSONALITY SOC. PSYCH. 876, 881 (2004) (exploring “the extent to which Black faces are brought before the footlights of attention when the concept of crime is activated”).

⁴ Roland G. Fryer Jr., *An empirical analysis of racial differences in police use of force*, 127 J. POL. ECON. 1210, 1213-14 (2019) (reporting racial disparities in both the use of nonlethal and lethal force of up to 50 percent); see also PAUL A. GOWDER, *THE RULE OF LAW IN THE UNITED STATES* 113 (2021) (“The bare fact of repeated police killings of black Americans, especially when the victims are innocent of any crime and/or the police receive no consequence for the killing, is itself a challenge to the US's self-conception as a rule of law state . . .”).

⁵ Max Weber, *National Character and the Junkers*, in FROM MAX WEBER: ESSAYS IN SOCIOLOGY 395 (H.H. Gerth and C.W. Wright, eds. 1958). Perhaps instead, our insurrectionary constitutions invite irregular political action.

⁶ On the legality of many responses to the 2007-09 global financial crisis, see ERIC A. POSNER, *LAST RESORT: THE FINANCIAL CRISIS AND THE FUTURE OF BAILOUTS* (2018). The most direct confrontation between law and economic emergency came in the September 2012 decision by the German Constitutional Court to limit Germany's participation in the European Stability Mechanism. See *Bundesverfassungsgericht*, 2 BvR 1390, 1421, 1438, 1439, 1440/12 (2012).

⁷ *Coronavirus in the U.S.: Latest Map and Case Count*, N.Y. TIMES (last visited March 8, 2022), <https://www.nytimes.com/interactive/2021/us/covid-cases.html> (recording 950,000 deaths from COVID-19 in the United States). On partisan divergences around pandemic-related measures, see Zalman Rothschild, *Free Exercise Partisanship*, 107 CORNELL L. REV. -- (forthcoming 2022).

comfort.⁸ To their jaundiced and weary ears, the pronouncements of the law might rather sound like a tinnitus from “impotent grandfathers feebly scold[ing].”⁹

Nevertheless, encomiums for law and the related (but not identical) normative ideal of ‘the rule of law’ keep gushing forth. In many contexts, the ideas of “law” and the “rule of law” are used almost interchangeably such that it is difficult to see where one ends, and the other begins. For example, Justices of the U.S. Supreme Court—most recently Neil Gorsuch and Antonin Scalia—routinely rhapsodize “the rule of law” as preferable to the “rule of men.”¹⁰ Law, Justice Sandra Day O’Connor once intoned, guards against a government driven by “caprice, passion, bias, and prejudice.”¹¹ Law, they say, lays the groundwork for “rudimentary justice.”¹² It “protects the rights and liberties of all Americans . . . [For] without the rule of law, any rights are meaningless.”¹³ The rule of law, for academic lawyers like Richard Fallon, remains “central to our political and rhetorical traditions, possibly even to our sense of national identity.”¹⁴ His sentiment echoes across the Anglophone world. In an influential book, the English Law Lord Tom Bingham has concluded that “it is on the observance of the rule of law that the quality of government depends.”¹⁵ Bingham’s vision of “government in accordance with performable and established norms” is twice the age of America: It has been traced back to the thirteenth-century English jurist Henri de Bracton.¹⁶ Its influence perhaps reached an acme in 1975, when the preeminent Marxist historian Edward Thompson pronounced that “the notion of the rule of law is an unqualified good”¹⁷—much to fellow travelers’ dismay.¹⁸

Underlying many of these endorsements of law, I think, is an implicit ‘folk theory’ of how law—how a well-ordered legal system, not just a single rule or enactment in isolation—actually works, and how it produces the social good of the “rule of law.”¹⁹ I cannot point to a

⁸ This review, and the book under consideration, focus on domestic rather than international law. The understanding of what it means to ‘comply’ with international law is more complex, and been subject to competing narratives over time. See John Fabian Witt, *The View from the U.S. Leviathan: Histories of International Law in the Hegemon* (January 22, 2022), <https://ssrn.com/abstract=4014826> (surveying the field).

⁹ W.H., Auden, *Law like Love*, in *SELECTED POEMS* 97-98 (Edward Mendelsohn, ed. 2007).

¹⁰ *Kisor v. Wilkie*, 139 S. Ct. 2400, 2438 (2019) (Gorsuch, J., concurring in the judgment); see also Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1176 (1989) (offering a “dichotomy between ‘general rule of law’ and ‘personal discretion to do justice’ as central to the rule of law”).

¹¹ *TXO Prod. Corp. v. Alliance Resources Corp.*, 509 U.S. 443, 475 (1993) (O’Connor, J., dissenting). The association of the rule of law with the constraint of official action goes back to a Victorian legal theorist who was one of the early adopters of the term ‘rule of law.’ A.V. DICEY, *INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION* 181-205 (2d ed. 1959).

¹² Scalia, *supra* note 10, at 1778. Scalia’s point here is embedded in a larger argument about the desirability of rules over standards as legal norms. *Id.* at 1185 (“I believe that the establishment of broadly applicable general principles is an essential component of the judicial process.”). But his identity theorem of rules with the rule of law is implausibly demanding of language. Timothy A.O. Endicott, *The Impossibility of the Rule of Law*, 19 OXFORD J. L. STUD. 1, 7-8 (1999).

¹³ Confirmation Hearing on the Nomination of John G. Roberts, Jr. to be Chief Justice of the United States: Hearing Before the S. Comm. On the Judiciary, 109th Cong. 55 (2005) (statement of John G. Roberts, nominee to be Chief Justice of the United States).

¹⁴ Richard H. Fallon, Jr., *‘The Rule of Law’ As A Concept in Constitutional Discourse*, 97 COLUM. L. REV. 1, 6 (1997).

¹⁵ TOM BINGHAM, *THE RULE OF LAW* 173 (2011).

¹⁶ JOHN PHILLIP REID, *RULE OF LAW: THE JURISPRUDENCE OF LIBERTY IN THE SEVENTEENTH AND EIGHTEENTH CENTURIES* 4-5 (2004).

¹⁷ E.P. THOMPSON, *WHIGS AND HUNTERS* 267 (1975). s

¹⁸ Morton J. Horwitz, *The Rule of Law: An Unqualified Human Good?*, 86 YALE L.J. 561 (1977).

¹⁹ In the balance of this essay, I use the word “law” to refer to a legal system in the sense of an “organized system[] of rules—that is . . . social or political systems in which human conduct is governed in one way or another.” Jeremy Waldron, *Positivism and legality: Hart’s equivocal response to Fuller*, 83 NYU L. REV. 1135, 1139 (2008) [hereinafter “Waldron, *Positivism and legality*”].

single place where this model is written down. It is not, to be clear in advance, the famous *jurisprudential* concept of law offered by legal positivists working in the vein of H.L.A. Hart (which I will come back later).²⁰ It is demotic, not a formal, understanding. It hence operates as a pre-theoretical presupposition that can be silently shared by the conservative jurist, the liberal legal scholar, and the Marxist historian. Once stated, I hope it will seem sufficiently familiar and intuitive that it can lay claim to a measure of generality as an operative presumption behind much everyday talk of law and the rule of law.²¹

I call demotic folk theory of law the ‘conveyor belt model of law.’ It has three elements, which correspond to the moments of law’s production, application, and output. First, the law typically has a temporally distinct origin in an *officially authorized* source.²² Its origin is thus known and fixed, both in time and institutional source, and legitimated by pedigree.²³ Second, the law is later applied by a cadre of specialized *state* actors, usually judges, to subsequent disputes involving new facts and new parties. Law not only has a proper pedigree but a distinctive armature.²⁴ And third, applying that body of early-forged law in new cases creates *general benefits beyond the localized good* of resolving a specific dispute.²⁵ The larger good most commonly associated with law relates to the possibility of binding of powerful actors in a society, especially those wearing badges of state authority, in ways that prevent capricious, whimsical, or self-interested action. This last result is often captured in the otherwise vague term “rule of

²⁰ I discuss that concept of law *infra* in Part III.A.

²¹ In the following description, I offer examples in the margin of each element of the conveyor-belt theory of law.

²² This assumption informs many complaints about judicial overreach. *See, e.g., Obergefell v. Hodges*, 576 U.S. 644, 686 (2015) (Roberts, J., dissenting) (“Under the Constitution, judges have power to say what the law is, not what it should be.”). This is the idea that the law comprises a fixed set of authoritative sources, and that judges are strictly bound within them.

This is one point on which the conveyor-belt theory diverges from legal positivism (albeit not the only one): The claim in the text is not at all the same as the “sources thesis” in legal positivism, which holds that the “existence and content [of law] can be identified by reference to social facts alone, without resort to any evaluative argument.” Joseph Raz, *Authority, law and morality*, 68 *The Monist* 295, 296 (1985); *see also* H.L.A. HART, *THE CONCEPT OF LAW* 45-49 (postscript ed. Penelope Bulloch & Joseph Raz, 2d ed. 1994) [hereinafter “HART, CONCEPT OF LAW”] (considering custom as laws, and concluding that law need not originate in a “deliberate law-creating act”). Under the sources thesis, law does not need to originate in an official source, but can emerge as custom and be recognized as such.

²³ The obvious exception to the conveyor-belt model at this step is the common law, which has long been understood as a “practised discipline of practical reasoning.” Gerald J. Postema, *Philosophy of the Common Law*, in *THE OXFORD HANDBOOK OF JURISPRUDENCE AND PHILOSOPHY OF LAW* 588, 601 (Jules Coleman & Scott Shapiro eds., 2002) [hereinafter “Postema, *Common Law*”]; *see also* A.W.B. Simpson, *The Common Law and Legal Theory*, in *OXFORD ESSAYS IN JURISPRUDENCE: SECOND SERIES* 77, 94 (A.W.B. Simpson ed., 1973) (characterizing the common law as an unwritten “body of practices observed and ideas received by a caste of lawyers”). This is a second instance of divergence between the legal positivist’s view of law and the conveyor-belt model. The former can more easily accommodate custom and the common law. For a discussion of how custom is another example that the legal positivist can accommodate, but not necessarily the conveyor-belt model, *see* Neil Duxbury, *Custom as Law in English Law*, 76 *CAMBRIDGE L.J.* 337, 339 (2017). The discomfort many modern American scholars and jurists have respecting the common law likely has to do with the background force of the conveyor belt model. *See* Ingrid Wuerth, *The Future of the Federal Common Law of Foreign Relations*, 106 *GEO. L.J.* 1825, 1833 (2018) (describing a “trend away from common law reasoning in foreign relations cases,” which is one of the most important redoubts of federal common law).

²⁴ The Supreme Court often describes its relation to written law in something akin to these terms. *See, e.g., James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529, 535-36 (1991) (noting that “the declaratory theory of law according to which the courts are understood only to find the law, not to make it ... comports with our received notions of the judicial role”(citations omitted)).

²⁵ *See, e.g., Republican Party of Minnesota v. White*, 536 U.S. 765, 804 (2002) (Ginsburg, J., dissenting) (“A judiciary capable of performing this function, owing fidelity to no person or party, is a ‘longstanding Anglo-American tradition,’ ... , an essential bulwark of constitutional government, a constant guardian of the rule of law.”).

law.”²⁶ I call all this a “conveyor-belt” model because it imagines a linear and unidirectional pathway from written law, to judicial application, and then to a state characterized by the rule of law.

In my judgment, the image of a conveyor-belt captures a motivating metaphor embedded deeply in the self-understandings of many actors within the American legal system. It formalizes, albeit in rather facile terms, what those actors believe themselves to be doing by participating in a legal system. It also captures one way in which a normative, evaluative element of some sort is irreducibly comingled into law’s description. Mere words, it implies, can and do enchain power, and hence work as a positive force for social good. (This is not to say, to be clear, that law must meet a moral criterion to count as law.²⁷ It is more simply a claim that law is a social fact with certain “normative” and also desirable consequences.²⁸) Specifically, the official act of following or enforcing a duly enacted piece of law mechanically creates a positive social good of the rule of law—i.e., the binding of powerful actors by *ex ante* rules in ways that limit capricious or arbitrary conduct.

So what’s gone wrong? If a folk theory of law is widely held and in good working order, why doesn’t law do its job of constraining power (especially state power) better? There are, to be sure, obvious local and contingent reasons for law’s present shortfalls. Specific legislative and judicial choices elicit the structural conditions of public violence, distrust in the public-health apparatus, and poorly-regulated security forces. Pick your poison. Yet these observable shortfalls in law’s ambitions invite the question whether we are not just making bad policy choices (although we certainly are ...), but also whether our understanding of law as a ground for producing the rule of law is flawed or incomplete. We have reason to suspect as much because, although its legal system is in reasonably good working order, the United States struggles to achieve either the imperative of a secure Hobbesian peace or the more ambitious project of securing common grounds for democratic self-government. If law’s operation and its aspirations have come this far apart, it is at least reasonable to ask whether something in our dominant working model of law, and its relation to the rule of law, is not accurate. Perhaps our expectation that law is a social technology capable of delivering certain social result is simply implausible. Perhaps we have overlooked law’s limitations by failing to grasp clearly its common constituent elements. Or perhaps we have just misperceived how law works in the first instance.

Picking up on that last possibility, my aim in this review essay is to re-evaluate the dominant assumptions about a well-functioning legal system in light of new evidence of how law operates across a wider historical and geographic panorama, and to elucidate some of the consequences of a revised model of law for current disputes in legal theory and contemporary legal debates. By moving away from parochial conceptions of law, and instead asking what picks out law as a transhistorical social practice, I hope to make some progress toward understanding the relationship between law’s aspirations, whether formal or normative, and the elusive ideal of the rule of law. In so doing, I also hope to gain purchase on how law’s modal vectors facilitate some, but by no means all, kinds of social arrangements.²⁹

²⁶ On this constraining understanding of the rule of law, see BRIAN TAMANAHA, *ON THE RULE OF LAW: HISTORY, THEORY, POLITICS* 63-67 (2004).

²⁷ *But see* H. L. A. Hart, *Positivism and the Separation of Law and Morals*, 71 *HARV. L. REV.* 593, 624 (1958) (“[T]here is, in the very notion of law consisting of general rules, something which prevents us from treating it as if morally it is utterly neutral, without any necessary contact with moral principles.”); *see also infra* text accompanying – to –.

²⁸ JEREMY WALDRON, *LAW AND DISAGREEMENT* 30 (2000) (discussing the “normative understanding of law”).

²⁹ A related project of “law and political economy” challenges the suppression of “problems of distribution and power throughout public and private law.” Jedediah Britton-Purdy et al., *Building A Law-and-Political-Economy Framework: Beyond the Twentieth-Century Synthesis*, 129 *YALE L.J.* 1784, 1791 (2020). That project takes law as a

Such questions are invited by Professor Fernanda Pirie's new book *The Rule of Laws: A 4,000-Year Quest to Order the World*.³⁰ As its title suggests, Professor Pirie's book is an extraordinarily ambitious effort to fuse historical, anthropological, sociological, and legal learning across continents and eras into a single narrative arc. It begins with a series of clay tablets inscribed at the behest of Sumerian dynast Ur-Namma in 2112 B.C.E. with rules for his city, and closes with the 2015 promulgation of an international agreement on cross-border sales under the auspices of UNCITRAL.³¹ Unlike Pirie's previous monograph on similar themes,³² *The Rule of Laws* is crafted for a non-specialist audience. It does not foreground theory. But it can be profitably read alongside that earlier scholarship to extrapolate a more abstract 'theoretical' claim about the modal elements of law as a social practice, and, in particular, the three elements of the conveyor-belt model: Law's sources, the institutional mechanisms through which it affects ordinary people, and its ensuing capacity to yield enduring changes to social relations.

By bringing our leading ideas about law into conversation with Pirie's work, I hope to broach several questions about both the theory and the practical promise of law, and its relation to the rule of law. To begin with, an effort toward de-parochializing our understanding of law shows up ways in which the conveyor belt model—which I have suggested lurks behind views of figures as disparate as Gorsuch, Fallon, Bingham and Thompson—does not accurately or completely capture the actual sources, development, and modal operation of law. Their model is instead at best contingent and at worst misleading. Pirie's work also provides an empirically grounded perspective from which to reconsider widely shared theoretical claims about law. Her analysis sheds light on the concept of law developed by H.L.A. Hart using a own distinctive brand of "descriptive sociology."³³ It also has implications for claims about the "morality" of law made by Lon Fuller.³⁴ That engagement with Fuller's work also casts a light on the relationship between the polythetic definition of law and the rule of law, understood as an aspiration toward the constraint of state power. Finally, that definition's implications for a contemporary problematic are worth exploring. I hence conclude by reconsidering the relation of law to racial hierarchy and subordination.

It is helpful to unpack here the first of these points, since it is central to much of what follows—how the elements of law, and their relation to the rule of law, vary from the conveyor

given, and then follows the Legal Realists in tracing its formative influence on economic as well as political arrangements. My project here is to step back one further level of generality, and ask if we really have a firm grasp on how law works, and how it tends toward some but not other social arrangements. Generality, however, is necessarily purchased here at the loss of some predictive precision.

³⁰ FERNANDA PIRIE, *THE RULE OF LAWS: A 4,000-YEAR QUEST TO ORDER THE WORLD* (2021) [hereinafter "PIRIE, RULE OF LAWS"].

³¹ *Id.* at 17-18, 431-32. The UNCITRAL example does not quite come at the end of the book, but it is the temporally final element of the book.

³² A previous 2013 book prefigures several of the themes in *The Rule of Laws* in a more theoretical register. FERNANDA PIRIE, *THE ANTHROPOLOGY OF LAW* (2013) [hereinafter, "PIRIE, ANTHROPOLOGY OF LAW"]. The specific relation of law to the modern project of state-building is addressed in Fernanda Pirie, *Law before government: Ideology and aspiration*, 30 OXFORD J. LEGAL STUD. 207 (2010) [hereinafter "Pirie, *Law before government*"]. I also found useful theoretical orientation in an earlier introduction to a collected volume of anthropological studies. Fernanda Pirie and Judith Scheele, *Introduction*, in LEGALISM: COMMUNITY AND JUSTICE (F. Pirie and J. Scheele eds. 2014) [hereinafter "LEGALISM: COMMUNITY AND JUSTICE"].

³³ HART, *CONCEPT OF LAW*, *supra* note 22, at v.

³⁴ See Lon L. Fuller, *Positivism and Fidelity to Law - A Reply to Professor Hart*, 71 HARV. L. REV. 630, 660 (1958) ("To me there is nothing shocking in saying that a dictatorship which clothes itself with a tinsel of legal form can so far depart from the morality of order, from the inner morality of law itself, that it ceases to be a legal system."); see generally LON FULLER, *THE MORALITY OF LAW* (1964) (developing this account further).

belt model in subtle but consequential ways. In brief, Pirie's work suggests that law does indeed have historically recurrent (albeit not invariant) characteristics. But the conveyer belt model gets these wrong. Law, Pirie shows, connotes written rules of general application maintained by a hieratic caste. And it is recurrently characterized by an aspiration toward acontextual generality and atemporality. This aspiration may be best embodied in a written text. Law's relation to the state, and to the practical fact of compliance, is in contrast contingent rather than necessary.

This account differs from the conveyer belt model along three margins. First, it identifies a subtly but importantly different *source* for law from the one assumed by the conveyer belt model. Second, the *relationship between the law and the state* is not stable in the way that the conveyer belt model implies. Law is akin to the ordinary commerce in the sense that it can get along perfectly well without the enforcement and adjudicative institutions ordinarily associated with the state.³⁵ Indeed, Pirie's historical work suggests, it is the state and those who aspire to its command that are the more needy, and hence the overly dependent, party in this relationship. Finally—and in some tension with Pirie's own conclusions—her own empirical synthesis suggests that the relationship of law to the rule of law (again, understood as the project of constraining state power) is not straightforward. It is instead inconstant and murky. Many social goods associated with the rule of law—e.g., predictability, stability, and regularity—can be realized outside the state. And it is possible to envisage a legal system that neither constrains powerful actors nor adds predictability. Such has long been true of one of the world's great legal traditions in China. It is possible, therefore, to have law, as well as a powerful state, without the rule of law.

A reasonable objection at the outset is whether the inquiries pursued here are methodologically confused: How can *historical* materials, marshalled however extensively, speak to purely *conceptual* questions about the 'nature' of law? Why should history determine the semantic content of any term? Even if covering laws or other generalizations can be derived from historical regularities about law, an effort to derive normative conclusions from them would seem to commit the naturalistic fallacy: It would seem to be deriving normative prescriptions from social facts. A brief answer here is that law is a concept that does not, and could not, exist detached from the mine run of actual social practices and actual patterns of expectations held by participants in legal systems.³⁶ It is possible to talk meaningfully of a "concept" of law independent of those practices and associated beliefs.³⁷ Obviously, "law" refers to distinct arrangements across varied jurisdictions at different times. But even if the term "law" may translate in different ways in different nations at different times, Pirie powerfully shows that there are also characteristics that recurrently transcend historical contexts, and in consequence are presupposed by the "ordinary usage" of the term "law" as a transnational and transhistorical referent.³⁸ As a result, reflection on the possibility conditions of law's normative aspirations today can usefully begin with the study of what, historically, has recurrently been

³⁵ BARRY HAWK, LAW AND COMMERCE IN PRE-INDUSTRIAL SOCIETIES 14 (2016) ("Men and women in ... nine pre-industrial societies engaged in commerce and trade Commerce and trade came before states").

