Chapter 3

Generality and hierarchy

In this chapter, I will use the conception of generality from the previous chapter to make sense of the way that the rule of law helps us understand hierarchical subordination in the real world. As will be seen, the principle of generality makes demands not