³⁶ See JOSEPH RAZ, ETHICS IN THE PUBLIC DOMAIN: ESSAYS ON THE MORALITY OF LAW AND POLITICS 237 (rev. ed. 2005) (emphasizing group understandings in accounts of law); cf. Jules L. Coleman, *Beyond Inclusive Legal Positivism*, 22 *RATIO JURIS* 359, 359-61 (2009) (describing debate over whether law is exclusively a social phenomenon between Hart and Ronald Dworkin).

³⁷ This is not a new position. For the classic statement, dating from 1884, see Rudolf von Jhering, *In the Heaven of Legal Concepts: A Fantasy*, 58 *TEMP. L.Q.* 799, 802 (1985).

³⁸ Kenneth Einar Himma, *Do Philosophy and Sociology Mix? A Non-Essentialist Socio-Legal Positivist Analysis of the Concept of Law*, 24 *OXFORD J. LEG. STUD.* 717, 733 (2004). Himma, however, would criticize what follows here as "too thin" to establish an adequate concept of law. *Id.* at 737.

the case with law. This exercise can help us to get past parochial “ideas and procedures” keyed to present practice that cloud our perceptions and judgments.³⁹ It allows us to reach a more realistic accounting of what we plausibly ask of law because we better understand what law is.

Pursuing this wider enterprise, I frankly acknowledge that I run the risk of losing sight of Pirie’s ambitions for her own volume, and straying from job of the reviewer: *reviewing* the book rather than deploying it as a footstool for my own asquint aspirations. I hope to avoid that snare. Part I, in particular, trains closely on Pirie’s text in its riches and demerits alike. But I can acquit my central obligation up front, right now: As a work aimed at a non-specialist audience, *The Rule of Laws* succeeds marvelously. Pirie’s narrative rarely flags or loses interest. She deftly moves forward in time and space, darting across continents and jurisdictions without losing a singular narrative thread. She also avoids the facile parsimony that mars many other humanity-spanning histories written for a popular audience. Hers covers an exhaustive breadth of human life with clarity and vigor, and without cliché or condescension. No one scholar can be expert in all of the heterogeneous legal practices she touches. (Certainly, I’m not). So one might well cavil with details or matters of emphasis.⁴⁰ But reflect a moment on the absence of any general text on the history of law—let alone one compassing four millennia within and also beyond the strictures of state building—and the magnitude of her accomplishment becomes immediately clear. It is little short of breath-taking.

³⁹ Bernard Williams, *Philosophy as a humanistic discipline*, 75 *PHILOSOPHY* 477, 492 (2000).

⁴⁰ To criticize Pirie on the ground that she makes omissions, I think, is a bit churlish: No one could plausibly tell a global history of law without some omissions. But two omissions are so striking that it would be wrong not to note them at least in the margin.

First, Pirie’s account is rich when it comes to Europe, Asia, and (to some extent) Oceania. But it has almost nothing to say about the legal systems of indigenous groups of North and South America, and very little to say about the law of sub-Saharan Africa, and in particular the great empires of Asante, Mali, Songhai, and Zimbabwe. At least some of the precolonial African experience can be understood as covered by Pirie’s treatment of Islamic law. *See, e.g.*, A. J. H. Goodwin, *The Medieval Empire of Ghana*, 12 *S. AFRICAN ARCHAEOLOGICAL BULL.* 108, 110-11 (1957) (discussing the use of Islamic law during the reign of Malian emperor Mansa Musa), but is there more to be said about precolonial African law? *See, e.g.*, WERNER F. MENSKI, *COMPARATIVE LAW IN A GLOBAL CONTEXT: THE LEGAL SYSTEMS OF ASIA AND AFRICA* 380-402 (2006) (offering a brief survey of that field, and arguing for the existence of law in this period). On the pre-Columbian Americas, Pirie cites the European destruction of Aztec and Inca records to explain the lacuna in her narrative. PIRIE, *RULE OF LAWS*, *supra* note 30, at 340-41. There *are* some accounts of Mesoamerican law. *See, e.g.*, Jerome A. Offner and Elizabeth Lambourn, *The Future of Aztec Law*, in *Legal Encounters in the Medieval Globe* (Elizabeth Lambourn and Carol Symes, eds. 2016); *see also* DIEGO DURÁN, *THE HISTORY OF THE INDIES OF NEW SPAIN* 569 (Doris Heyden trans., 1994) (1581) (“Yet others made records of the laws...”). Given the history of malign neglect of both Mesoamerican and African law, *cf.* MENSKI, *supra*, at 380 (noting the “barely hidden undercurrent of African laws and their contributions to jurisprudence”), this is an unfortunate gap.

Second, as we will see, Pirie makes claims about the relation of law to the normative concept of the rule of law. The twentieth century, however, was indelibly scarred by regimes ostensibly characterized by law but which committed atrocities of catastrophic cruelty. How law operated under these circumstances provides important data in respect to some of the claims she makes about law’s normativity. Consider one preeminently evil regime: In early 1942, Adolf Hitler first told German judges that “the nation is not here for them but they are here for the nation,” and yet a month later barred Nazi officials from pressuring or interfering with any legal proceeding. Hans Petter Graver, *Why Adolf Hitler spared the judges: judicial opposition against the Nazi state*, 19 *GERMAN L.J.* 845, 846 (2018) (quotation marks and citation omitted). Without minimizing the horrors of the Nazi regime, it seems fair to say that the latter had a complex relationship with law. The other example that would have been useful to address is Soviet law. *See, e.g.*, JUDAH ZELITCH, *SOVIET ADMINISTRATION OF CRIMINAL LAW* (2018). The law’s relation to normativity under the Nazi regime, of course, was raised in an important article by Gustav Radbruch, and then provided the seed for an important debate between Lon Fuller and H.L.A. Hart. Gustav Radbruch, *Statutory lawlessness and supra-statutory law*, 26 *OXFORD J. LEG. STUD.* 1 (2006) (originally published in 1946). For a subtle account of Radbruch’s thought, and Fuller’s reaction, see Stanley L. Paulson, *Lon L. Fuller, Gustav Radbruch, and the ‘Positivist’ Theses*, 13 *L & PHIL.* 313, 323-24 (1994).

Part I introduces *The Rule of Laws*, focusing on its implicit definition of “law.” Part II then derives from Pirie’s work a new, general accounting of law, which I call the ‘polythetic’ definition. To be clear, I can’t ascribe this theoretical claim to her (or blame her for its flaws!) Part II also contrasts this definition to the conveyor-belt model, and demonstrates important, if nuanced, divergences. Part III considers implications of a polythetic definition for key elements of leading jurisprudential theories of Hart and Fuller, with particular attention to the relation of law to the state and to the rule of law. Finally, Part IV takes up one practical application—the relation of law to racial hierarchy and projects of racial reform—as a way of showing that a highly abstract account of law can nonetheless yield (modest) insight on practical, present problems.

I. Law as it Was: A Polythetic Definition

The Rule of Laws offers a synoptic history of law as a social practice across almost the full breadth of recorded human history.⁴¹ I am not aware of another book aimed at the general reader with a similar ambition.⁴² There was a wave of scholarly interest in “legal pluralism” in the 1970s and 1980s.⁴³ This focused largely on colonial encounters and synchronic conflicts between different legal orders.⁴⁴ But the legal pluralism literature never generated an analogous unitary text canvassing the *historical* development of law as such. Today, as interest in legal pluralism has ebbed,⁴⁵ relatively few scholars working in the American legal academy could pull off such a feat. A professor of the anthropology of law at Oxford University, Fernanda Pirie has unique standing for such an enterprise. Formerly a practicing barrister (like Herbert Hart),⁴⁶ and an expert in Tibetan law,⁴⁷ Pirie co-supervised the massive comparative-law

⁴¹ *But see supra* note 40 for exceptions.

⁴² There have been scholarly efforts at a tour de horizon of law through history. *See, e.g.*, 1 CHARLES WIGMORE, PANORAMA OF THE WORLD’S LEGAL SYSTEMS, at xi (1936) (characterizing the scope of the work as extending to “sixteen principal legal systems, past and present, form the subject-Egyptian, Mesopotamian, Hebrew, Chinese, Hindu, Greek, Roman, Japanese, Mohammedan, Keltic, Slavic, Germanic, Maritime, Ecclesiastical, Romanesque, Anglican”); *see also* H. PATRICK GLENN, LEGAL TRADITIONS OF THE WORLD: SUSTAINABLE DIVERSITY IN LAW (5th ed. 2014). Other leading texts focus on the “Western” legal tradition, *see, e.g.*, HAROLD J. BERMAN, LAW AND REVOLUTION: THE FORMATION OF THE WESTERN LEGAL TRADITION (1985), or train more narrowly on the history of ideas, *see, e.g.*, CARL JOACHIM FRIEDRICH, THE PHILOSOPHY OF LAW IN HISTORICAL PERSPECTIVE (2d ed. 1958). Glenn’s effort is perhaps the closest parallel to Pirie’s.

⁴³ *See* Ralf Michaels, *Global Legal Pluralism*, 5 ANN. REV. L. & SOC. SCI. 243, 245 (2009) (defining “legal pluralism” as “a situation in which two or more laws (or legal systems) coexist in (or are obeyed by) one social field” and noting the hey-day of its study in the 1970s and 1980s). The leading theoretical formulation of legal pluralism is by the late Sally Engle Merry, *Legal Pluralism*, 22 LAW & SOC’Y REV. 869 (1988). William Twining embedded legal pluralism within a broader account of globalization. William Twining, *General jurisprudence: understanding law from a global perspective* 70-74 (2009). And Brian Tamanaha has brought pluralism into conversation with Hartian positivism. *See, e.g.*, Brian Z. Tamanaha, *Socio-legal positivism and a general jurisprudence*, 21 OXFORD J. LEGAL STUD. 1 (2001).

⁴⁴ Early contributions defined legal pluralism as a function of the colonial encounter. *See* MICHAEL BARRY HOOKER, LEGAL PLURALISM: AN INTRODUCTION TO COLONIAL AND NEO-COLONIAL LAWS (1975).

⁴⁵ A recent publication that aims to revive interest in legal pluralism is *The Oxford Handbook of Global Legal Pluralism* (Paul Berman ed., 2020). Its editor explains legal pluralism as “a ... complicated descriptive account of the interaction of normative systems, the strategic actions of individuals and groups in deploying these multiple systems to pursue their interests, and the subtle processes by which even norms without coercive power can change legal consciousness and have impact over time.” Paul Schiff Berman, *Understanding Global Legal Pluralism: From Local to Global, from Descriptive to Normative*, *in id.* at 12. The majority of the handbook’s chapters, though, concern how contemporary legal systems interact, rather than how law has developed over time. That is, they concern the conflict, rather than the historical genealogy, of law.

⁴⁶ Maitland Chambers, *Fernanda Pirie* (last visited Mar. 17, 2020), <https://www.maitlandchambers.com/our-people/barristers/associate-members/fernanda-pirie>.

⁴⁷ *See* Fernanda Pirie, *Legal Ideology in Tibet*, University of Oxford China Center (last visited Mar. 17, 2022), <https://www.chinacentre.ox.ac.uk/research/legal-ideology-in-tibet-politics-practice-and-religion/>

“Oxford Legalism” project.⁴⁸ This effort “brought together scholars from anthropology, history, and other disciplines to compare wide-ranging empirical examples,” and yielded four rich and diverse edited volumes from Oxford University Press.⁴⁹ Fingering the indices of these four volumes, it is easy to see the ground upon which Pirie built her impressive, synoptic account of law in the historical and geographical round. Further, she approaches her topic credentialed by an immersion in two very different legal systems (English and Tibetan), as well as by a command of the leading comparative evidence of law’s historic spread and diffusion. No review of her work usefully gainsays this unique epistemological grounding. Worthwhile engagement instead must focus on the theoretical apparatus that sustains her narrative, or alternatively must use her account as grist for new theoretical insight into the social technology of law in wide-angle historical perspective.⁵⁰

To this end, this Part spins out theoretical commitments animating *The Rule of Laws* along two different axes. A history of law as a social technology has to start with a definition of sorts of its subject-matter. I thus begin by fleshing out the implicit definition of law Pirie’s study applies. I next ask whether regularities emerge from Pirie’s history about the manner in which law nurtures and palpates the social world. The working model of the law that emerges from this inquiry diverges in useful ways from the conveyor belt model that is now dominant.

A. The Historical and Comparative Taxon of “Law”

Pirie’s history of law begins chronologically with clay tables containing a Mesopotamian legal code circa 2112 B.CE.⁵¹ The narrative that follows initially moves, chapter by chapter, between the cities of the ancient Middle East; the Aryan civilization of the Gangetic flood plain; the Zhou kingdoms across what later would be known as China; the ancient Mediterranean civilizations of Greece, Rome, and Constantinople; and the Merovingian, Lombard, and Saxon courts of the early Middle Ages. Different geographical categories receive either one or two chapters apiece. Charting this trajectory, Pirie neatly reverses conventional teleologies of law. Having begun with the proto-state of Ur, she first interleaves chapters on ‘major’ civilizations with discussions of law at the “margins” of the urbanizing world (in sites such as Ireland, Iceland, Kievan Rus’, and Armenia), and law “beyond the state” (on the Tibetan steppe, the Kabylia highlands of northeastern Algeria, and mafia-dominated Sicily). The result of this sequencing is an implicit repudiation of triumphalist narratives of historical ‘development’ that place contemporary states at an apex. Instead, Pirie offers a more diverse, yet horizontal, mosaic of historical vignettes about “law” scattered across social, historical, and institutional contexts—one without a single vector of monotonically increasing complexity or sophistication.⁵²

What, then, unites these vignettes? What transforms a scintillating cascade of diverse stories into a single image? And what excludes other vectors of social organization from the

⁴⁸ The project was co-convened with Paul Dresch and Judith Scheele. Email from Fernanda Pirie (Apr. 20, 2022) (on file with author).

⁴⁹ LEGALISM: ANTHROPOLOGY AND HISTORY (Paul Dresch and Hannah Skoda, eds, 2012); LEGALISM: COMMUNITY AND JUSTICE (Fernanda Pirie and Judith Scheele, eds, 2014); LEGALISM: RULES AND CATEGORIES (Paul Dresch and Judith Scheele, eds, 2015); LEGALISM: PROPERTY AND OWNERSHIP (Georgy Kantor, Tom Lambert, and Hannah Skoda, eds, 2017).

⁵⁰ I expect experts in specific bodies of ancient law could identify lacuna or distortions; what else are they for?

⁵¹ PIRIE, RULE OF LAWS, *supra* note 30, at 17.

⁵² The internal diversity of the category ‘law’ is recognized in H.L.A. Hart, *Definition and Theory in Jurisprudence*, in *ESSAYS IN JURISPRUDENCE AND PHILOSOPHY* 21, 22 (1983) (noting that the “range of cases to which [the word ‘law’] is applied has a diversity that baffles the initial attempt to extract any principle behind the application”).

term law?⁵³ The binding assumption of the book, of course, is that there *is* a coherent single category of law that can be pursued, like Ariadne’s thread, through the historical maze. To understand the story Pirie is telling, it is thus necessary to start by asking how that thread is braided together. Surprisingly, *The Rule of Laws* presents no threshold definition of its central organizing taxon.⁵⁴ To the contrary, Pirie offers a series of negatives that eliminate obvious, demotic denotings. Law, she says, “does not always recognize[] territorial boundaries”; it sometimes lacks “efficiency, authority, and efficacy”; and it often “hardly ... contributed to the smooth running of their societies.”⁵⁵ Rather than stipulate the frame of her canvas as it is first stretched, Pirie’s method is thus inductive. She starts with what are indubitably examples of ancient laws, literally carved onto clay tablets and stele in the first of Mesopotamian city states. She then works incrementally outward by sketching out other examples. Law, in her portraiture, is not a crisply defined conceptual form pegged out in advance. It is rather what Pirie calls a “technique” that emerges periodically to resolve certain problems.⁵⁶ The contours of this “technique” emerge from an analysis that starts with a set of historical ‘core’ cases and then pushes outward until the label ceases to be plausible. Elsewhere, she has written that her process begins with “ordinary language” and heeds “form rather than function, rules more than command, and legalism rather than conflict resolution.”⁵⁷ The distinguishing hallmarks of “law,” under this method at least, are outputs of an inquiry working stepwise across a vertiginously varied historical landscape.

B. Theorizing Law as it Was

In an earlier academic monograph, Pirie offered a more extensive theoretical gloss on her approach to the comparative and historical study of law. This earlier work is reasonably read in conjunction with *The Rule of Laws* to give the latter a crisper theoretical edge. We can usefully start by asking how a definition of the word “law” might be reached.

At the threshold, Pirie observes that law is a “category of the English-speaking world” that has no necessary or precise analog even in historically related contexts such as Ancient

⁵³ Writing in the legal pluralism school, Sally Falk Moore eschewed the term “law” in favor of “[t]he semi-autonomous social field,” defined in terms of its capacity to “generate rules and coerce or induce compliance to them.” Sally Falk Moore, *Law and social change: the semi-autonomous social field as an appropriate subject of study*, 7 LAW & SOC’Y REV. 719, 722 (1972). Moore underscored the imbrication of several fields, with “the law” being enforced through pressures “emanat[ing] from the several social milieu in which an individual participates.” *Id.* at 729; Merry, *supra* note 34, at 880 (noting the “dialectical, mutually constitutive relation between state law and other normative orders”). Even though this resistance to a hard barrier between “law” and other normative orders “confounds the analysis” by making law an essentially boundless category, legal pluralists were not able to “clearly demarcate[] a boundary between normative orders that can and cannot be called law.” *Id.* at 878-79. Boundary conditions offered within that literature were hardly satisfying. Some, for example, suggested an approach keyed to whether “the binary code of legal/illegal” was used. Gunther Teubner, *The Two Faces of Legal Pluralism*, 13 CARDOZO L. REV. 1443, 1451 (1992). Even setting aside the difficulty of translating the terms “legal/illegal” across cultures and histories, it is not clear what unites the use of this terminology, and why the “binary” character of a judgment should be so important. Think here of the familiar debate in 1L classes about whether a tort plaintiff or defendant should prevail, and further whether their interests are protected by a property rule or a liability rule. There is nothing distinctively binary about the resulting choice.

⁵⁴ Nor, indeed, does she offer a definition of the rule of law, although she says that it is “as ancient as the law itself.” PIRIE, *RULE OF LAWS*, *supra* note 30, at 14. In this same passage, she also appears to equate the mere fact of writing down rules with the constraint of powerful state actors, and hence the rule of law. *Id.* As I develop in the main text, I think *The Rule of Laws* contains a more subtle and interesting account of the rule of law.

⁵⁵ *Id.* at 3.

⁵⁶ *Id.* at 12.

⁵⁷ PIRIE, *ANTHROPOLOGY OF LAW*, *supra* note 32, at 9.

Greek and Roman societies.⁵⁸ There is a long tradition in that “English-speaking” world of defining law in relation to the state. Writing in 1832, John Austin defined the province of jurisprudence as “positive law: law, simply and strictly so called: or law set by political superiors to political inferiors.”⁵⁹ In work published posthumously almost a century later, the sociologist Max Weber argued that there was a necessary relationship between law and “physical or psychological coercion ... applied ... to bring about compliance.”⁶⁰ More recently, legal scholar Simon Roberts has resisted the legal pluralism framing of jurisprudence by insisting that the idea of law “is a concomitant of centralizing process” associated with “the nation state.”⁶¹ He would inscribe a perimeter around law to exclude, say, the Tibetan law codes that Pirie’s fieldwork elaborated. The term “rule of law” is also a distinctly Anglo-American term lacking in precise analogs in other languages. Although the continental European tradition uses similar vocabulary—the German term ‘Rechtsstaat’ for example—the seemingly parallel terms do not capture quite the same idea as ‘rule of law.’⁶²

On one level, these disputes admit of no resolution. Semantically, there is no way of simply looking across linguistic divides and asking naively what counts as ‘law’ given the specificity with which that English term has been employed.⁶³ To the contrary, there is a quite specific way in which looking for cognates for “law” across linguistic boundaries risks serious error: Pirie observes that the English-speaking term “law” is “firmly associated with the nation state” even though “what look like legal codes” are elsewhere often to be found outside the legal context.⁶⁴ Reflecting on her fieldwork in Lakadh, Pirie observes that “some societies seem to do very well without law when settling disputes.”⁶⁵ To assume the forms of law in “the English-speaking world” are canonical is to miss the contingency of the relations between law and state-building, between law and order-maintenance, and perhaps much more besides. The same is likely true of the term “rule of law.”

But such observations leave Pirie in a dilemma. She might join the legal pluralist scholarship⁶⁶ in rejecting the Scylla of state-centered parochialism (law is just what we, the English-speaking peoples, call it). But this pushes her toward the Charybdis of definitional hyperinflation: If law is to not definitionally affiliated to the state, that is, how can “law” be distinguished from non-legal systems of normative ordering that purport to instruct people on

⁵⁸ *Id.* at 4-5.

⁵⁹ JOHN AUSTIN, *THE PROVINCE OF JURISPRUDENCE DETERMINED* 9-19 (Isaiah Berlin et al. eds. Weidenfeld & B Nicolson 1954) (1832).

⁶⁰ 1 MAX WEBER, *ECONOMY AND SOCIETY* 34 (G. Roth and R. Wittich, eds., 1968)

⁶¹ Simon Roberts, *After government? On representing law without the state*, 68 *MODERN L. REV.* 1, 13 (2005).

⁶² N.W. Barber, *The Rechtsstaat and the Rule of Law*, 53 *U. TORONTO L. J.* 443, 448-49 (2003) [hereinafter “Barber, *The Rechtsstaat*”] (discussing Hans Kelsen’s account of the Rechtsstaat and distinguishing it from the rule of law).

⁶³ Reliance on naïve translation to demarcate the bounds of law also risks making meaningful generalization impossible. Cf. CLIFFORD GEERTZ, *THE INTERPRETATION OF CULTURES* 25 (1973) (“Theoretical formulations [can] hover so low over the interpretations they govern that they don’t make much sense or hold much interest apart from them.”).

⁶⁴ PIRIE, *ANTHROPOLOGY OF LAW*, *supra* note 32, at 5; PIRIE, *RULE OF LAWS*, *supra* note 30, at 398-99 (describing Tibetan nomadic “tribes’ laws” despite their lack of a state apparatus); Pirie, *Law before government*, *supra* note 32, at 215 -17 (describing “law without government”).

⁶⁵ PIRIE, *ANTHROPOLOGY OF LAW*, *supra* note 32, at 5.

⁶⁶ This was known as the fallacy of “legal centralism.” See Merry, *supra* note --, at 374 (rejecting “the ideology of legal centralism,” which was “the notion that the state and system of lawyers, courts, and prisons is the only form of ordering”); John Griffiths, *What is legal pluralism?* 19 *J. LEGAL PLURALISM & UNOFFICIAL L.* 1, 1 (1986) (criticizing “legal centralism” for privileging the “moral and political claims of the national state”).

how to act on pain of social sanction?⁶⁷ Custom, tradition, and even fashion fall into this class.⁶⁸ If law isn't just that which is associated with the state, in other words, isn't it almost everywhere? At the very least, this view engenders a persisting, difficult boundary dispute over where law runs out that does not arise if "[t]he relation between custom and law is, basically, one of contradiction, not continuity."⁶⁹

Pirie's exit from this dilemma is to stipulate that the category of law does not have a precise, transcultural definition. It is instead a "polythetic classification," i.e., it is a "class composed by sporadic resemblances."⁷⁰ Its study hence involves a cross-cultural search for "recurrent features amongst the class of phenomena that bear a family resemblances one to another ... without assuming we can identify a set of common or essential features."⁷¹ The study of law is hence less akin to physics, where definitions are hard-edged and exacting, and much more like biology, where taxonomies tend to be riddled with exceptions and caveats.⁷² I detect a debt here to Michael Oakeshott, who argued for a jurisprudence that "*seeks* rather than dogmatically delivers, a framework for explanation that relates and makes epistemically coherent ... otherwise partial conceptions and approaches."⁷³ There is also an echo of Hart's (fleeting) claim that law is "complex of normally concomitant but distinct elements."⁷⁴ Yet Pirie's definition is more demanding than the anodyne assertion that "different cultures have

⁶⁷ For a version of this critique, see Simon Roberts, *Against Legal Pluralism: Some Reflections on the Contemporary Enlargement of the Legal Domain*, 42 J. LEGAL PLURALISM 95, 105 (1998) (criticizing the "unstable epistemological and methodological climate" of legal pluralism).

⁶⁸ Think of the 'no white after labor day' injunction. Cf. Auden, *supra* note 9 ("Law is the clothes men wear/ Anytime, anywhere").

⁶⁹ Stanley Diamond, *The Rule of Law Versus the Order of Custom*, 38 SOC. RES. 42, 44 (1971).

⁷⁰ PIRIE, ANTHROPOLOGY OF LAW, *supra* note 32, at 8 (citing Rodney Needham, *Polythetic classification: convergence and consequences*, 10 MAN 349, 352 (1975)); accord Jeremy Waldron, *What is Private Property?*, 5 OXFORD J. LEGAL STUD. 313, 317 (1985) ("[I]n jurisprudence as in all philosophy, it is a mistake to think that particulars can be classified under general terms only on the basis of specified common features.").

⁷¹ PIRIE, ANTHROPOLOGY OF LAW, *supra* note 32, at 9; cf. *id.* at 22 ("[A] model of law should ... describe an arc of actions, movements, words, and sentiments, none of which is likely to be exactly reproduced."). I do think Pirie does assume, with Joseph Raz, that "[i]t is part of our understanding of the law that certain social institutions are instances of law whereas others are non-legal." Joseph Raz, *Can there be a theory of law?*, in THE BLACKWELL GUIDE TO THE PHILOSOPHY OF LAW AND LEGAL THEORY 324 (Martin A. Fielding and William A. Edmondson, eds., 2005). This "part of our understanding" necessarily supplies the seed—the starting point—for analogical reasoning.

⁷² Needham remarks on the use of polythetic definitions in biology. Needham, *supra* note --, at 352-53 (noting that "a member of a class of plants did not need to possess all the defining features of the class, and ... a deviant specimen did not need to be assigned to a separate class"). For a good explanation of the problem in biology, see *As Many Exceptions as There Are Rules*, BIOLOGICAL EXCEPTIONS (Oct. 29, 2014),

<http://biologicalexceptions.blogspot.com/2014/10/almost-this-or-almost-that-must-be-other.html>. Note that this kind of explicandum is disfavored in the increasingly econometric study of law because it does not admit of easy statistical testing; but no explanation is ever offered in that literature of why conceptual parsimony should be deduced from methodological limits.

⁷³ Gerald Postema, *Jurisprudence as a Sociable Science*, 101 VA. L. REV. 869, 881 (2015) (discussing Oakeshott's work on law). For another, more general gloss on Oakeshott's method, see Bhikhu Parekh, *The political philosophy of Michael Oakeshott*, 9 BRIT. J. POL. SCI. 481, 486 (1979) (explaining Oakeshott's methodological ambition as seeking "the logical structure of political life" and giving a "definitive account" of it). Although Pirie does not make this claim, or cite Oakeshott (so far as I can tell) in either *The Rule of Laws* or *The Anthropology of Laws*, she makes a parallel claim in an earlier coauthored paper, see Naomi Creutzfeldt, Agnieszka Kubal, and Fernanda Pirie, *Introduction: exploring the comparative in socio-legal studies*, 12 INT'L J. L. IN CONTEXT 377, 378 (2016) ("The purpose of ... comparison is generally analysis and interpretation, rather than evaluation and prescription.").

⁷⁴ HART, CONCEPT OF LAW, *supra* note 22, at 4. For discussion of this passage, see Frederick Schauer, *Hart's Anti-Essentialism*, in (A. Dolcetti, L. Duarte d'Almeida & J. Edwards, eds. 2013).

different conceptions of law.”⁷⁵ It is less law as concept, more law as observable and recountable praxis.

Again, I do not see a way of deciding which of these approaches is “correct”: There is no empirical ground truth against which each can be compared to discern a ‘winner.’ Instead, it is more profitable to adumbrate the relative strengths and weaknesses of each framing. The advantage of Pirie’s approach is that it avoids intellectual parochialism. The contingent and eccentric won’t be mistaken for the needful. It also helps make sense of variation even within our own cultural sphere that we might otherwise confuse. Consider here the “artificial reason”⁷⁶ of the uncodified common law as a problem in a legal system, such as the United States, that is too often taken to have a comically mechanical rule of recognition indexed to exclusively codified sources.⁷⁷ Further, her framing draws attention to the way that very similar “techniques” can take on fresh and unexpected life as the background circumstances of the state, the economy, and society change. It invites the use of disciplined comparison across cultural contexts as a means to explore law as a series of variations on a theme. Those variations hold the possibility of reflecting and hence illuminating each other.

On the other hand, its disadvantage is that it is not a method amenable to replication: It offers a hermeneutics, but not an algorithm. Different scholars, with subtly varying conceptions of the core case of “English-speaking law” might extend that term in different ways, and to different degrees. Indeed, Roberts on this view may well be glossed as applying a variant on Pirie’s method of polythetic classification. He reaches a different outcome because of his divergent normative sensitivities.⁷⁸ That is, he has solved the problem of definitional inflation but only in a different way to Pirie.

Perhaps the chief strength of Pirie’s method, despite these drawbacks, is the weakness of its competition. I find neither the narrow view of law criticized by the legal pluralists nor their seemingly boundless alternative all that useful as analytic categories. Both, to my mind, yield uncertain berths for embarking upon any meaningfully comparative study of law.⁷⁹ Both, despite protestations at neutrality, allow their progenitors to retrace grooves cut by their own intellectual biases. Taking law as a somewhat promiscuous term of ordinary language is to recognize its capaciousness and its ability to take on different qualities under different circumstances. Like the peppered moth that takes up the colors of its surrounding, this approach has the virtue of promising no more precision than the immediate social context allows. Practiced well, it forces the analyst to explain what she takes as the core case, and how she winnows out the central (rather than accidental) features of “law.” A measure of its success, Oakeshott would say, is whether this method uncovers a class of cases with enough “recurrent features” and “family resemblances” to hang together in a plausible and insight-generating way.

⁷⁵ Frederick Schauer, *The Social Construction of the Concept of Law: A Reply to Julie Dickson*, 25 OXFORD J. LEG. STUD. 493, 498 (2005). Schauer’s essay does not answer the question of how to discern whether two different concepts, framed in distinct verbal forms in different languages, are both ‘concepts of law.’ But his essay is focused on other questions, and the question is reasonably one he could have seen as beyond his mandate.

⁷⁶ GERALD J. POSTEMA, BENTHAM AND THE COMMON LAW TRADITION 16-17 (2019).

⁷⁷ This point has been made forcefully in David A. Strauss *The irrelevance of constitutional amendments*, 114 HARV. L. REV. 1457 (2000).

⁷⁸ Indeed, Pirie’s analytic frame is wide enough to encompass Roberts’s core point. See Pirie, *Law before Government*, *supra* note 32, at 221 (“The development of law can ... be important to the development of a certain type of centralized polity.”).

⁷⁹ Indeed, Austin’s positivist successors viewed him as “clearing and ordering the lawyer’s understanding of his working rules and concepts.” A.H. Campbell, *Introduction*, in GEORGIO DEL VECCHIO, JUSTICE: AN HISTORICAL AND PHILOSOPHICAL ESSAY, at ix (A.H. Campbell, ed. 1952).

II. A Common Tongue of Law

So the strength of a “polythetic” treatment of law will depend on the skill with which a seed is planted, and the steps taken from that seed to congruent social forms. *The Rule of Laws*, glossed as application of that method, reveals a series of commonalities (emphatically not universal traits) linking together the phenomena that might plausibly be translated as “law” in a wide variety of cultures. Knitting these different elements together reveals an account of law that peels away the dominant ‘conveyor belt’ model that, I have suggested, has seized hold of the modern American imagination.

My aim in this Part is to draw out several common threads of “law” implicit in Pirie’s synoptic history—without claiming any one is a necessary or definitional element—and then to set the ensuing image up in contrast to the conveyor belt model that dominates contemporary theory. To be clear, what follows is my theoretical reconstruction of “law” from the materials Pirie offers: I claim no certainty that she would agree with the particular abstractions I’ve found in her work, or how I have organized them.

A. Law’s Relation to the State

A first element of *The Rule of Laws*’ narrative concerns what law is not. Unlike Austin’s, Weber’s, and Roberts’, Pirie’s taxon of law has only a contingent relation to the state—understood either in terms of institutions of legislation and adjudication or as an instrument of coercion.⁸⁰ Law could precede chronologically the state and could derive from non-state institutions. Religious codes emerging from Judaism, Islam, and Vedic traditions, later adopted by various bodies of state law, are illustrative.⁸¹ The Dharmasutras of Vedic tradition, including Manu’s 5000-plus line catalog of rules for daily life, emerged from scholarly Brahminic communities.⁸² They addressed business matters, such as debt, interest, partnership, and theft.⁸³ When adopted by governing bodies, they “specified which communities should make their own rules,” in effect acting as a sort of “meta-level law.”⁸⁴ Under the Umayyad caliphate, caliphs appointed judges, or qadis, to administer law. The qadis “probably looked to Qur’anic norms as much as they could,” but also piggybacked on the “norms and customs” of conquered territory.⁸⁵ Similarly, Fatimid leaders in eleventh century Cairo authorized the city’s Jewish community to manage their own affairs “according to the law of Moses.”⁸⁶ To the extent that law arose from a central state, it could “filter[] down” via an administrative web of judges,

⁸⁰ Note that this way of phrasing the matter might falsely suggest a transhistorically fixed way of understanding the state, say, as “an established apparatus of government.” Quentin Skinner, *A Genealogy of the Modern State*, 162 PROC. BRIT ACAD. 325, 361 (2009). But this ignores “earlier and more explicitly normative ways of thinking about the state.” *Id.*

⁸¹ See, e.g., PIRIE, RULE OF LAWS, *supra* note 30, at 34-38, 123-26 (Jewish law); *id.* at 43-56 (Dharmasutras); and 130-44 (Sharia); see also Merry, *supra* note --, at 883 (“[S]tate law both constitutes and is constituted by the normative orders of which it is composed.”).

⁸² PIRIE, RULE OF LAWS, *supra* note 30, at 54-56. Manu’s Codes dates back at least to the fifth century C.E., and possibly to the third century C.E., and was probably compiled over several centuries by numerous scribes. PATRICK OLIVELLE AND SUMAN OLIVELLE. MANU’S CODE OF LAW 3-6 (2005).

⁸³ PIRIE, RULE OF LAWS, *supra* note 30, at 55-56.

⁸⁴ *Id.* at 68.

⁸⁵ *Id.* at 131. More than a thousand years later, the British East India Company would take the same tack. *Id.* at 350. Diamond is hence incorrect to suggest that laws “arise in opposition to the customary order of the antecedent kin or kin-equivalent groups.” Diamond, *supra* note 69, at 54.

⁸⁶ PIRIE, RULE OF LAWS, *supra* note 30, at 212-13.

courts, and juridical bodies spread—but Pirie gives the impression that this tended to happen slowly, over decades or centuries, rather than in one fell swoop.⁸⁷

Roberts’s model of law “as associated with the state and its processes of government” emerges only in the seventeenth century.⁸⁸ And when the state did adopt its own law, rulers often borrowed that law from an extrinsic, pre-existing source. Religious texts were not the only potential objects of emulation. The Persian emperor Darius the Great, for example, cribbed his code from Mesopotamian predecessors.⁸⁹ The first European codes, which in time would evolve into what is now called the civil law, drew in part on customary norms and processes, and in part on pieces of Roman law preserved in Constantinople through Justinian’s codification.⁹⁰ Even when a discernibly modern state emerged, it did not extirpate parallel ‘legal’ systems. As the historian Dylan Penningroth has explained, slaves in the antebellum South developed “complex networks of social relations” through which they could transubstantiate “possessions into property.”⁹¹ Remarkably, under one of the most brutally repressive and extractive regimes of the past several centuries, subordinated peoples have developed and deployed the social technology of law—despite, if not against, the state.

Law, on Pirie’s view, can coexist alongside state institutions of adjudication and coercion, and even float above them as an unrealized, immaterial aspiration. Its relation to coercion, pace Weber, is contingent and not constitutive.⁹² The example of customary or religious law folded into imperial enterprises shows how law can indeed be layered into the state.⁹³ The finding of law persisting in Tibet and Kabylia beyond the state’s writ further suggest that law can cling to life in liminal zones geographically contiguous with, but standing in uneasy détente with, the project of state-building.⁹⁴ The afterlife of Roman law, at least as refracted through Justinian’s Institutes, shows that law can also endure past the state that engendered it. Rather than a tightly hitched relationship of necessity, the relation of law to the state is thus open as a descriptive and as an analytic matter. There is hence at least a potential distinction, moreover, between, between law and state power.⁹⁵ The former may or may not be in service of the latter.

⁸⁷ *Id.* at 270-71 (describing the diffusion of “rules, practices, and principles developed within the royal system of courts” across medieval England as occurring between the thirteenth and the sixteenth century).

⁸⁸ *Id.* at 315; *id.* at 451 (“In little more than three hundred years, law has come to be associated firmly with the nation-state”). There is a lively debate about when the “modern” state comes into being, and not all would agree with Pirie that it is an Enlightenment creation. Cf. JOSEPH R. STREYER, *ON THE MEDIEVAL ORIGINS OF THE MODERN STATE* (2011).

⁸⁹ PIRIE, *RULE OF LAWS*, *supra* note 30, at 32-33.

⁹⁰ *Id.* at 319-20; *id.*, at 150-51 (describing the origins of Lex Salica in “customs” and “practices”). In England the common law similarly was not a “systematic body of precedent and rules.” *Id.* at 321.

⁹¹ DYLAN C. PENNINGROTH, *THE CLAIMS OF KINFOLK: AFRICAN AMERICAN PROPERTY AND COMMUNITY IN THE NINETEENTH-CENTURY SOUTH* 189 (2004).

⁹² Cf. PIRIE, *RULE OF LAWS*, *supra* note 30, at 449 (“Daghestanti villagers, who did not have a police force or prisons, wrote out rules to regulate the use of common property.”). For a nuanced view of the relationship between force and law, see FREDERICK SCHAUER, *THE FORCE OF LAW* 10 (2015) (underscoring the importance of “law’s coercive, force-imposing, and force-threatening dimensions”).

⁹³ More generally, legal rules depend on the “working social context” in which they are found and depend on the “semi-autonomous social fields on which they impinge.” Moore, *supra* note 53, at 742.

⁹⁴ PIRIE, *RULE OF LAWS*, *supra* note 30, at 398-99 (describing Tibetan nomadic “tribes’ laws” despite their lack of a state apparatus). On the persistence of law in Kabylia “despite a century of colonial rule,” see Judith Scheele, *A taste for law: rule-making in Kabylia (Algeria)*, 50 *COMP. STUD. SOC. & HIST.* 895, 900 (2008) (noting that “laws, codes and rules remain omnipresent in Kabylia”).

⁹⁵ PIRIE, *ANTHROPOLOGY OF LAW*, *supra* note 32, at 12.

Pirie's separation of law and state opens analytic horizons, but is not without its difficulties. For one thing, it has the virtue of dodging what Clifford Geertz called the "misconception" that laws are "mere artifices, more or less cunning, more or less illusional, designed to facilitate the prosier aspects of rule."⁹⁶ That is, laws cannot be reduced to the practical projects of the powerful; indeed, they are often crutches on which the powerful lean to compensate for their inability to be omnipotent. It allows for the possibility of what Robert Cover famously called "jurigenesis," or the emergence of distinct normative orders up in isolated communities far from the chambers of official power.⁹⁷ In addition, Pirie's account also avoids the potentially difficult question of determining who or what the state is.⁹⁸ It critically allows for the possibility of recognizing law despite the absence of a state-sanctioned author. It also widens the array of potential functional justifications that might be offered for law's persistence. Where the state does not extend, such as among the Golok tribes of Tibet, and where "detailed and explicit" sets of "printed laws" are not "applied directly," they may still invoked with "reverence" by adjudicators.⁹⁹ Such laws are not instruments toward some practical goal of the powerful. They instead inscribe a normative horizon, creating a "sense of moral order ... rooted in tribal autonomy ... morally linked to the legal and religious traditions of central Tibet."¹⁰⁰ (Mutatis mutandi, one might ask whether much the same could not be said about the U.S. constitution today, at least outside the clutches of the Justices). Yet at the same time, a concern about definitional inflation—i.e., is the idea of law infinitely extensible? Where does it end?—looms especially large once the idea of law is decoupled from the project of the state.

This first element of Pirie's account diverges fairly clearly from the conveyor belt model of law. The origin of law, Pirie shows, is not accurately understood in terms of official acts by duly authorized officials or citizens. Instead, the latter might come to recognize law not because it has the correct source, but rather because it already claims widespread adherence or sociological legitimacy. Law cannot be defined by the authoritative caliber of its sources. Quite the contrary, as students of the common law and custom have long been telling us,¹⁰¹ law can obtain *despite* the absence of a properly credentialed source.

B. Law's Systematicity and Casuistry

If shearing law from the state creates a problem of definitional inflation, then it is worth asking what intellectual resources Pirie brings to bear in corralling the category of law back into a manageable compass. No direct answer is offered in the text of *The Rule of Laws*, but one can be inferred from its structure and details. This answer focuses on a set of formal qualities, in the sense of qualities distinct from the substance of the rules experienced by regulated parties, and methodological habits that are repeatedly found across otherwise divergent models of law. Consonant with the polythetic nature of law in Pirie's account, I offer no claim that every one of the following can be found in each case of "law." But the commonalities are recurrent enough to make them highly symptomatic of that taxon.

⁹⁶ CLIFFORD GEERTZ, *NEGARA: THE THEATER STATE IN 19TH CENTURY BALI* 122 (1980).

⁹⁷ Robert M. Cover, *The Supreme Court, 1982 Term-Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4, 11 (1983).

⁹⁸ Consider in that regard the response offered by a pirate after his capture by Alexander the Great, as recounted by St. Augustine: "What thou meanst by seizing the whole earth; but because I do so with a petty ship, I am called the robber, whilst thou dost it with a great fleet are styled emperor." ST. AUGUSTINE, *THE CITY OF GOD* 112-13 (M. Doda, trans. 2010).

⁹⁹ PIRIE, *RULE OF LAWS*, *supra* note 30, at 398-99.

¹⁰⁰ *Id.* at 400.

¹⁰¹ Postema, *Common Law*, *supra* note 23, at 601; Duxbury, *supra* note 23, at 341 (making this point about custom in legal positivist terms).

Law thus is also a distinctive genre of intellectual *system* that is characterized by certain distinctive styles of argumentation and related characteristics.¹⁰² It typically arises as a *congeries* of rules, principles, and standards, not as a single commandment. None of the historical examples that Pirie identifies involve a system comprising a single law. Nor is it easy to imagine one. A plurality of commands instead characterizes any plausible legal system. This plurality entails further a distinctive approach to resolving questions of application, in the sense that different legal systems, widely separated in time and place, are characterized by the same kinds of formal argumentative modes. Among the most important elements of this common toolkit are: (i) the ambition toward abstraction, in the sense of categories being used that are characterized by generality across time and space; coupled to (ii) a resistance to wholly personalized, ad hoc, and situational judgments; (iii) the distinctive use of casuistic deduction from general principles, and the related application of analogical reasoning; and finally, (iv) the fact that the ensuing ‘system’ purports to have a durability over time, indexed by the extraordinary efforts taken, even before the invention of paper, printing, or digital storage, to reduce law to a written form with an extension in time and space. I hereafter use the term ‘systematicity’ to capture this distinctive blend of a durable¹⁰³ plurality of norms with the existence of common methodological tools for their application.¹⁰⁴

It is worth saying that many of the elements I’ve pegged to law can also be observed in other contexts. Law’s common features may overlap with nonlegal practices, even if there remains a boundary line between what is and what is not law. Consider the durability, generality, and formality of rules that define games such as chess and Go. Or think of the famously “casuistic” reasoning of Jesuit scholars, ridiculed to great effect by Blaise Pascal.¹⁰⁵ Indeed, the methods of (non-legal) casuistic reasoning can themselves be applied to legal materials so as to reach judgments about law within the terms set by some other moral systems.¹⁰⁶ The existence of methodological overlap, and even the sharing of rules, between law and extralegal intellectual systems does not, I think, defeat the ambition to delineate law as a distinctive case. Two games, for example, might share some rules, but diverge in other ways (think of Uno and its vastly inferior variant Dos). Law can borrow methods and moves from other intellectual systems without losing its autonomy. Indeed, given the roots of much law in

¹⁰² Pirie uses the term “intellectual system” to describe law in other work. See Pirie, *Law before Government*, *supra* note 32, at 222; PIRIE, *ANTHROPOLOGY OF LAW*, *supra* note 32, at 73.

¹⁰³ By “durable,” I also do not mean compositionally invariant. Like Theseus’s ship, the different pieces of a legal system can be switched out one by one without losing a sense of identity over time. Pirie’s chapter on colonialism, which I will not otherwise discuss in this review, leans into the history of European colonialism, where it could have focused more on the way in which metropolitan ideas diffused into the legal systems of subordinated societies. Compare PIRIE, *RULE OF LAWS*, *supra* note 30, at 363 (briefly mentioning influence of “English ideas of rights and liberty” on Indian nationalists), with Rabiati Akande, *Secularizing Islam: The Colonial Encounter and the Making of a British Islamic Criminal Law in Northern Nigeria, 1903–58*, 38 *L. & HIST. REV.* 459 (2020) (discussing how British imperial officials leveraged Sharia, and in so doing changed that legal system, in colonial Nigeria).

¹⁰⁴ In linguistics, that term has a related but distinct usage. Steven Phillips, Yuji Takeda, and Fumie Sugimoto, *Why Are There Failures of Systematicity? The Empirical Costs and Benefits of Inducing Universal Constructions*, 7 *FRONTIERS IN PSYCH.* 1, 1 (2016) (“Systematicity is a property of cognition where capacity for certain cognitive abilities implies capacity for certain other (structurally related) cognitive abilities.”).

¹⁰⁵ For Pascal’s famous critique of Jesuitical argumentation, see BLAISE PASCAL, *THE PROVINCIAL LETTERS* 194–212 (O.W. Wight ed., Thomas McCrie trans., Hurd and Houghton 1875) (Letter V).

¹⁰⁶ For a fascinating example by a now-sitting Supreme Court Justice, see John H. Garvey & Amy V. Coney, *Catholic Judges in Capital Cases*, 81 *MARQ. L. REV.* 303, 305 (1998) (“[W]e believe that Catholic judges (if they are faithful to the teaching of their church) are morally precluded from enforcing the death penalty. This means that they can neither themselves sentence criminals to death nor enforce jury recommendations of death.”)

non-state practices, such as religion and custom, it is perhaps hardly surprising to observe methodological bleed.

Evidence for this claim about law's systematicity is scattered across *The Rule of Laws*. A first indicia of law's systematicity is the physical form that "law" takes: A durable writing.¹⁰⁷ The very first law-givers in Mesopotamia "chiseled their laws onto stone slabs" with the aim of endowing them with a "permanence" that could "outlast the authority of the lawmakers."¹⁰⁸ The Dharmashastras were "read and reread, cop[ied], comment[ed] on, and collate[d]," even as different kingdoms shuffled in and out of existence across the Indian subcontinent.¹⁰⁹ Law under the Zhou empire in what is now China was painstakingly etched on long bamboo strips, each one character wide, for display to the general public.¹¹⁰ Several hundred years later, magistrates of the Qin dynasty would use again similar bamboo strips to record specific judgments, aggregating them into a system of precedent "not unlike the English common law."¹¹¹ Around the time that Prince Vladimir of the Rurikids was fashioning the first Russian laws from his capital in Kiev, issuing a first set of Russian laws in the *Russkaia Pravda*, the Rus people were beginning to record their own customs and norms by writing down "instructions and records" about their disputes on "peeling bark of birch trees."¹¹² While literacy was becoming increasingly common among the Rus, it is striking that the practice of writing down laws—sometimes with great public ceremony and often at great expense—dates back before the wide diffusion of literacy.¹¹³ Written laws, that is, antedate the broad capacity of a public targeted to consume such rules by reading them. Hence, even if publicity was a value advanced by the reduction of "law" to a written form, it cannot have been the *sole* or even the most pressing ambition of that costly enterprise early on. The rich examples that Pirie offers point to something more at stake: Writing offered a "new modality" that bespeaks the ambition to organize a society's affairs at a more general level.¹¹⁴ It was an effort to forge a consciously constructed system of verbal rules" using "abstract and objectively definable categories."¹¹⁵ The ambition to transcend not just the particulars of a specific case, but also the mundane circumstances of a single law-maker or scribe toward some more durable kind of norm. Law, that is, has long aimed past the sublunary particular toward the *sub specie aeternitatis*, even if it never quite gets there.¹¹⁶

¹⁰⁷ Of course, this raises the worry that Pirie's examples are dominated by ones for which written records are available. If that were indeed so, then it would be no surprise that law would be defined in the historical record by its reduction to writing: That's simply indexing what remains to us today. I am not convinced that this is a serious worry. Pirie relies on not just her anthropological fieldwork, but also the time in the field of other scholars, in societies where one might expect unwritten codes. Further, the colonial encounter produced records (albeit highly imperfect ones) of the legal orders in societies subject to European expansion. See PIRIE, RULE OF LAWS, *supra* note 30, at 352.

¹⁰⁸ PIRIE, RULE OF LAWS, *supra* note 30, at 12.

¹⁰⁹ *Id.* at 67

¹¹⁰ *Id.* at 76

¹¹¹ *Id.* at 87.

¹¹² *Id.* at 190-94

¹¹³ *Id.* at 101 (noting that the Twelve Tablets, containing laws in antique Rome, were "inscribed onto bronze tablets and nailed up in the Forum," even though "few citizens were literate"). For this point in the context of law in medieval England and its environs, see Alice Taylor, *Lex Scripta and the Problem of Enforcement: Anglo-Saxon, Welsh, and Scottish Law Compared*, in LEGALISM: COMMUNITY AND JUSTICE, *supra* note 49, at 48 ("Because written law could be only the preserve of the literate and the specialist, it occupied a largely symbolic or ideological position for the rest of the community.").

¹¹⁴ JACK GOODY, THE LOGIC OF WRITING AND THE ORGANIZATION OF SOCIETY 129 (1986).

¹¹⁵ PIRIE, ANTHROPOLOGY OF LAW, *supra* note 32, at 138 (citation omitted); accord Fredric L. Cheyette, *Suum cuique tribuere*, 6 FRENCH HIST. STUD. 287, 288 (1970) (offering a similar formulation).

¹¹⁶ In the extreme, the Emperor Justinian asserted that his codification of Roman law would be "valid for all time." PIRIE, RULE OF LAWS, *supra* note 30, at 119. For a not altogether sympathetic account of this perspective,

A second element of law's aspiration toward transcendent generality can be found in the verbal form that law takes. To see this, consider cases beyond the category of law. In the Amdo region of Tibet, in what is now Qinghai province, mediators would negotiate between parties to achieve a satisfactory resolution without applying any general norm. Their practice was "not remotely legalistic."¹¹⁷ It was not law, much as the informal norms famously identified by Robert Ellickson in Shasta County were not law because there was no effort to systematize the outcomes of discrete disputes into general rule-like regularities.¹¹⁸ So law may begin with the tracers left by discrete resolutions,¹¹⁹ but in its core cases, the category of law bespeaks an assembly of such decision points into something of more general scope and ambition. The law cannot be for this case, and this case alone, lest it lose its claim to be "law" as such.

To be sure, no legal system can be perfectly abstract and general, or cover every imaginable case. Even in a legal system that is mature in the sense of having endured for decades, developing a thick underbrush of rules, questions of how much generality is needful are likely to keep arising. In contemporary American law, those debates take several forms. In an often-quoted essay, for example, Justice Scalia condemned the use of legal standards, as opposed to sharp-edged rules, by intimating that they might not count as law at all.¹²⁰ Further, the question of law's obligate generality has been sharply posed in the rare cases in which a law-maker singles out a person or entity for distinctive treatment. This constitutional jurisprudence, which treats the demands of Article III of the Constitution upon the adjudicative branch, has been marked by a recent recession from the more exorbitant ambitions of generality, albeit one that has occasioned sharp dissent and unfamiliar ideological cleavages.¹²¹ These disputes evince the continuing force of law's modal claim to generality, as well as the difficulty of applying that principle to specific circumstances. Yet it is telling that there is no one

see Thomas Nagel, *The absurd*, 68 J. PHILOSOPHY 716, 720 (1971) ("[H]umans have the special capacity to step back and survey themselves, and the lives to which they are committed, with that detached amazement which comes from watching an ant struggle up a heap of sand.").

¹¹⁷ PIRIE, RULE OF LAWS, *supra* note 30, at 399.

¹¹⁸ ROBERT ELLICKSON, ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES 3, 283 (1991) (noting that the ranchers and farmers in his study "develop[ed] and enforce[ed] adaptive norms of neighborliness that trump formal legal entitlements" and hence that "some spheres of life seem to lie entirely beyond the shadow of law").

¹¹⁹ This seems to be the case in the Rurikind lands. PIRIE, RULE OF LAWS, *supra* note 30, at 193-94.

¹²⁰ Justice Scalia's essay started out with an "image of how justice is done—one case at a time, taking into account all the circumstances, and identifying within the context the "fair" result." Scalia, *supra* note --, at 1176. A judge who engages in an all-things-considered judgement is similarly "not so much pronouncing the law in the normal sense as engaging in the less exalted function of fact finding." *Id.* at 1180-81. This was not an abstract commitment on Scalia's part. See Steven G. Calabresi & Gary Lawson, *The Rule of Law As A Law of Law*, 90 NOTRE DAME L. REV. 483, 488 (2014) (describing "numerous examples of Justice Scalia's rule-driven rather than meaning-driven approach to decisionmaking"). Hence, generality, for Scalia, is almost necessary to law—a stronger claim than I want to press here.

¹²¹ In *Bank Markazi v. Petersen*, the Court upheld provisions of the Iran Threat Reduction and Syria Human Rights Act of 2012 stating that the "financial assets that are identified in ... *Peterson et al. v. Islamic Republic of Iran et al.*, Case No. 10 Civ. 4518," 22 U.S.C. § 8772(a)(1)(C), (b), would be available "to satisfy any judgment ... awarded against Iran for damages for personal injury or death caused by" acts of terrorism. *Bank Markazi v. Peterson*, 578 U.S. --, 136 S. Ct. 1310, 1322 (2016). The Court validated the law as consistent with the "independent Judiciary" established by Article III, even though it altered the outcome of a pending case. *Id.* Then, in *Paichak v. Zinke*, the Court upheld a statute that singled out and authorized a Department of the Interior decision to take certain land into trust, and then directed the federal courts to dismiss all suits related to the land in question. 138 S. Ct. 897, 910 (2018) (Thomas J., plurality op.). For further discussion of these cases, including attention to their unfamiliar ideological divisions, see Aziz Z. Huq, *Why Judicial Independence Fails*, 115 NW. U. L. REV. 1055, 1065-76 (2021).

who suggests that a series of discrete, personalistic resolutions, lacking any sort of intellectual glue, could ever count as “law.”

Related to systematically, and perhaps parasitic on it, the practice of law internally entails a set of very similar analytic moves. It is thus characterized by what literary critics call a style.¹²² This takes the form of distinctive patterns of normative reasoning. One of these is casuistry, which is “the art of analyzing moral issues in terms of cases and circumstances.”¹²³ The other is “analogical reasoning.” The latter has a number of “overlapping” features, which include “principled consistency; a focus on particulars; incompletely theorized judgments; and principles operating at a low or intermediate level of abstraction.”¹²⁴ While analogical leaps cannot be made in the absence of some principle determining similarities and differences, such a principle need not be explicit, but it need be a “legal principle” to count here.¹²⁵ Casuistry of this ilk reflects and embodies law’s ambition toward systematicity.

Strikingly, these related methodological moves can be discerned at the very cusp of Pirie’s history of law. The seed then planted has borne fruit many times across subsequent legal systems. These borrowed habits of casuistic and analogical reasoning, indeed, shape the content of law-school class discussions today. The earliest recorded laws, associated with the Sumerian dynast Ur-Namma, were crafted in the casuistic form of “if ... then.”¹²⁶ One and a half millennia later, the Athenian statesman Solon again adopted the casuistic form “almost certainly inspired by Mesopotamian laws.”¹²⁷ These stylistic indices of law “traveled westward, along with luxury goods, decorative arts, and the alphabet.”¹²⁸ The same style of reasoning was once again “adopted and adapted by the citizens of Rome” a few hundred years later.¹²⁹ Roman law, of course, influenced the European civil law and Anglo-American common law. The latter eschewed “broad general principles,” and instead prized the “disciplined” practice of argumentation: based on “analogical” reasoning, “arguing from one case to the next in terms on the basis of perceived likenesses and differences ... in the landscape of common experience.”¹³⁰ Today, it is no stretch to say that the form of casuistic reasoning from case-law to hypotheticals, which is used in the 1L classroom around the United States, has a historical

¹²² For a useful definition of “style” in the art historical context, see MEYER SCHAPIRO, *THEORY AND PHILOSOPHY OF ART: STYLE, ARTIST, AND SOCIETY* 51 (1994) (“[S]tyle is, above all, a system of forms with a quality and a meaningful expression through which the personality of the artist and the broad outlook of the group are visible”).

¹²³ ALBERT R. JONSON AND STEPHEN TOULMIN, *THE ABUSE OF CASUISTRY: A HISTORY OF MORAL REASONING* 15 (1988) (also calling it the “case method”); accord RICHARD MILLER, *CASUISTRY AND MODERN ETHICS: A POETICS OF PRACTICAL REASONING* 4-5 (1996).

¹²⁴ Cass R. Sunstein, *On Analogical Reasoning*, 106 *HARV. L. REV.* 741, 746 (1993); see also Emily Sherwin, *A Defense of Analogical Reasoning in Law*, 66 *U. CHI. L. REV.* 1179, 1182 (1999) (defining analogic reasoning as follows: “confronted with an unsettled question, the judge surveys past decisions, identifies ways in which these decisions are similar to or different from each other and the question before her, and develops a principle that captures the similarities and differences she considers important”). For a more parsimonious definition that I don’t follow here, see FREDERICK SCHAUER, *PLAYING BY THE RULES: A PHILOSOPHICAL EXAMINATION OF RULE-BASED DECISION-MAKING IN LAW AND IN LIFE* 183-87 (1995) (defining analogical reasoning as a form of deduction from rules). Sunstein also places more weight on the absence of “a comprehensive theory” driving outcomes than I do. Sunstein, *supra*, at 747.

¹²⁵ Frederick Schauer & Barbara A. Spellman, *Analogy, Expertise, and Experience*, 84 *U. CHI. L. REV.* 249, 266 (2017).

¹²⁶ PIRIE, *RULE OF LAWS*, *supra* note 30, at 17.

¹²⁷ *Id.* at 35.

¹²⁸ *Id.*

¹²⁹ *Id.* at 44.

¹³⁰ Postema, *Common Law*, *supra* note 23, at 6. In other ways, however, the common law was a divergence from the modal form of law, in particular to the extent that it was “self-consciously nonsystematic.”

pedigree far older than any other form of legal reasoning. Rather than working from text or ordinary meaning, that is, reasoning from the facts of a precedent is the oldest modality of legal reasoning.

I cannot substantiate the claim that law *always* involves casuistic or analogical reasoning. But the diffusion of that kind of argumentative style has such a long historical pedigree. It has widely spread thanks to the influence of first Mesopotamian law, and then Roman law. Now, it seems to me reasonable to say that a distinctive, albeit not defining, element of law's larger systematicity is its highhanded claim to generality, abstraction, and durability over time.¹³¹

C. Law's Hieratic Elite

A third commonality flows from law's systematicity. An intellectual system, like a garden, must be cultivated and tended so as to expunge pests and to extend its vitality. Accordingly, law tends to be associated with an intellectual elite that plays the role of gardeners, a group that I label a *hieratic elite* because of their close connection in pre-modern (and perhaps also our) societies with priesthoods. The members of this hieratic caste are responsible for maintaining law's systematicity in tolerably good working order. In preliterate societies, they were also responsible for the bardic task of preserving and disseminating law across generations through writing.¹³² In performing this function, however, the hieratic elite does not need to be embedded in the state. To the contrary, it follows from Pirie's dissociation of law and the state that a hieratic legal elite can be entirely separate from state institutions.

Across time and vast geographic spans, hieratic elites have summoned a body of ideas to facilitate law's crystallization as an intellectual system. In antique Rome, "the authority of the law" was closely associated with the classes of orators and jurists such as Cicero; their authority in turn was tightly linked to the "independence of the law" as a system.¹³³ In the wake of the Roman destruction of the temple in Jerusalem, it was a group of rabbis who collected "unwritten norms and ritual practices" and turned them into "a systematic program" with the aspiration toward law.¹³⁴ And after the fall of Rome, its legal traditions were kept alive by scholars and Lombardian notaries, who continued to use ancient legal forms.¹³⁵ Only with the emergence of a law school at Bologna did a "powerful guild" of scholars emerge, pouring out "commentaries, opinions, and glosses on the *Corpus Iuris*," and hence establishing themselves as "authorities on the law."¹³⁶ One of the ways in which China, at least since the Qin dynasty,

¹³¹ Pirie takes this claim a step further by asserting that "law" does not need to be effective in order to qualify as law. See, e.g., PIRIE, RULE OF LAWS, *supra* note 30, at 27 (noting that Hammurabi's laws "do not ever seem to have been referred to in legal cases"); *id.* at 151-52 ("[Justinian's] *Corpus Iuris* made [little] impact on legal practice at the time."). Even if it is not applied, Pirie suggests, law can nonetheless supply a normative schematic for society "specifying the different classes and professions people could belong to." *Id.* at 27. I think one can both accept that law has an aspirational cast and, perhaps, effect, and deny that the core case of law entails no effect on actual social relations. All legal structures struggle to make an imprint on social world. See FROM PARCHMENT TO PRACTICE: IMPLEMENTING NEW CONSTITUTIONS (Tom Ginsburg & Aziz Z. Huq eds., 2020) (collecting case studies of struggles to realize new constitutional orders). So while it is implausible to demand complete, or even near-complete compliance, to count something as law, it also seems plausible to say that its "recurrent feature" is a tractable claim to viability as an actual guide to some segment of the social sphere.

¹³² Were there oral bardic traditions whereby laws were persevered? Cf. PIRIE, RULE OF LAWS, *supra* note 30, at 181 (noting the "oral wisdom of ... poets and lawyers" in medieval Ireland)

¹³³ *Id.* at 114-15.

¹³⁴ *Id.* at 125.

¹³⁵ *Id.* at 159.

¹³⁶ *Id.* at 162; see also *id.* at 167 (flagging the role of scholars such as Ranulf de Glanville and Henry de Bracton in formulating what would eventually become the common law of England).

has been distinctive is its use of civil servants, rather than judges or scholars, to understand and apply the law.¹³⁷ Vedic scholars acted as judges, offered valuable legitimation for kings, and “affirmed and elaborated” the emergent caste system.¹³⁸

There are a number of reasons why law’s hieratic elite would emerge outside the state, and then at times be subject to slow absorption into formal institutions. In the context of the proto-states such as Mesopotamia and the Indus Valley, leaders could exercise authority through physical force or by establishing the sociological legitimacy of their rule. Even today, when the state has at its disposal a far wider array of tools for keeping the populace in line, cultivating the belief that its rule is legitimate and warranted remains important.¹³⁹ Violence is rarely enough to constitute dominion.¹⁴⁰ Putative leaders, of course, can claim legitimation on the basis of outcomes.¹⁴¹ But if their position depends on the persistence of success alone, they are rendered hostage to chance and fortune.¹⁴² Recourse to an external coterie of hieratic intellectuals, who ostentatiously assert the autonomy of their systematic thought from politics’ vagaries, provides political leaders with a vehicle to credential their rule. If that coterie is already ensconced within the state, it is less likely that it can credibly vouch for the legitimacy of that state. The repeated emergence of a hieratic caste, often in communication with a leader bent upon building a state, therefore, may hence be explained as one of the strategies for consolidating and maintaining rule in the early stages of state-building.¹⁴³ The relationship between putative state-builders and hieratic elites, therefore, was likely one of symbiosis. Both parties gained credibility and influence through their interaction. The hieratic caste could even become “largely independent of any ruler’s political power.”¹⁴⁴ Over time, moreover, those leaders could integrate law “as a useful tool for building a bureaucratic state” and hence keeping in line potential rivals.¹⁴⁵

The exception to this trend is pre-Communist Chinese law. From the ancient Xia and Shang dynasties, to the fall of the Qing dynasty in 1928, “emperors never allowed a class of priests, or any other specialists, to challenge their authority.”¹⁴⁶ Instead, “powerful emperors managed to avoid the rule of law by . . . combin[ing] the roles of king and priest.”¹⁴⁷ That is, this period of Chinese development was marked not by an absence of a hieratic caste, but by a substantial overlap—or perhaps identity—between that caste and the ruling class of power-

¹³⁷ *Id.* at 81; *id.* at 245-49 (describing the operation of the legal bureaucracy in the Song period).

¹³⁸ *Id.* at 61, 64-65 & 206.

¹³⁹ I have in mind here a sociological understanding of legitimacy. See BRUCE GILLEY, *THE RIGHT TO RULE: HOW STATES WIN AND LOSE LEGITIMACY* 6 (2009) (“Legitimacy . . . is a particular type of political support that is grounded in common good or shared moral expectations.”). Moral legitimacy is “moral justifiability or respect-worthiness.” Richard H. Fallon, Jr., *Legitimacy and the Constitution*, 118 *Harv. L. Rev.* 1787, 1794-95 (2005).

¹⁴⁰ Isaac Ariail Reed, *Performative state-formation in the early American Republic*, 84 *AM. SOC. REV.* 334, 335 (2019) (“We can . . . expect all processes of state-formation to involve some aspect of performative display.”).

¹⁴¹ In the modern context, there is evidence that the quality of representation in a democracy, which is an outcome, determines legitimacy judgments. See Bo Rothstein, *Creating political legitimacy: Electoral democracy versus quality of government*, 53 *AM. BEHAV. SCI.* 311, 311-12 (2009).

¹⁴² This observation is quintessentially associated with NICCOLO MACHIAVELLI, *THE PRINCE* 70 (Harvey C. Mansfield trans., 2d ed. 1998) (1532) (“And so [the Prince] needs to have a spirit disposed to change as the winds of fortune and variations of things command him . . .”).

¹⁴³ Pirie does not precisely say this, but briefly states that law can “both legitimate and limit power.” PIRIE, *RULE OF LAWS*, *supra* note 30, at 453

¹⁴⁴ *Id.* at 206.

¹⁴⁵ *Id.* at 318 (discussing the consolidation of political power in the sixteenth century Europe).

¹⁴⁶ *Id.* at 71-72 (noting also that emperors thereby “successfully avoided becoming, themselves, subject to the rule of law”).

¹⁴⁷ *Id.* at 455

holding officials. Pirie carefully explores how legalist and Confucian thought enabled this state of affairs. The legalist tradition in Chinese thought understood law as an instrument of direct, coercive state control.¹⁴⁸ In contrast, the Confucian “orthodox doctrine of the state” drew a sharp contrast between penal law on the one hand and “teaching and moral guidance” on the other.¹⁴⁹ Confucian thought, with its accent on self-cultivation, hierarchy, and the force of filial bonds, placed emphasis on values rather than laws.¹⁵⁰ Confucian opposition to the promulgation of legal codes, however, was unavailing. Between the Chou dynasty (between 1027 and 221 B.C.E.) and the Qing code of 1740, Chinese rulers employed comprehensive codes embodying “ethical norms of Confucianism.”¹⁵¹ These laws, nevertheless, “always operated in a vertical direction from the state upon the individual, rather than on a horizontal plane directly between two individuals.”¹⁵² The content of those codes, moreover, was “overwhelmingly penal.”¹⁵³ This has been described by one commentator as a “legalist triumph but confucianization of law.”¹⁵⁴

At a minimum, law across Chinese history diverges sharply in its institutional foundations and its social effects from other kinds of law canvassed by Pirie. Nevertheless, this important example does not defeat the claim that it is a “recurrent feature” of law to have a hieratic elite located outside the state. Rather, the polythetic understanding of law urged by Pirie allows us to recognize the Chou code and its successors as law, and at the same time isolate features of that institution that diverge from the core cases observed elsewhere: This is, indeed, one of its strengths as a taxonomical method. The Chinese cases, I would instead suggest, has two useful implications for understanding the more general category of law. As a descriptive matter, it shows how law can emerge even when the relevant hieratic elite is well integrated into the state-building enterprise. As a more normative matter, the Chinese experience points toward a possibility that law can be grafted onto the enterprise of state building in such a way that it imposes no effectual constraint upon the exercise of state power. This possibility is wholly consistent with law’s systematicity and its dependence a hieratic elite—but would have implications for the normative valence of the category “law” more generally.

D. Law’s Normativity

The first three features of law that I have picked out of Pirie’s synoptic account are matters of descriptive fact. They reflect either the social or institutional contexts in which law arises, or the formal content of law as a distinctive intellectual system. The fourth commonality is again an empirical regularity, but one that operates in a subtly different register. This is the idea that law is associated with the making of a normative claim. To say of a rule that it is one element of a legal system, that is, is implicitly to make a claim that it has some normative force. To be clear, this is true of rules in many contexts. The rules of chess or Go also have *some* relationship to normativity, i.e., to an ‘ought’ as well as an ‘is.’ So what distinguishes them from

¹⁴⁸ See Erik Lang Harris, *Legalism: Introducing a Concept and Analyzing Aspects of Han Fei’s Political Philosophy*, 9 PHIL. COMPASS 155 (2014). There was “bitter controversy between Confucians and Legalists from 536 BC[E] onwards.” MENSKI, *supra* note 40, at 525.

¹⁴⁹ GEOFFREY MACCORMACK, *THE SPIRIT OF TRADITIONAL CHINESE LAW* 6-7 (1996).

¹⁵⁰ *Id.* at 9-11 (noting a “preference for education rather than law as a means by which people should be guided”); see also MENSKI, *supra* note 40, at 508 (“[P]unishment did have a place in the scheme of Confucian ethics, but it was to be used sparingly and merely to support moral discipline”).

¹⁵¹ MENSKI, *supra* note 40, at 522-23.

¹⁵² Derk Bodde, *Basic Concepts of Chinese Law: The Genesis and Evolution of Legal Thought in Traditional China*, 107 PROC. AM., PHIL SOC. 375, 376 (1963).

¹⁵³ PIRIE, *RULE OF LAWS*, *supra* note 30, at 92 (discussing the Tang code); Bodde, *supra* note --, at 375.

¹⁵⁴ Bodde, *supra* note 152, at 386.

law? It is a further element of Pirie’s argument, as I read it, that in almost every case, the law is associated with a distinctive normative project that she calls the “rule of law.” As I read her, this term connotes the constraint of powerful actors, often those affiliated to a state.

Consider first the idea that law is somehow normative in nature. The meaning of the term ‘normativity’ is debated among philosophers and jurists. A useful general definition can be borrowed from the philosopher Christine Korsgaard. On her Kantian account, normative standards “do not merely describe a way in which we in fact regulate our conduct” but also “make claims on us: they command, oblige, recommend, or guide.”¹⁵⁵ Normativity, on this account, involves something more than description. It also purports to supply some or all of the elements necessary for a person to have a reason for action or inaction. Normativity, understood as some measure of prescription or reason-giving, does not require that the audience to whom reasons are provided be universal. It is, for example, a normative claim that I should not leave my children waiting in the rain after school, even though that claim does not bear on anyone else. So too is it a normative claim that a knight or a rook can only make certain moves on a chess board. Nor does this exceedingly thin account of normativity dictate much about the nature or direction of the reasons supplied (if any indeed are).

Law, according to the account offered in *The Rule of Laws*, has a normative edge. To say that something ‘is’ the law is to do more than describe a normatively inert empirical fact.¹⁵⁶ But the precise onus that this observation places upon human behavior can vary quite dramatically. To point to law’s normativity is not to say all that much. It is not to say law has either a positive social effect, or, more pessimistically, portends exploitation and the despoiling of the weak. It is simply to say that the law connotes a normative claim of some sort in the same way, say, as a chalkboard connotes a pedagogical or communicative ambition.¹⁵⁷ The law, one might even say with a hint of melodrama, is akin to a vaudevillian’s unctuous prestidigitation, fluttered out to obscure the naturalist fallacy.¹⁵⁸ Further, it is quite clear (albeit not quite said) from the reach and detail of Pirie’s history that societies organized around diametrically divergent and mutually repugnant moral claims can alike deploy the law as she defines it. Most polities have used law in some way. And most have rested on economic or social arrangements that are deeply repugnant to the early twenty-first American palate. Law can be found in polities that were organized around slave labor, the colonial extraction of wealth from subjugated lands, or the deliberate suppression and extermination of religious or racial minorities.¹⁵⁹ Jurists under the National Socialist regime, for instance, “emphatic[ally] call[ed] for merging law with mortality” so that the state’s authority encompassed not only the sphere of outer freedom but the also the sphere of inner freedom.¹⁶⁰ All this, remember, under law’s broad flag.

The variety of normative orders that can be embodied in law is illustrated by the vast range of normative claims made by law throughout history. This variety is not easily reducible

¹⁵⁵ CHRISTINE M. KORSGAARD, *THE SOURCES OF NORMATIVITY* 9 (1996); see also JUDITH J. THOMPSON, *NORMATIVITY* 1 (2015) (offering a similar thought, albeit less crisply). Normativity is also connected to the provision of reasons, which have been described as “the only fundamental elements of the normative domain.” T.M. SCANLON, *BEING REALISTIC ABOUT REASONS* 3 (2014).

¹⁵⁶ Cf. CLIFFORD GEERTZ, *LOCAL KNOWLEDGE* 182 (1983) (“[L]aw ... is part of a distinctive manner of imaging the real.” (quotation marks omitted)).

¹⁵⁷ No doubt there are non-communicative uses of a chalkboard—torture for the aurally sensitive, perhaps?—but they are deviant and marginal uses, far removed from the central meaning of the term.

¹⁵⁸ This is in sharp contrast to Hans Kelsen’s resistance to deriving legal validity from historical facts. HANS KELSEN, *PURE THEORY OF LAW* 193-205 (Max Knight, trans. 1967).

¹⁵⁹ A point made emphatically in HART, *CONCEPT OF LAW*, *supra* note 22, at 200.

¹⁶⁰ HERLINDE PAUER-STUDE, *JUSTIFYING INJUSTICE: LEGAL THEORY IN NAZI GERMANY* 211 (2020).

to a simple classification.¹⁶¹ Instead, the best way to perceive law's diverse normativity is through the range of examples on offer.

Start with law beyond the state: Roughly twelve or thirteen centuries ago, Tibetan nomads developed a complex system for injury compensation built upon an intricate "logic of ... status distinctions."¹⁶² Doubting that Tibetan society of the time could be quite so finely sliced, Pirie suggests, this premodern Tibetan law offered a "map for civilization," and not a map of an existing social order."¹⁶³ Similarly, the 'law codes' of Mesopotamia, including Hammurabi's, are "best understood" not as "repositories of law" but rather as the "rhetorical expressions" of "duties and limitations of royal power."¹⁶⁴ Four millennia later, the first Holy Roman Emperor Charlemagne ordered the re-promulgation of the older Lex Salica, but failed to update that text in line with inflation: The result was a law that could scarcely be applied "in any detail," and yet expressed his aspiration toward "something grander"—a regime akin to that of the glorious earlier Roman emperors.¹⁶⁵ Writing of law in medieval Anglo-Saxon kingdoms, Alice Taylor affirms that "written codes projected, rather than actually governed, a united legal community," and as such had a "symbolic value" that quickly outran the writ of marshbound monarchs.¹⁶⁶ Only in the thirteenth century, suggests Frederick Cheyette, did people take the fateful step of "equat[ing] the norms used to make authoritative settlements with the norms that are supposed to govern men's [sic] behavior."¹⁶⁷ In contrast, hundreds of years before that, Hindu scholars drew on Manu's Dharmashastra to affirmatively produce a phenomenal and palpable "hierarchy of social status that put brahmins and ruling classes above commoners and servants."¹⁶⁸ Law here served as a map for the active *creation* of a social order.¹⁶⁹ It suggests that law can enable people to experience a sense that they are "participating in a wider cosmological order."¹⁷⁰ And then in her fine anthropological work on modern Tibet, Pirie has explored how law can be a site of compromise in contests between an imperial power and a subaltern people.¹⁷¹ Rather than being a vessel for casting the molten metal of contempt into the permanent irons of hierarchy, law is a median in which the colonial master and their subaltern meet, clash, and find a murky, negotiated ground.

¹⁶¹ In a fleeting comment in the book's conclusion, Pirie offers a tripartite taxonomy of law's normativity: "justice in Mesopotamia, discipline in China, and duty in India." PIRIE, *RULE OF LAWS*, *supra* note 30, at 448, 541-43. None of the key terms she uses of justice, discipline, and duty, however, is illuminating: Each of those terms could be glossed in very different ways.

¹⁶² *Id.* at 8.

¹⁶³ *Id.* at 9 (emphasis omitted); *id.* at 449 ("At their most basic level, laws provide a means to order social life.").

¹⁶⁴ DAVID WENGROW, *WHAT MAKES CIVILIZATION?* 129 (2010); *see also* NORMAN YAFFE, *MYTHS OF THE ARCHAIC STATE: EVOLUTION OF THE EARLIEST CITIES, STATES, AND CIVILIZATIONS* 108 (2005) (describing Hammurabi's law code as an "attempt to portray Babylonian domination of conquered territory as quintessentially just).

¹⁶⁵ PIRIE, *RULE OF LAWS*, *supra* note 30, at 153-54; *id.* at 450.

¹⁶⁶ Taylor, *supra* note 113, at 48. I say 'marshbound' because at the periphery of royal power, Welsh law existed "in an ambiguous relationship to royal power." *Id.* at 71; *see also* ALICIA MARCHANT, *THE REVOLT OF OWAIN GLYNDWR IN MEDIEVAL ENGLISH CHRONICLES 14-15*(2014) (summarizing the major revolt against English rule led by the famous Owain Glyndwr).

¹⁶⁷ Cheyette, *supra* note 115, at 278.

¹⁶⁸ PIRIE, *RULE OF LAWS*, *supra* note 30, at 206.

¹⁶⁹ *See* PIRIE, *ANTHROPOLOGY OF LAW*, *supra* note 32, at 222 ("[L]aws and codes make explicit an ideal of justice in the form of concepts and principles fundamental to the social organization of their time and place.").

¹⁷⁰ PIRIE, *RULE OF LAWS*, *supra* note 30, at 311.

¹⁷¹ Fernanda Pirie, *The limits of the state: Coercion and consent in Chinese Tibet*, 72 *J. ASIAN STUD.* 69, 80-85 (2013) (exploring "complex, shifting, and negotiated" links between state and society).

All these are, to put it mildly, widely divergent kinds of normativity.¹⁷² In each case, the law is being deployed in the service of a certain species of social order. Sometimes, it is purely aspirational; sometimes it's a bare palimpsest, lying lightly on the face of experience; and sometimes it forms a heavy set of chains, keeping the lowly in their fixed and earthbound place. Yet across these cases, the relation between the law and that social order is not fixed: Law can be a blueprint, an arena for conflict and compromise, or a myth of sorts. One possible inference from Pirie's history hence concerns the changing *scope* of law's normativity. The normativity associated with (say) chess or even parenting has a limited scope: It applies only to a certain, limited set of activities. In contrast, Pirie's narrative seems to capture a process of enlargement. Law comes to apply to more and more facets of social life. It offers fewer and fewer exit options. At the limit, it tenders a "whole cosmological order" from which there is no escape. At some point in this series of developments, those subject of law seem to lose any choice as to whether they are bound by law. At some point, that is, law applies regardless of subjective intentionality.¹⁷³

Pirie's extensive evidence of law's normativity in the thin sense, is persuasive: In its core cases, law has normative aspirations. Gesturing either weakly or strongly to the way a society 'should' be ordered, law comes to operate as a source of reasons for action or hesitancy. The law therefore does not take the proverbial "bad man," who "cares only for the material consequences which such knowledge enables him to predict,"¹⁷⁴ as its modal subject. Instead, law operates in the main on the assumption that its subjects are social creatures,¹⁷⁵ and as such respond to reason-giving practices predicated on their being already embedded in a society.

Indeed, I wonder here if it is not too much to suggest that this species of normativity as linked to sociality is not just a "recurrent feature" of law, but a feature that is never lacking. This supposition is hard to prove or reject, although it certainly seems the case with respect to contemporary societies characterized by legal regulation. This possibility has implications for the modeling of individual incentives under such regulation. It is common for legal scholars, especially those working in the rational choice tradition, to reject out of hand motivations that cannot be modeled parsimoniously in terms of discrete, individual agents.¹⁷⁶ For those who embrace such models, the idea of law's pervasive and thoroughly social normativity will seem unpersuasive or irrelevant. For those already disposed to see human interactions as imbricated in normativity, a stronger version of Pirie's claim may well seem plausible.

There is also a second strand to Pirie's claim about normativity: She further claims that laws have also "defined and limited how power should be exercised" across diverse historical

¹⁷² Accord PIRIE, *RULE OF LAWS*, *supra* note 30, at 447 (noting the variance in "social ambitions" of law across different historical contexts).

¹⁷³ It is at this point that conflicts between the obligations imposed by law and those engendered by morality become acute: No wonder, then, that the story of Antigone lies at the threshold of the Western theatrical, and moral, tradition.

¹⁷⁴ Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 459 (1897).

¹⁷⁵ In contrast, the Holmesian 'bad man' is atomized and detached from any social context. See Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685, 1773 (1976) ("The certainty of individualism is perfectly embodied in the calculations of Holmes' 'bad man,' who is concerned with law only as a means or an obstacle to the accomplishment of his antisocial ends.").

¹⁷⁶ There is some empirical evidence of the model's limited accuracy. See Toshio Yamagishi et al., *In search of Homo economicus*, 25 PSYCH. SCI. 1699, 1699-1700 (2014) (finding limited evidence of narrowly-defined utility maximization behavior in a Japanese sample). And the model itself has been subject to considerable criticism from different fronts. For a recent summary, see Dante A. Urbina and Alberto Ruiz-Villaverde, *A critical review of homo economicus from five approaches*, 78 AM J. ECON. & SOC. 63 (2019).

and institutional contexts, and as such produced “the rule of law.”¹⁷⁷ This is a more ambitious claim than her first. It posits not only that law is associated with *some* sort of normative claim, but rather that it generates a very specific kind of normative effect: that law forges “limit[s]” on how “power” (however this term defined) is wielded. Law, that is, is said to serve the specific good of curbing the potential for the *misuse* of power.

I am not sure that Pirie has substantiated this more ambitious and important assertion about the relationship between law and legality. But I will take up this worry in the next Part, by exploring how the account of law I’ve derived from *The Rule of Laws* interacts with the famous argument for legality as a conceptual prerequisite to law offered by Lon Fuller.¹⁷⁸

E. The Conveyor Belt Model of Law Reconsidered

Let’s return then to the conveyor-belt model of law which, I asserted, lies behind contemporary claim-making about law and the rule of law. Recall that this model has three elements in my telling: that the law has a temporally distinct origin in an officially authorized source; that its application must be channeled through a cadre of specialized state actors (typically judges); and that their application of law to fact yields generalized social goods.

Like a sudden cold breeze in autumn, Pirie’s work has the salutary and bracing effect of showing that no piece of this model holds true; Its lurid blossoms, promising so much on law’s behalf, wither and shrivel. To begin with, law does not necessarily originate via any officially authorized channel. To the contrary, it is not merely the law merchant that has percolated into formal legal codes from beyond the state.¹⁷⁹ At its inception, law is often substantively parasitic on exogenous custom or religious norms. These are worked up and maintained by a hieratic elite, again often located outside the state. The consequent vectors of law’s influence upon social practice are varied—law works as aspiration or intellectual vanity as often as it offers practical guidance—and they do not always involve the state and its agents. Finally, law may make normative claims on its subjects—but we have yet to discern whether this yields the general good of legality implicit in the conveyor belt model.

The conveyor-belt model of law that imagines a unidirectional trajectory from text to application to legality, in short, makes nice copy. Pirie’s work suggests, however, that it has little to do with the social facts of law as observed transhistorically. We need, instead, a more complex account of law, one that decenters the state and that takes account of the many different ways in which law can be invoked by both officials and also the public.

III. Law as Polythetic Category in Theory

The polythetic conception of law made available in *The Rule of Laws* provides a powerful lens through which to reconsider theoretical claims about law, and to analyze some of the pressing contemporary challenges to the rule of law. In this Part, I aim to show how the account of law developed in Parts I and II provides a fruitful starting point for theorizing about law and its benefits. Specifically, I now put aside the demotic conveyor-belt model as refuted. Instead, I will develop implications from the polythetic conception for some features of canonical works

¹⁷⁷ PIRIE, RULE OF LAWS, *supra* note 30, at 311.

¹⁷⁸ See *infra* Part III.B.

¹⁷⁹ The role of commercial practice has long been recognized and embraced. See, e.g., Karl N. Llewellyn, *The First Struggle to Unhorse Sales*, 52 HARV. L. REV. 873, 903-04 (1939) (offering a “plea for merchants’ law to be recognized and be further made for merchants”).

of H.L.A. Hart and Lon Fuller. The former brings into sharp focus the distinction analytic contribution of the polythetic definition, and also helps us think about the relation of law to the state; the latter points our analysis toward a reconsideration of law's linkage to the rule of law.

A. History and officialdom in *The Concept of Law*

Perhaps the most influential work of twentieth-century Anglophone jurisprudence is H.L.A. Hart's *The Concept of Law*.¹⁸⁰ Hart's immensely rich work has been foundational respecting many important questions; its influence continues to be felt in mainstream public law discussions in the United States.¹⁸¹ Most importantly, Hart opens his work by characterizing it as a piece of "descriptive sociology"¹⁸²; he relatedly offers an account of the movement from a "primitive" to a "developed" legal system.¹⁸³ He goes on to famously argue that "[t]he union of primary and secondary rules is at the center of a legal system," even if it is "not the whole" of that system.¹⁸⁴

I want to focus here on two elements of Hart's account in respect to which Pirie's evidence fruitfully bears. The first is the role of history, or genealogy, in *The Concept of Law*, and the second is the role that "officials," and hence the state, play in the recognition and application of law. On both points, there is not a settled, single understanding in the voluminous literature on *The Concept of Law*. Even the seemingly anodyne opening genuflection toward "descriptive sociology," indeed, remains an object of lively debate.¹⁸⁵ So I will do my best to make clear how I understand Hart, and upon whose readings I rely.

1. *The Movement from the Primitive to the Modern in The Concept of Law*

Hart's *Concept of Law* begins by rejecting John Austin's command theory of the law to make space for a "fresh start."¹⁸⁶ His ostensible aim is to make room for an "modern municipal legal system."¹⁸⁷ Hart begins this new account of law by offering the reader a generalized historical narrative—a genealogy—of how law comes into being. Hart's genealogy posits two states of social development. Movement from the first to the second marks a transition from the "pre-legal to the legal world."¹⁸⁸ The first stage is a "primitive" society, lacking a "system"

¹⁸⁰ HART, CONCEPT OF LAW, *supra* note 22.

¹⁸¹ In a 1979 essay, Hart identifies three "central" theses of positivism: the conceptual separation of law and morals; the social sources of law; and the thesis of judicial discretion. H.L.A. Hart, *The New Challenge to Legal Positivism*, 36 OXFORD J. LEGAL STUD. 459, 460-63 (2016). I address the first below, in reference to Fuller's claim about legalism, and indirectly address the second, here. I have nothing to say here on the third.

¹⁸² HART, CONCEPT OF LAW, *supra* note 22, at iv.

¹⁸³ *Id.* at 91-95.

¹⁸⁴ *Id.* at 99.

¹⁸⁵ For competing interpretations, see Frederick Schauer, *The Limited Domain of the Law*, 90 VA. L. REV. 1909, 1911-12 (2004) (noting that Hart's method involved the "use of the implicitly empirical methods of ordinary language philosophy" and that "Hart's claims about the central features of a legal system are driven as much by the observations of an insider to the system as by philosophical speculation"), and Ronald Dworkin, *Thirty Years On*, 115 HARV. L. REV. 1655, 1680 (2002) ("What kind of sociology is conceptual? What kind makes no use of empirical evidence? What kind defines itself as studying not just legal practices and institutions here and there, but the very concept of law everywhere?"). In her monograph, Pirie describes Hart's method as entailing the "description of usage [as] the foundation for the foundation for philosophical analysis." PIRIE, ANTHROPOLOGY OF LAW, *supra* note 32, at 17.

¹⁸⁶ HART, CONCEPT OF LAW, *supra* note 22, at 80.

¹⁸⁷ *Id.* at 239-40. Hart distinguishes this from a "primitive" system, but does not provide a clear distinction between these categories. *Id.* at 3.

¹⁸⁸ *Id.* at 94.

of laws, but instead striated by “primary rules of obligation.”¹⁸⁹ This society, however, experiences “defect[s]” of uncertainty, immobility, and inefficiency that “require supplementation.”¹⁹⁰ To remedy these “defects,” “secondary” rules of recognition, change, and adjudication emerge, which are used by “officials” to isolate, adjust, and apply primary rule.¹⁹¹ It is the “union of primary rules of obligation with such secondary rules” that “characterize[es]” law.¹⁹² This account has a teleological flavor. Most obviously, it seems to posit the “primitive” as an antecedent stage to the modern. The former is “simple” and lacks “specifically legal concepts with which the lawyer is concerned.”¹⁹³ At the same time, defects in the primitive system seem to be causally prior to the complex of secondary rules necessary for law to emerge. Hart does not explicitly suggest that without the first primitive stage, the second modern one cannot emerge: but it is not hard to extract that implication from his text. This suggests that law, as such, emerges only when the state reaches a certain threshold of complicity—a suggestion that is at odds with the non-state-centered polythetic definition of law.

The first question that I want to take up is what we should make of this story, and whether it is indeed inconsistent with the polythetic definition outlined in Part II. There is some disagreement about the story’s role in Hart’s argument. John Gardner brusquely consigns Hart’s account to an oubliette for “fables,” labeling it “an imaginary tale of the birth of a possible legal system.”¹⁹⁴ On this view, Hart’s argument simply has nothing to do with how “how actual legal systems in general emerge, or even whether one legal system ever has so emerged.”¹⁹⁵ Nicola Lacey also suggests that Hart was not very concerned with the correspondence between his argument and empirics.¹⁹⁶ In a slightly different register, Leslie Green reads Hart’s theory as “plac[ing] law firmly in history.”¹⁹⁷ He adds that the existence of law “follows wholly from the development of human society, a development that is intelligible to us, and the content of particular legal systems is a consequence of what people in history have said and done.”¹⁹⁸ But even he dismisses Hart’s threshold account as “wooden” and “fictional.”¹⁹⁹

On the other hand, at least one recent commentator reads Hart to be offering an abstraction closely calibrated to historical facts, and hence amenable to evaluation on the basis of an understanding of such empirics. Coel Kirby suggests that Hart relies on “fundamental

¹⁸⁹ *Id.* at 91-92.

¹⁹⁰ *Id.* at 92-93.

¹⁹¹ *Id.* at 94-97 & 117.

¹⁹² *Id.* at 94. The “existence of a legal system,” though, depends on two further facts: that primary rules are “generally obeyed,” and secondary rules are “effectively accepted as common public standards of official behavior by ... officials.” *Id.* at 116; *id.* at 117 (noting that only officials need to accept law from the “internal point of view”).

¹⁹³ *Id.* at 93, 98

¹⁹⁴ John Gardner, *Why law might emerge: Hart’s problematic fable*, in *READING HLA HART’S THE CONCEPT OF LAW* 81, 82 (L. Duarte et al. eds. 2013).

¹⁹⁵ *Id.* A similar reading is offered by Philip Pettit, who describes Hart as engaged in a “counterfactual exercise” that “should be distinguished from the genealogy in a historical sense.” Philip Pettit, *Social Norms and the Internal Point of View: An Elaboration of Hart’s Genealogy of Law*, 39 *OXFORD J. LEGAL STUD.* 229, 231 (2019).

¹⁹⁶ Nicola Lacey, *Analytical jurisprudence versus descriptive sociology revisited*, 84 *TEX. L. REV.* 944, 953 (2005) (“Hart was relatively impervious to historical and sociological criticism, precisely because he saw his project as philosophical and therefore to the charge of having ignored issues that seemed central to historians and social scientists.”).

¹⁹⁷ Leslie Green, *The Concept of Law Revisited*, 94 *MICH. L. REV.* 1687, 1691 (1996).

¹⁹⁸ *Id.*

¹⁹⁹ *Id.* at 1698.

social data ... for analytic generalizations.”²⁰⁰ On this view, Hart’s key distinction between primary and secondary is “drawn from a generalised description of empirical knowledge of ‘primitive’ societies derived primarily from anthropological sources [and] driven by the dynamics of social evolutionary.”²⁰¹ Further, Kirby argues, the “step from the pre-legal world into the legal world is ... an *evolution* of primitive societies bound by custom into modern societies of individuals mediated by law.”²⁰² There is some textual evidence, contends Kirby, to support this reading. Hart does point to the “many studies of primitive communities.”²⁰³ He also refers to “rules ... always found in primitive societies of which we have knowledge,” to “what is confirmed by what we know of primitive communities,” and to the “history of law.”²⁰⁴ The relevant pages in *The Concept of Law* are supported in end notes with citations to anthropological studies, rather than philosophical work positing a state of nature.²⁰⁵ On the other side of the ledger, Hart begins his account by asking readers to “imagine” a society without legal institutions.²⁰⁶

Another possibility—somewhat in between the polar opposite readings offered by Gardner and Kirby—is the idea of genealogy as functional explanation. In a masterful late work, Bernard Williams has explained the use of genealogy as a “narrative that tries to explain a cultural phenomenon by describing a way in which it came about, or could have come about, or might be imagined to have come about” in a fashion that always “will consist of real history,” at least in part.²⁰⁷ On Williams’s account, a genealogy can be fictional in the sense that it abstracts away from the particulars of a specific historical trajectory, yet nonetheless explanatory because it “represents as functional a concept, reason, motivation, or other aspect of human behavior, where that item was perhaps not previously seen as functional.”²⁰⁸ Understood in this sense, a genealogy derives a generalization from plural and complex histories as a way of accentuating the “functional,” even as it sacrifices particulars and variances of specific historical paths. Importantly, while a genealogy in this sense has some relation to historical facts, it can be calibrated at either more or less distant from them.

Can Pirie’s history help us to evaluate whether the very idea of a transition from primitive to modern societies produces the law as a historical matter? I think so—and asking the question usefully brings into focus how the polythetic definition of law is both novel and distinctive. The evidence marshalled by Pirie suggests that such a sequence does not track law’s modal historical path. This offers an additional grounds for reading Hart in the way that Gardner, Lacey, and Green do: To the extent that Kirby is correct, and the story of a movement from primitive to modern law is taken literally, it makes little historical sense. Indeed, even in the more modest sense offered by Williams, a genealogy of law can do scant work. There are three reasons for this.

²⁰⁰ Coel Kirby, *Law Evolves: The Uses of Primitive Law in Anglo-American Concepts of Modern Law, 1861-1961*, 58 AM.J. LEGAL HIST. 535, 536 (2018).

²⁰¹ *Id.* at 556.

²⁰² *Id.* at 557 (citation and quotation marks omitted; emphasis added).

²⁰³ HART, CONCEPT OF LAW, *supra* note 22, at 91.

²⁰⁴ *Id.* at 91-93.

²⁰⁵ HART, CONCEPT OF LAW, *supra* note 22, at 291-92

²⁰⁶ *Id.* at 91.

²⁰⁷ BERNARD WILLIAMS, TRUTH AND TRUTHFULNESS: AN ESSAY IN GENEALOGY 20 (2002).

²⁰⁸ *Id.* at 34. There is a second, more critical, sense of the term that does not apply here, which involves a more closer-to-the-grain reading of historical pathways. See Michel Foucault, *Nietzsche, Genealogy, History*, in LANGUAGE, COUNTER-MEMORY, PRACTICE: SELECTED ESSAYS AND INTERVIEWS (D. F. Bouchard., ed. 1977). I don’t think Hart is using ‘genealogy’ in Foucault’s sense, and so leave the latter to one side.

First, Pirie’s evidence shows that law tends to emerge outside state institutions and prior even to the coordinated efforts at formal rule-making that warrant the label of proto-state.²⁰⁹ In Europe, for example, “customs” and “practices” were borrowed and cast into written form by soi-disant kings and emperors.²¹⁰ Law was not necessarily a functional form associated with the state’s drive toward more complex, more dynamic government. It instead was an off-the-rack solution to the practical problems associated with rule that emerge in the context of the Mesopotamian Bronze Age and persist, *mutatis mutandi*, in the global market of digital goods and services covered by UNCITRAL.²¹¹ The distinctive qualities of this intellectual system, such as its reliance on analogic and casuistic modes of reasoning,²¹² do not arise because “a simple form of social control will prove defective and will require supplementation.”²¹³ Rather, they are associated with the effort of a hieratic elite to refine an intellectual system comprised of abstract, general categories.

Second, “authoritative” written embodiments of law are not necessarily a functional response to the problem of “uncertainty.”²¹⁴ From Hammurabi onward, laws have been reduced to writing even when they do not ever seem to have been referred to in legal cases,²¹⁵ or even capable of being read (and hence understood) by their putative subjects. Even the Justinian “*Corpus Iuris* made [little] impact on legal practice at the time.”²¹⁶ Neither of these examples of codification seem to be historical outliers. Yet neither was adopted in response to a *functional* need for a focal point to facilitate coordination and compliance in the face of “uncertainty.”²¹⁷ Again, this is inconsistent with the idea of an evolution from primitive to modern societies driven by functional forces.

Third, as Jeremy Waldron has observed, it is “wrong to think that secondary rules are the only ways of remedying defects ... in a simple society of primary rules.”²¹⁸ Pirie’s historical work abrades Waldron’s concern into a sharper point. The “defects” Hart associates with primitive legal systems can well be solved by the expedient of identifying a hieratic caste. The latter do not develop any formal criteria of validity, whether embodied in writing or not. The ‘rule of recognition’ might simply be what the caste declares to be legally valid. As a result, there is no functional necessity for any *non-compositional* rules of recognition, change, or adjudication—i.e., verbal rules that are independent of, and supplementary to, the social fact

²⁰⁹ See *supra* text accompanying notes 81 to 90.

²¹⁰ PIRIE, RULE OF LAWS, *supra* note 30, at 150-51 (describing the origins of Lex Salica)

²¹¹ *Id.* at 431-32.

²¹² See *supra* text accompanying notes 102 and 104.

²¹³ HART, CONCEPT OF LAW, *supra* note 22, at 92.

²¹⁴ *Id.* at 94-95. Note that my point here is about the plausibility of a genealogical account: I am not making a point about the relative plausibility of exclusive versus inclusive legal positivism. For brief definitions, see Wilfrid J. Waluchow, *The many faces of legal positivism*, 48 *U. Toronto L. J.* 387, 394-95 (1998).

²¹⁵ PIRIE, RULE OF LAWS, *supra* note 30, at 27.

²¹⁶ *Id.* at 151-52

²¹⁷ More generally, there is some reason to worry about functionalist explanations for social phenomena. In perhaps the famous and most influential genealogy, Nietzsche noted that “[t]he standpoint of utility is as alien and as inapplicable as it could possibly be” when it comes to explaining the origins of moral concepts. FREDERICK NIETZSCHE, ON THE GENEALOGY OF MORALS 15 (M.C. Scarpitti trans., 2013); see also Robert W. Gordon, *Critical Legal Histories*, 36 *STAN. L. REV.* 57, 64 (1984) (developing a critique of the view that “the legal system *has in fact* responded to evolving social needs”). If functionalist explanations generally do not illuminate the causes or shapes of social phenomena such as law (or its constituent elements), there is an open question of what the genealogy of the kind Hart offers can illuminate.

²¹⁸ Jeremy Waldron, *All We Like Sheep*, 12 *CANADIAN J.L. & JURISPRUDENCE* 169, 173 (1999) [hereinafter “Waldron, *All We Like Sheep*”].

of a hieratic group's composition.²¹⁹ Provided the group is socially homogenous enough, defined by sufficiently convergent interests, they may never need to formulate, or even imagine, rules of change, adjudication, or recognition. Cicero, for example, underscored "the importance of the jurists" as "interpreters of law" capable of asserting "the authority of law."²²⁰ Islamic law was initially "unsystematic" and "not at all comprehensive," but nevertheless worked in practice because the Umayyad and Abbasid empires relied on *uluma* and *qazis* to formulate working rules derived from both religious principles and local "norms and practices."²²¹ To enable the settlement, application, and change of legal rules, in short, it may not be necessary to have free-standing *rules* of recognition, adjudication, and change. There hence need not be "internal" rule-following at work among officials, and no sincere criticism for deviations.²²² It may instead suffice to have a hieratic class that can, by fiat, declare what the law is today, how it resolves particular cases, and what the law will be, perhaps differently, tomorrow.²²³

To the extent that there is ambiguity in *The Concept of Law*, therefore, Pirie's evidence supplies powerful reasons for rejecting Kirby's reading of the passage from primitive to modern legal regimes. Even a more modest reading of that passage, as a genealogy in Williams's sense, runs into obstacles. Gardner's description of the "fable" as "problematic" seems more apt as a way of doing justice to Hart's text without running into conflict with the empirical evidence.

2. *The Role of Officials in The Concept of Law*

A second implication of Pirie's historical evidence for Hart's theory concerns the role of "officials" in a modern legal system. On Hart's view, a modern legal system exists where there is a union of primary and secondary rules, and where one of the secondary rules, the rule of recognition, sets out the criteria of legal validity for all other rules:²²⁴ The rule of recognition, further, "provides the criteria by which the validity of other rules of the system" can be assessed, including unwritten custom.²²⁵ It is hence a matter of official practice, i.e., the criteria officials converge upon and accept from an internal point of view. Hart describes the relevant "official world" as encompassing "the judiciary" and the "the legislature" and other tribunals

²¹⁹ Or, to rework the Hartian account, the rule of recognition may be defined simply by whatever the hieratic elite happens to say it is at a given moment in time. As I read Hart, this seems at minimum an outlier form of law as he accounts for it.

²²⁰ PIRIE, *RULE OF LAWS*, *supra* note 30, at 114-15.

²²¹ *Id.* at 131-32. The bulk of religiously derived rules in Islam are not anchored in the Qur'an, but in the hadith, or authenticated sayings of the prophet. The *uluma* did develop something akin to a formal rule of recognition for the purpose of authenticating hadith. Wael B. Hallaq, *The Authenticity of Prophetic Hadith: A Pseudo-Problem*, 89 *STUDIA ISLAMICA* 75, 78-81 (1999) (summarizing basic rules for recognizing hadith). Note that without the emergence of recognized groups of scholars capable of formulating such a rule, the latter could not have emerged.

²²² HART, *CONCEPT OF LAW*, *supra* note 22, at 55-57.

²²³ If I were to dub this theory with a sarcastic label, I would call it the conspiracy theory of the law.

²²⁴ HART, *CONCEPT OF LAW*, *supra* note 22, at 99.

²²⁵ *Id.* at 103; *id.* at 94 (explaining that the rule of recognition "will specify some feature or features possession of which by a suggested rule is taken as a conclusive affirmative indication that it is a [law]"); *id.* at 46 (discussing custom).

established by the state.²²⁶ And he distinguishes officials from “private citizens.”²²⁷ Hence, the word “official” in Hart’s text seems to capture only state actors. Some commentators, such as Roger Cotterrell, have disagreed and suggested that “priests” or “elders” could count.²²⁸ Cotterrell’s suggestion is, in my view, ultimately a fruitful one, but it is not supported by a reading of Hart’s text.²²⁹ Hart, to be sure, recognizes that “only officials might accept and use the system’s criteria of legal validity,” at the peril of a “deplorably sheeplike” public.²³⁰ But he did not say that “officials” could be non-state actors.

Pirie’s historical account suggests not only a contingent relation of law and the state, but also the strong historical likelihood that it is not state officials but a hieratic elite *standing at a remove from the state* that fabricates and maintains law as an intellectual system.²³¹ These elites are drawn into symbiotic relations with the state, without always being absorbed into it. This raises the interesting possibility the rule of recognition would comprise simply whatever rules that this group of non-state actors happen to converge upon and accept regardless of pedigree or logic.

Indeed, it is worth noting that Pirie’s account invites the thought that there may be functional reasons for reliance on non-state actors to play this role. If law is to play the legitimating role that the powerful seek, then the availability of a hieratic elite that is distinct from the state may well make law more, rather than less, potent. Hence, law in its modern form may be just as likely (or even more likely) to emerge when there is a non-state elite that can operate as a site for the rule of recognition. Simultaneously, the gap between hieratic and political elites enlarges the possibility, recognized by Hart,²³² that law will be used to advance the former’s social projects without regard to its costs to rulers or to other elements of the polity. The promotion of the caste system by Brahminic scholars aimed at consolidating and enhancing their own social standing illustrates this possibility.²³³ Law there provided a device to maintain social hierarchy favoring a specific elite, notwithstanding the tide of shifting social and political conditions.²³⁴

²²⁶ *Id.* at 122; see also Green, *supra* note 197, at 1693 (describing the rule of recognition as a “social rule[]” and a “customary practice of those whose role it is to identify and apply primary rules.”). There must be a “common practice ... among officials” but this does not mean that such practice “form[s] part of the reasons which each of the officials has for accepting the rule of recognition.” Julie Dickson, *Is the Rule of Reason Really A Conventional Rule?*, 27 OXFORD J. LEG. STUD. 373, 375, 381 (2007). At one instance, Hart briefly mentions an “umpire or scorer” as a kind of official. HART, CONCEPT OF LAW, *supra* note 22, at 102. Clearly, these are not *state* officials, but I think Hart is best read in this passage as offering a non-state analogy to illuminate understanding of how a legal system works.

²²⁷ HART, CONCEPT OF LAW, *supra* note 22, at 116.

²²⁸ ROGER COTTERRELL, LAW, CULTURE AND SOCIETY 17 (2017).

²²⁹ The textual evidence on this point largely runs in one direction. In Chapter 10, Hart discusses international law, but neither of the two “objections” he analyzes illuminates the question whether non-state officials can be, or were at his time, the relevant social group among whom the rule of recognition was held and applied. *Id.* at 213-27. I take all these to be suggest that “officials,” especially in the core case of municipal law are within the state. Accord Barber, *The Rechtsstaat*, *supra* note 62, at 450-51 (associating Hart with a “unitary model” organized around the state).

²³⁰ *Id.* at 109 & 117 (noting how there is an “essentially factual” question of “practice” that lies behind “statements of validity”).

²³¹ See *supra* text accompanying notes 133 to 145.

²³² HART, CONCEPT OF LAW, *supra* note 22, at 109 & 117.

²³³ PIRIE, RULE OF LAWS, *supra* note 30, at 206.

²³⁴ See S. BAYLY, CASTE, SOCIETY AND POLITICS IN INDIA 25-26 (2001) (noting the fluid nature of Indian caste, and identifying the 1650-1850 period as pivotal to its formation).

This modest amendment to Hart’s account has interesting implications for the American legal system. A traditional application of Hart’s rule of recognition in the United States focuses on what counts as the validly enacted content of the U.S. Constitution, which operates as supreme law within the jurisdiction.²³⁵ Of course, even a passing familiarity with constitutional jurisprudence reveals that what counts as (supreme) constitutional law is not determined by any stable criterion of validity: Neither text nor original public meaning, nor even any blend of them with precedent, provides a plausible account of the supreme law’s content. Justices instead cycle between text, original meaning, precedent, and first-order moral reasoning. In this process of argumentative cycling, moreover, it is plausible to think that a majority of those jurists are in practice responsive in a fairly direct and mechanical way to ideological appeals by co-partisans that are cloaked in the appropriate ‘constitutional’ garb.²³⁶ This can be true, strictly, even if it is not possible to argue to a judge that ‘the law is simply what you say it should be.’ The forms of legible argumentation within a legal system, that is, have no necessary relationship to the underlying political economy of constitutional jurisprudence. The paraphernalia of legal argumentation is hence no reliable index of the actual causal, motivating, or binding quality of legal arguments. The United States’ rule of recognition, on this view, depends not just on a hieratic elite of judges, but also on the parastatal organs that influence successfully the Justices’ beliefs about what counts or does not count as law. As a result, a revised account of the rule of recognition opens up the possibility that we are not just ruled by a Court acting as a de facto “super-legislature,”²³⁷ but by the tight-knit group of intellectuals and interest-groups that can persuade those judges as to what the law is or is not.

Of course, I don’t expect that all readers will be persuaded by this description of the present political economy of constitutional law. My point here is more simply that this is a legible account of American constitutional law in which there is no fixed verbal criterion of legal validity, but a parastatal group that exercises control over the content of supreme law. It is an account that you may think wrong on the facts (although you may well change your mind when the Court’s majority is hostile to your ideology), but it is not an analytically incoherent one.²³⁸

* * *

In short, bringing Hart’s famous account of law in *The Concept of Law* into conversation with the polythetic account of law brings to light possibilities that are commonly ignored. The distinctive, recurrent features of law do not emerge from an evolutionary process infused with functional pressures. They are not adaptations, but borrowings. Hart’s fable is merely a just-so

²³⁵ See, e.g., Kent Greenawalt, *The Rule of Recognition and the Constitution*, 85 MICH. L. REV. 621, 632 (1987) (“A criterion of law is supreme . . . if norms adopted according to it take precedence over norms adopted by any other procedure. The criterion about which that is true in the United States is the amending clause, article V, of the Constitution.”). An obvious flaw in Greenawalt’s account is that it leaves no room for judicial precedent, and offers no explanation of the hierarchical relation of different kinds of precedent

²³⁶ Craig Green, *Deconstructing the Administrative State: Chevron Debates and the Transformation of Constitutional Politics*, 101 B.U. L. REV. 619, 657 (2021) (describing “the sudden transition from conservative support for *Chevron* to constitutional opposition” in 2016 as a consequence of changes to the Republican Party); see also Calvin TerBeek, “*Clocks Must Always Be Turned Back*”: *Brown v. Board of Education and the Racial Origins of Constitutional Originalism*, 115 AM. POL. SCI. REV. 821, 822 (2021) (developing the link between opposition to *Brown* and the emergence of modern originalism).

²³⁷ Brian Leiter, *Constitutional Law, Moral Judgment, and the Supreme Court As Super-Legislature*, 66 HASTINGS L.J. 1601, 1601 (2015).

²³⁸ For an excellent account, see Leslie Green, *Positivism and the Inseparability of Law and Morals*, 83 NYU L. REV. 1035, 1038-44 (2008) [hereinafter “Green, *Inseparability*”]

story. And law is not necessarily tightly linked to officials, as opposed to a parastatal elite that can determine the scope and content of supreme law.

B. Decoupling Law from the Rule of Law?

The relation of law to moral values remains sharply contested in the jurisprudence literature. Because Hart, in particular, has been associated (to varying degrees) with the thought that there is no necessary connection between law and morality, we can start with his work again to explore how a polythetic account of law bears on that question.

In *The Concept of Law*'s penultimate chapter, Hart describes and accepts five ways in which law and morality might be connected; he rejects only one.²³⁹ Among those he accepts is the notion that the practical realization to some extent of the “principles of legality”—which means intelligibility, non-retroactivity, and the feasibility of actual compliance, and so is roughly analogous to one meaning of the “rule of law”—is a prerequisite for effective “social control,” even if it is at the same time also “compatible with great iniquity.”²⁴⁰ He rejects the idea, however, that “enactments which enjoined or permitted iniquity should not be recognized as valid.”²⁴¹

This last claim is often juxtaposed with Lon Fuller’s argument that a “total failure to meet [one of a number of principles of legality] does not simply result in a bad system of law, but in something that is not properly called a legal system at all,” and thus no “moral obligation” to obey such law.²⁴² Hart’s response to this, on one reading, is that such law still ‘counts’ as law, even as it fails to satisfy a basic “aspiration of legality,” because it guides officials, even if it does not guide ordinary subjects of the law.²⁴³ Law might excel qua law, indeed, but still be pervasively and comprehensively unjust.²⁴⁴

If the account developed in Parts I and II does suggest some linkage between law and legality, it is a rather different from the one Fuller posits. To begin with, the polythetic account of law offered in *The Rule of Laws* severs the necessary connection between law and the expectation of general compliance. Law that cannot guide, hence, is not a “total failure.” Neither Hammurabi nor Justinian, recall, crafted laws that were, or seemingly were intended to be, followed.²⁴⁵ Yet they typically are counted as law nonetheless. That may simply be to say that the polythetic account of law is broader than the modern concept associated with both Hart and Fuller. It is decoupled not only from the state but also from the proximate ambition of general compliance; it hence leaves more space for aspirational and expressive functions of law.

²³⁹ HART, CONCEPT OF LAW, *supra* note 22, at 202-11.

²⁴⁰ *Id.* at 207; *see also id.* at 206 (“[W]e have in the bare notion of applying a general rule of law, the germ at least of justice.”).

²⁴¹ *Id.* at 208.

²⁴² FULLER, *supra* note 34, at 39; *see also* KRISTEN RUNDLE, FORMS LIBERATE: RECLAIMING THE JURISPRUDENCE OF LON L FULLER 90-92 (2012) (explaining Fuller’s argument here in terms of the creation of a “particular quality of relationship between the lawgiver and the legal subject,” characterized by “reciprocity”).

²⁴³ John Gardner, *Hart on Legality, Justice and Morality*, 1 JURISPRUDENCE 253, 257-59 (2010).

²⁴⁴ HART, CONCEPT OF LAW, *supra* note 22, at 185-86 (“[I]t is in no sense a necessary truth that laws reproduce or satisfy certain demands of morality, although they have often done so.”); Green, *Inseparability*, *supra* note 238, at 1051. Jeremy Waldron has persuasively suggested that there is a “basic contradiction” in Hart’s responses to Fuller. Waldron, *Positivism and Legality*, *supra* note 19, at 1157-59. I am leaning here on one strand of that contradiction.

²⁴⁵ *See supra* text accompanying notes 215 to 216.

More importantly, even if law is both intended and efficacious as a guide for practical conduct by meeting the “principles of legality,” law’s potential to ground moral obligations in the sense that Fuller intends remains unclear. On Fuller’s account, legality vouchsafes a “particular quality of relationship between the lawgiver and the legal subject,” characterized by “reciprocity”²⁴⁶ Such “reciprocity” arises at least in part from the sense that law entails some mutuality: Just as it binds and guides the citizenry, so too it binds the exercise of (state) power. At moments, this seems idea that Pirie embraces.²⁴⁷

Yet *The Rule of Laws* yields little to support that proposition, despite its kind words for legality. Pirie offers a number of different formulations of a claim about the link between law and the normative ambition of constraining power. Early on, she points to a historical “line of legal instruments designed to curb the wrongful use of power” that is “as ancient as law itself.”²⁴⁸ But it’s not at all clear the mere historical incidence of such laws is probative. Perhaps it demonstrates the *possibility* that law can be deployed to modulate power, but it offers no certainty of this effect. Indeed, Pirie’s account of imperial law in pre-Communist China suggests that law need not have any constraining effect on a particularly powerful state.²⁴⁹ Nor indeed is it obvious that the constraining effect of law is inconsistent with the ambition of law to facilitate coercive power more generally. An influential theory of constitutional design, for example, posits that ruling elites will converge on an organic law when doing so provides “insurance” to protect their own interests in the future.²⁵⁰ A related account highlights the way in which sovereign commitments to honoring property rights can facilitate desirable economic growth that the sovereign requires.²⁵¹ These accounts may or may not apply persuasively to particular cases.²⁵² But they are potent illustrations of the point that law may be used to generate *enabling* constraints: These might protect those who already wield influence, while leaving the marginal in the wind. The protection of property rights, which is often associated with the rule-of-law ideal, may well hence be associated with an overall increase in the ability of the powerful to act without constraint.²⁵³

²⁴⁶ RUNDLE, *supra* note 242, at 92.

²⁴⁷ PIRIE, RULE OF LAWS, *supra* note 30, at 311 (“[I]n most legal systems, the laws also defined and limited how power should be exercised This is the rule of law”).

²⁴⁸ PIRIE, RULE OF LAWS, *supra* note 30, at 14.

²⁴⁹ *Id.* at 96. On the other hand, Pirie also notes that “[l]ocal strongmen would sometimes find themselves facing the discipline of law, as would corrupt officials.” *Id.* at 254. That is, law might not impose a constraint on state power as an undifferentiated whole, but might allow apex officials to police line-officials at the behest of the public. This is one way in which an undifferentiated notion of power is unsatisfying.

²⁵⁰ See RAN HIRSCHL, TOWARDS JURISTOCRACY: THE ORIGINS AND CONSEQUENCES OF THE NEW CONSTITUTIONALISM 41 (2004) (describing the need for political actors who expect to lose power for “insurance” through constitutional designs which protect their interests by facilitating their eventual return to power).

²⁵¹ See Douglass C. North & Barry R. Weingast, *Constitutions and Commitment: The Evolution of Institutions Governing Public Choice in Seventeenth-Century England*, 49 J. ECON. HIST. 803, 803-04 (1989) (arguing that “the sovereign or government must not merely establish the relevant set of rights, but must make a credible commitment to them,” and does this “by being constrained to obey a set of rules that do not permit leeway for violating commitments”).

²⁵² North and Weingast’s view, though, likely imputes intentional human agency where none in fact existed. Jon Elster, *Don’t Burn Your Bridge Before You Come to It: Some Ambiguities and Complexities of Precommitment*, 81 TEX. L. REV. 1751, 1785 (2003).

²⁵³ For an exploration of this dynamic in respect to contemporary American law, see Aziz Z. Huq, *Property Against Legality: Takings after Cedar Point*, 101 VA. L. REV. – (forthcoming 2023) [hereinafter “Huq, *Property against Legality*”]; see also JEREMY WALDRON, THE RULE OF LAW AND THE MEASURE OF PROPERTY 61-65 (2012) (developing a similar point).

A different possibility is that law is necessary but not sufficient for the constraint of power. It thus may provide the intellectual template through which such constraint can emerge. In one of her earlier works, Pirie gestures at this claim. She suggests that the “process of abstraction” embedded in law’s systematicity “led to the crucial distinction between person and office” and hence “between the rule of law and the rule of man.”²⁵⁴ On Joseph Streyer’s famous account of the state’s emergence, however, the impersonality enabled by law is not so much the handmaiden of legality as an instrumentality of state power, and a result of the latter’s emergence.²⁵⁵ Similarly, on Quentin Skinner’s view, it is only at the end of the sixteenth century, as marked out by the publication of Bodin’s *Six livres de le republique*, that jurists start to write of “something of more impersonal significance that rulers must preserve if they wish to avoid a coup d’etat.”²⁵⁶ The abstraction of law in Bodin, as in the work of Hobbes a century later, does not mark out any constraint on those wielding power. It only emerges in the wake of the absolute state, and is hence perfectly consistent with tyrannical power.

In a more speculative vein, it could be imagined that the creation of the impersonal idea of the state may be associated with the emergence of certain dispositions necessary for legality—sentiments such as loyalty, bureaucratic neutrality, and a distaste for nepotism. In this way, law mediates the emergence of bureaucracy of a certain timbre to work as a constraint on state power. I am skeptical. None of those qualities seems to me adequate on their own to impose any predictable friction on the flexing of state power. As Hannah Arendt’s meditation on the Eichmann trial suggested, loyalty to an abstract institution and bureaucratic orientation toward the diligent execution of policy choices—shorn entirely of extra-institutional moral reflection—can facilitate even the worst in humanity.²⁵⁷ Even the mundane operation of supposedly benign regulatory agencies can lead to undesirable kinds of mission creep.²⁵⁸

Pirie’s most categorical assertion of the connection between law and constrained power comes, revealingly, at the end of a chapter on the procedures for ascertaining truthful testimony, whether by ordeal or oath, over time. In most legal systems, she says, “the laws ... defined and limited how power should be exercised.... This is the rule of law”²⁵⁹ In her conclusion, she repeats that “laws set out a vision that people believe in [and] can ... be used against any power holder who tries to ignore them.”²⁶⁰ Alas, I do not see what in her amplitudinous and eloquent history supports that optimism. So while I share Pirie’s professional desire to assign what I do and teach the secure rank of a moral benediction, there is scant evidence that in its actual operation, the law will often or always be used against “any power holder,” or even that it tends to be used as such with the overall effect of bending the arc of power toward humanity. Nor am I certain that it is a “recurrent feature[]”²⁶¹ of the law as polythetic category to achieve this salutary effect. Societies are too varied, the ambitions of “power” too plural, and the vagaries of social forms too inconstant to find comfortable berth in

²⁵⁴ Pirie, *Law before Government*, *supra* note 32, at 221.

²⁵⁵ See STREYER, *supra* note 88, at 6 (describing the origin of the state in terms of “the formation of impersonal, relatively permanent political institutions”).

²⁵⁶ Skinner, *supra* note 80, at 328.

²⁵⁷ HANNAH ARENDT, EICHMANN IN JERUSALEM: A REPORT ON THE BANALITY OF EVIL 287 (1992) (“Except for an extraordinary diligence in looking after his own personal advancement, [Eichmann] had no motives at all.”); see also ZYGMUNT BAUMAN, MODERNITY AND THE HOLOCAUST 41 (1st ed. 1989) (exploring how crimes have been a “conspicuous feature of modern bureaucracies” existing so as to “dissociate evil from human motives”).

²⁵⁸ For a criticism in this register, see Jacob Gersen & Jeannie Suk, *The Sex Bureaucracy*, 104 CALIF. L. REV. 881, 883-84 (2016).

²⁵⁹ PIRIE, RULE OF LAWS, *supra* note 30, at 311.

²⁶⁰ *Id.* at 453.

²⁶¹ PIRIE, ANTHROPOLOGY OF LAW, *supra* note 32, at 9.

that certitude. Instead, the best we can do is to acknowledge, with regret, that the broader history Pirie recounts provides surprisingly limited evidence of this constraining effect on “power”, however that term is defined.

There is a second basis for concern about Pirie’s optimism, as well as Fuller’s claim about “reciprocity,” buried here: There is no reason to think that the existence of law creates expectations or beliefs among those subjected to power in ways that can be fairly characterized as ‘reciprocity.’ Where Pirie addresses this question, her evidence cuts against Fuller’s claim. Of Mesopotamian law, for example, Pirie suggests that people “needed laws as resources for justice.”²⁶² She does not back this claim up with any evidence of actual constraint being experienced by Ur Namma or his successors. Writing of medieval Ireland, Pirie postulates that laws “must have given people greater confidence to stand up to authoritarian behavior.”²⁶³ But this again seems doubtful. Isn’t it equally possible that the sight of such clear laws being violated by those in power had a demonstration effect? Rather than spurring people to resistance, they were a manifest and constant reminder of how much less those in power needed to curry favor with law. Law may matter not as a source of moral succor, but as a sound stage for demonstrating the absolute character of a ruler’s power. Nor has the existence of law ever given ordinary, rank-and-file legal officials much aid when it came to manifestly evil regimes: History teaches that judges can be among the first to stumble, head-long and heedless, into the murk of evil, so long as it can be framed in the correct casuistic form.²⁶⁴ We should not expect judges to be heroes. The notion that a legal education furnishes the moral ballast to resist the evil use of power is too strained to warrant serious consideration: Just look around you.

In addition, the centrality of hieratic elites in producing and maintaining law (which is, recall, a recurrent feature of polythetic law) cuts against the idea that law is recurrently characterized by “reciprocity” between the ruler and the ruled. To be sure, the history of law contains moments at which hieratic groups resisted temporal power in ways that may have generated an equilibrium between ruler and ruled.²⁶⁵ But there seem to be an equal number of powerful counterexamples. For instance, Vedic scholars of the Indian subcontinent had influence over the rajputs who depended on scholarly benediction for legitimacy.²⁶⁶ There is little evidence, however, that they used such power for anything other than the selfish goal of reifying social status in the form of a caste system.²⁶⁷ More generally, we should anticipate that hieratic elites will be bent not toward the general good, but rather in the service of their own idiosyncratic and selfish interests. Again, it is rather tempting to suggest that the evidence of legal elites’ moral vacuity, and the futility of expecting legal education to inculcate virtue or goodness, is readily available at any one of today’s elite law schools.

Here again, the example of Chinese law looms large as a counter-example. On Pirie’s account, the Chinese “thought of their law as a system of norms created by their rules to bring order to great empires.”²⁶⁸ Under the sign of Confucian conformity to familial and social

²⁶² *Id.* at 43.

²⁶³ *Id.* at 183.

²⁶⁴ On the “exasperating” failure of even non-Nazi judges to resist evil orders under the Hitler regime, see Karl Loewenstein, *Reconstruction of the Administration of Justice in American-Occupied Germany*, 61 HARV. L. REV. 419, 432 (1947).

²⁶⁵ PIRIE, RULE OF LAWS, *supra* note 30, at 139 (arguing that uluma of the Abbasid caliphate “insisted on the rule of law” as against “powerful caliph[s]”); *id.* at 114 (same for Roman orators such as Cicero); *id.* at 349 (rule-of-law criticism of British imperialism).

²⁶⁶ *Id.* at 206.

²⁶⁷ *Id.* at 64-65.

²⁶⁸ *Id.* at 95.

hierarchy, emperors could successfully resist the “possibility that they could be judged by their own rules.”²⁶⁹ Instead of reciprocity, the “Legalist Confucian” model that characterized Chinese law for two millennia was characterized by an “ideal of political meritocracy.”²⁷⁰ Today, the Chinese political leadership, comprising the Chinese Communist Party and its leadership, are not constrained by law in the reciprocal sense Fuller suggests.²⁷¹ Contemporary Chinese law “simply does not attempt” to constrain state power, even as it aims to use law to achieve policy ends.²⁷² Some commentators suggest that social endorsement of law might eventually generate “political” constraints on the Party.²⁷³ But to me that seems at best a dim and distant aspiration.

More weakly, law, as a matter of historical regularity, has been associated with normative assertion in the sense that it is a vehicle for making moral claims either on behalf of a ruling power, or as between members of the same society. It is, in other words, a social technique for evaluative denotation: It is the standard-form vocative prestidigitation by which an ‘is’ can be offered as if it were an ‘ought.’ Legal enactments work as verbal vessels for normativity whether or not the morality in question is spurious or malign, and without regard to whatever blood and dirt encrust the vessel’s lips. In Green’s words, law “contains obligation-imposing norms” and as such has “moral pretensions.”²⁷⁴ But to recognize as much is to say “nothing about their soundness.”²⁷⁵ The social technique of law, indeed, may engender a bespoke “political ideology” of “legalism,” which “holds moral conduct to be a matter of rule following, and moral relationships to consist of duties and rights determined by rules.”²⁷⁶ While legalism can be a “civilized” ambition, stabilizing an aspiration toward “decent government,”²⁷⁷ it can also work great harm, even evil if it enables participants in the legal system to forego their own moral judgments.

By demonstrating the heterogeneity of moral commitments advanced through law, in short, Pirie’s account gives us reasons to be highly skeptical of claims that morality works as a necessary condition precedent for ranking either a particular rule or a system as a whole as “law.” Her account confirms Hart’s view that the benefits of the rule of law can be made available on a “quite restrictive or discriminatory basis.”²⁷⁸ Indeed, the evidence that Pirie marshals ultimately cuts against her own claim that laws have always “defined and limited how power should be exercised” to produce “the rule of law.”²⁷⁹

²⁶⁹ *Id.* at 96; accord GLENN, *supra* note 42, at 324.

²⁷⁰ DANIEL A. BELL AND WANG PEI, JUST HIERARCHY: WHY SOCIAL HIERARCHIES MATTER IN CHINA AND THE REST OF THE WORLD 72 (2020); *id.* at 74 (arguing that this ideal is “endorsed by the vast majority of the people”).

²⁷¹ Taisu Zhang and Tom Ginsburg, *China’s turn toward law*, 59 VA. J. INT’L L. 306, 316 (2019).

²⁷² *Id.* at 316-17; accord Ruiping Ye, *Shifting meanings of fazhi and China’s journey toward socialist rule of law*, 19 INT’L J. CONST’L L. 1859, 1881 (2021) (“The Party promises to rule according to law, but one way of achieving this is to change the law rather than change the style of ruling.”).

²⁷³ Zhang & Ginsburg, *supra* note 271, at 317.

²⁷⁴ Green, *Inseparability*, *supra* note 238, at 1048-49.

²⁷⁵ *Id.*

²⁷⁶ JUDITH N. SHKLAR, LEGALISM: LAW, MORALS, AND POLITICAL TRIALS 1, 5 (1986).

²⁷⁷ Judith N. Shklar, *In Defense of Legalism*, 19 J. LEGAL EDUC. 19, 19 (1960).

²⁷⁸ Waldron, *All We Like Sheep* *supra* note 218, at 174.

²⁷⁹ PIRIE, RULE OF LAWS, *supra* note 30, at 311.

IV. Law as Polythetic Category in Practice

It is hardly news that the aspiration toward legality in its most public-facing form confronts many obstacles today.²⁸⁰ This Part takes up one such question. Violent crime and state lawlessness in crime control both have intimate, if complex, historical, ideological, and material connections to racial dynamics.²⁸¹ It is therefore appropriate to ask whether a polythetic account usefully sheds light on law's relation to racial dynamics, and its capacity to mitigate social pathologies linked to race.

The polythetic account of law I have refined from Pirie's research works at a very high level of generality. It would be wrong, even absurd, to try and illuminate variation within the United States, or across decades of its history, with a category crafted to work across national (and imperial) boundaries, and over centuries and millennia. A synthetic category designed to encompass variation within the taxon of law can't do much to illuminate the different ways in which law can be deployed either to advance or undermine projects of racial hierarchy under specific historical circumstances. Most immediately useful on this score is a historically grounded approach aiming to excavate the conditions under which legal institutions emerge. A recent book by historian Elizabeth Hinton develops a sharp account of the conditions under which both private and state violence emerge.²⁸² Recent work by Alice Ristroph and David Sklansky engages the important questions of how violence has been imagined as a problem in the recent American past, with special attention to the roles of race and gender.²⁸³ Perhaps the most pertinent example of this genre is Paul Gowder's recent book, which offers a "panoptic view of the American rule of law and its connection to the borders of membership" taking account of racial dynamics.²⁸⁴

On Gowder's view, law has been constitutive of the social forces that have generated a subaltern classification of Blackness in the United States. At the threshold, he stresses the economic centrality of slavery, which "challenge[d]" the rule of law through its propulsive pressure toward expansion.²⁸⁵ Here, he adopts David Brion Davis's view of slavery as a fundamentally legal institution.²⁸⁶ Property, often seen as central to the rule of law,²⁸⁷ provided an unraveling vector of anti-legality in the antebellum era. He then stresses the 1850 Fugitive Slave Act,²⁸⁸ but gives surprisingly short shrift to post-Reconstruction state and federal laws

²⁸⁰ See *supra* text accompanying notes 3 to 4.

²⁸¹ On the erasure of these connections in the core of criminal-justice discourse, see Alice Ristroph, *The Curriculum of the Carceral State*, 120 COLUM. L. REV. 1631, 1674 (2020) ("Rather than confronting the question of racial judgment within "substantive" criminal law itself, in teaching affirmative defenses and inchoate offenses the curriculum portrays racial bias as the property of an errant individual.").

²⁸² ELIZABETH HINTON, *AMERICA ON FIRE: THE UNTOLD STORY OF POLICE VIOLENCE AND BLACK REBELLION SINCE THE 1960s* (2021).

²⁸³ See Alice Ristroph, *Criminal Law in the Shadow of Violence*, 62 ALA. L. REV. 571 (2011); DAVID ALAN SKLANSKY, *A PATTERN OF VIOLENCE: HOW THE LAW CLASSIFIES CRIMES AND WHAT IT MEANS FOR JUSTICE* (2021).

²⁸⁴ GOWDER, *supra* note 4, at 17.

²⁸⁵ *Id.* at 40; *id.* at 49 (noting the interaction of economic incentives, the law of property, and "settler republicanism").

²⁸⁶ "Traditional definitions of slavery" have stressed a legal relation—that "the slave's person is the chattel property of another man or woman. DAVID BRION DAVIS, *INHUMAN BONDAGE: THE RISE AND FALL OF SLAVERY IN THE NEW WORLD* 30 (2006). *But cf.* ORLANDO PATTERSON, *SLAVERY AND SOCIAL DEATH: A COMPARATIVE STUDY* 32 (1982) ("The cardinal attribute of the condition of slavery was that the slave was a person subject to domination.").

²⁸⁷ See Huq, *Property against Legality*, *supra* note 253, at 1-2 (collecting sources to this effect, and developing an argument that property rights can pose a threat to legality principles).

²⁸⁸ GOWDER, *supra* note 4, at 54-56.

that worked to maintain the color line.²⁸⁹ Like many other scholars, Gowder also notes that the breadth of contemporary criminal law invites dangerous discretion without effective ex post checks on illegal force.²⁹⁰ On the other side of the ledger, Gowder underscores the legal creativity of Blacks, even at moments of intense social and political stress, in articulating claims to “equal legal rights and full citizenship.”²⁹¹

The value of an intervention such as Gowder’s is its particular tracing of how law and racial hierarchy interact. Specific engagement with this circuit begets skepticism. American law, he concludes, lacks “tools necessary to effectively control the abuse of power.”²⁹² Time and again, popular demands for reform pressed by Black and brown interests are (when successful) litigated out of existence,²⁹³ or simply ignored.²⁹⁴

What an account such as Gowder’s cannot offer, however, is an evaluation of law’s immanent potential as an instrument for or against racial hierarchy. It is hard to tell, for example, whether the dismaying trajectory he traces might have yielded different, less racially iniquitous developments, or whether the Slaveholders had so “vast [a] breadth and fierce confidence of political vision” that they would have always overwhelmed any rectificatory project advanced through law in the early Republic,²⁹⁵ or whether the causal springs of oppression lay yet deeper still. Gowder hence does not help us understand whether the choice to use law, as opposed to other techniques of social organizations, conduces to hierarchy or equitable social structures.²⁹⁶ He does not ask how recurrent social features of law either conduce to or inhabit racial reform. It is here that the polythetic account of law can make a contribution, although I think the insight here is very modest. By drawing attention to the recurrent elements of law, that account tees up the question of law’s general orientation toward projects or hierarchy or reconstruction. Corroborating Gowder’s generally pessimistic conclusions, a pursuit of that question does not suggest strong reasons for threshold optimism about law. Headwinds against racial reform are instead woven tightly into law’s warp and woof.

How then does the polythetic account bear on law’s relation to projects of emancipatory racial reform? Recall once more that this definition picks out, inter alia, a characteristic discourse (of analogy and casuistry) and the hegemonic power of a small elite. These features counsel for pessimism, in the long term at least, about law’s redemptive potential.²⁹⁷

²⁸⁹ See Aziz. Z. Huq, *The Private Suppression of Constitutional Rights*, -- TEX. L. REV. – (forthcoming 2023) (discussing Jim Crow contract law, and then the legal infrastructure of housing law, as instruments for the maintenance of structural subordination).

²⁹⁰ GOWDER, *supra* note 4, at 116-21.

²⁹¹ *Id.* at 71-72; *id.* at 78-79 (discussing role of Black activists in the welfare rights movement).

²⁹² *Id.* at 175.

²⁹³ *Id.* at 89-95 (discussing early, unraveling judicial constructions of the Reconstruction Amendments).

²⁹⁴ See Aziz Z. Huq, Robert Vargas, and Caitlin Loftus, *Governing Through Gun Crime: How Chicago Funded Police After the 2020 BLM Protests*, 134 HARV. L. REV. F. – (forthcoming 2022) (documenting strategies used to deflect the Black Lives Matter protest demands in Chicago).

²⁹⁵ MATTHEW KARP, THIS VAST SOUTHERN EMPIRE: SLAVEHOLDERS AT THE HELM OF AMERICAN FOREIGN POLICY 256 (2016).

²⁹⁶ In particular, Gowder might have said more about the way in which “the sexualized violence against, and captivity of, Black people” constituted “conditions of possibility” for basic elements of the American constitutional order, such as our system of presidential elections. FRANK B. WILDERSON III, AFROPESSIMISM 197 (2020). The ability to inter such “conditions of possibility” while advancing a putatively race-neutral discourse of constitutional originalism is, I think, possible only in an ethical context characterized by legalism in Shklar’s pejorative sense. SHKLAR, *supra* note 276, at 5.

²⁹⁷ A broader view of what “law” is, which took into account the sorts of social ordering to which legal pluralists are attentive, would have a different answer to this inquiry. But the broader a definition of what law is, the more

First, law is an intellectual system characterized by casuistic and analogic reasoning. It relies on general categories as a means of pushing beyond specific cases.²⁹⁸ This tendency toward abstraction makes it a capacious vessel for hierarchy-creating projects because it tilts attention away from the specifics of human individuality, corporeality, and experience. Race is not a natural or biological kind. It reflects, and helps to create, a knot of unequal, often harmful social relations.²⁹⁹ The moral implications of race cannot be grasped without attention to the specific harms, the particular indignities and despoilings, that historically embed and embody racial categories. But legal terminology and forms of argumentation offer an embarrassing array of opportunities for self-exculpation, evasion, and obfuscation.³⁰⁰ The very possibility of abstraction creates, that is, a risk that the moral wrong associated with race will be missed or purposefully avoided. To do law is thus, in some measure, to extricate oneself from the realm of human pain and hurt wherein the harms of domination and subjugation are realized. Formality and casuistry in reasoning can instead conduce to a numbing of the moral sense in favor of a morally arid form of legalism.

Second, the taxon of race needs to be stabilized and propagated through society because it lacks a biological or presocial predicate. It must be systematized across different parts of the social field. An intellectual system that operates by fashioning durable abstractions upon which power can be applied is, in a very obvious sense, well adapted to that task. And the casuistic nature of legal reasoning means that the law may be well adapted to the creation of racial categories through its ability to produce and disseminate taxonomizing nomenclatures. It is, indeed, well established that law and legal institutions have played an important role in stabilizing and disseminating racial categories though “the extension of racial meaning to ... previously racially unclassified relationship[s], social practice[s and] group[s].”³⁰¹ Of course, many of the instrumentalities of “racist” regimes work primarily through law.³⁰² But even when a court adjudicates a racial discrimination matter, it necessarily makes determinations of racial identity. It hence reifies categories of racial identity.³⁰³

Third, it is plausible to think that law is better able to create than reverse racial hierarchies. Law, which is organized around casuistry and analogy, is suited to the reification of social categories such as race. It is likely less effective at dissolving those categories once they

vacuous becomes any claim of causal efficacy. If law is (almost) everything, that is, it would be a bit silly to ask whether law had a causal effect.

²⁹⁸ See *supra* text accompanying notes 105 to 124.

²⁹⁹ Sally Haslanger, *Gender and Race: (What) Are They? (What) Do We Want Them To Be?*, 34 *NOUS* 31, 44 (2000) (noting that a race is a group “demarcated by the geographical associations accompanying perceived body type, when those associations take on evaluative significance concerning how members of the group should be viewed and treated... .”); see also DON HERZOG, *POISONING THE MINDS OF THE LOWER ORDERS* 283-99 (1998) (discussing different conceptions of race).

³⁰⁰ The classic study, of course, is ROBERT COVER, *JUSTICE ACCUSED* (1980).

³⁰¹ MICHAEL OMI & HOWARD WINANT, *RACIAL FORMATION IN THE UNITED STATES* 111 (3d ed. 2015); see also Neil Gotanda, *A Critique of "Our Constitution in Color-Blind"*, 44 *STAN. L. REV.* 1, 35 (1991) (discussing the “statutory histories of state racial classification schemes”); IAN HANEY LÓPEZ, *WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE* 6 (1996) (same); Ariela J. Gross, *Litigating Whiteness: Trials of Racial Determination in the Nineteenth-Century South*, 108 *YALE L.J.* 109 (1998). Justices, however, have “consistently distanced the Court and the law from responsibility for upholding racism and racist policies.” Kathryn Stanchi, *The Rhetoric of Racism in the United States Supreme Court*, 62 *B.C. L. REV.* 1251, 1254 (2021)

³⁰² GEORGE M. FREDERICKSON, *RACISM: A SHORT HISTORY* 100-01 (2002) (listing the “distinguishing features of an overtly racist regime,” almost all of which take the form of laws).

³⁰³ Richard R.W. Brooks, *Incorporating Race*, 106 *COLUM. L. REV.* 2023, 2091 (2006) (“But can there be court recognition of race without court production of race? Of course not”).

have become encumbered with material correlates.³⁰⁴ Once created, law's categories may be sticky. The close linkage between law and a hieratic elite implies that there will often not be sufficient motivation to decouple law from hierarchy's creation and maintenance. To be sure, other potential roles for law are bidirectional. For instance, law can play a role in both in concentrating and distributing the material advantages (e.g., schooling, housing, and a clean environment) and material encumbrances (e.g., convictions, removal orders) that partially constitute race. But my point is simply that law may have *more* tools for creating than eroding hierarchy.

Fourth, law is associated as a sociological matter with a hieratic elite that is responsible for generating and maintaining its integrity as an intellectual system. It thus tends to be produced by a social elite, rather than by the population as a whole. It does not arise through anything akin to all-encompassing social contracts imagined by thinkers such as Hobbes and Rousseau. That hieratic elite, moreover, is likely to have interests that diverge systematically from those of the balance of the polity. In the case of the Vedic tradition, for example, the hieratic elite directly engaged in the production of legal justification and infrastructure for a caste system.³⁰⁵ In perhaps the most influential treatment of intellectuals' role in politics, the Italian theorist Antonio Gramsci suggested that the "major part of intellectual activities" in European history had been "ecclesiastical," with interests quite distinct from those of the population as a whole.³⁰⁶ Gramsci imagined the possibility of a new class of "organic" intellectuals capable of standing alongside working people.³⁰⁷ But that vision, whatever its merits, never came to pass. Instead, legal intellectuals are more akin to Jeremy Bentham's "Judge and Co.," who "care for the rest of the mass of suffering ... what a steam-engine would care for the condition of a human body pressed or pounded by it."³⁰⁸ It would, with this history in mind, be surprisingly if the social technology of law, so reliant upon the actions and choices of a small elite, tended often or easily toward emancipatory projects benefiting all.

For similar reasons, I am rather skeptical of the notion that law exercises a beneficial effect merely through the regularizing force of procedural regularity.³⁰⁹ On this view, the fact of writing down rules, and then having a judiciary to apply them, will generate good outcomes more often than not. But it is not just that this "conveyer-belt" theory of law is implausible given the insights generated by the polythetic theory of law. It is also that the history Pirie recounts offers little basis for confidence that the hieratic elites responsible for husbanding the

³⁰⁴ It is not dispositive, but the history of colorblindness as an equality principle casts doubt on the ability of courts to dissolve racial categories by the simple expedient of ignoring that. See Reva B. Siegel, *Discrimination in the Eyes of the Law: How "Color Blindness" Discourse Disrupts and Rationalizes Social Stratification*, 88 CALIF. L. REV. 77, 85 (2000) (exploring ways in which "the discourse of color blindness itself works to disrupt and to rationalize the practices that sustain group inequality"); Ian F. Haney López, "A Nation of Minorities": *Race, Ethnicity, and Reactionary Colorblindness*, 59 STAN. L. REV. 985, 988 (2007) (defining and criticizing "reactionary colorblindness" as "an anticlassification understanding of the Equal Protection Clause that accords race-conscious remedies and racial subjugation the same level of constitutional hostility").

³⁰⁵ PIRIE, *RULE OF LAWS*, *supra* note 30, at 206.

³⁰⁶ ANTONIO GRAMSCI, *SELECTIONS FROM THE PRISON NOTEBOOKS* 17 (Q. Hoare & G. Nowell Smith eds., 1971); *id.* at 11 (suggesting that intellectuals traditionally arose from the "petty and middle landed bourgeoisie and certain strata of the petty and middle urban bourgeoisie").

³⁰⁷ *Id.* at 15-16.

³⁰⁸ Jeremy Bentham, *Scotch Reform, Real Property, Codification Petitions, Petition of Justice* in *THE WORKS OF JEREMY BENTHAM* (William Tait ed., 1843), <https://oll.libertyfund.org/title/bowring-the-works-of-jeremy-bentham-vol-5-scotch-reform-real-property-codification-petitions>

³⁰⁹ The best known version of this argument is Fuller's claim about the "inner morality" of the law. Fuller, *supra* note 34, at 558-59.

law will be anything more than sporadically attentive to the interests of a larger population that might be advanced through law's regularity or predictability.

I do not want to be misunderstood to suggest that law can *never* be a vehicle for racial progress. That would be false. Rather, my more modest claim is that the social facts that ordinarily make up law are such that any effort at its deployment toward racial justice will face a built-in headwind. So an aspiration that “reason would someday become the currency of law”³¹⁰ may well be noble and even life-sustaining. But it is also an assertion of hope *against* experience—the important, life-sustaining illusion that this time, just this one time in *your* lifetime and not that of your children or their children, justice and legality will rhyme.

Conclusion

Law has had a four-thousand year run. As technologies go, this is not a bad life course, and not a bad time for a reckoning. Drawing on that history, *The Rule of Laws* offers readers a foundation for thinking closely about how law operates, and how it enables our moral best and worst. It illuminates several ways in which the intuitive conveyor belt model of law—which I discern beneath much modern thought about the law—misses the mark. It also helps us see how law's achievements ordering social and political life are irremediably intertwined with its costs. Law has been a vessel for preserving peoples and *gemeinschaft* against exile, loss, and conquest; but it is also a scalpel to craft social and racial caste, and a bludgeon for empire built on the Tigris, the Ganges, the Dnieper, or the Potomac. Trying to unravel the harm it inflicts from the productive human flourishing it enables is a Sisyphean task.

Law's history also illuminates a chasm looming between the proud ambition of law respecting the constraint on power and its reality. Even if law is a necessarily normative enterprise, its normative constrain can be weak. As an instrument of Judith Shklar's “liberalism of fear” is inadequate, at least standing on its own.³¹¹ To tie one's hope for a decent respect for humanity to the mast of law, therefore, seems vain. Instead, with Auden again, it might be better to “at least confine / Your vanity and mine,”³¹² to more timid claims, tendered closely to historical experience, on law's behalf. What advocates for a more just social order can reasonably hope for from law is a rather modest matter.

Yet after four thousand years, the end of law is, perhaps, in sight. Machine-leaning tools can, and increasingly are, deployed to extract correlations and associations from existing data. They can now not only displace frontline enforcement discretion, but also produce “personalized” legal rules³¹³ and displace judges.³¹⁴ Some of these predictions are more plausible than others.³¹⁵ There is no iron command of history directing the adoption and dissemination of new technologies: *The Rule of Laws*, indeed, is testament enough to the variable and uncertain path that technological adoption can take. Yet, if the most ambitious of the

³¹⁰ Mark Tushnet, *Thurgood Marshall and the Rule of Law*, 35 HOWARD L.J. 13, 22 (1991).

³¹¹ Judith Shklar, *The liberalism of fear*, in POLITICAL LIBERALISM: VARIATIONS ON A THEME 149, 156-57 (Nancy L. Rosenblum, ed., 1989).

³¹² Auden, *supra* note 9, at 97-98.

³¹³ OMRI BEN-SHAHAR AND ARIEL PORAT, PERSONALIZED LAW: DIFFERENT RULES FOR DIFFERENT PEOPLE (2021).

³¹⁴ Eugene Volokh, *Chief justice robots*, 68 DUKE L.J. 1135 (2018).

³¹⁵ For what is (I hope) a more measured view of the prospects of displacing human-crafted law with machine-refined tools, see Mariano-Florentino Cuéllar and Aziz Z. Huq, *The Democratic Regulation of AI*, KNIGHT FIRST AMENDMENT INSTITUTE AT COLUMBIA UNIVERSITY (Jan. 31, 2022), <https://knightcolumbia.org/content/the-democratic-regulation-of-artificial-intelligence>.

technologists' predictions come to pass, law will no longer necessarily be an intellectual system crafted by a hieratic elite contingently bound to the state. The cost functions of contemporary machine-learning tools cannot be reduced to writing. Those tools are distinct precisely because they write their own rules, rather than being given a functional form to apply. And once implemented, they displace the casuistic and analogic reasoning that has characterized legal elites for thousands of years. The question invited by power, and the project of its supposed constraint, will necessarily modulate.

I am not sure we have learned enough about how law fails as it succeeds, or prevails through disaster, to predict with confidence how this new technique for knowing and shaping the social order will unfold. By looking backward with such acuity, *The Rule of Laws* offers a surer ground for that endeavor, just as it helps us see better the limits and self-delusions of our own craft.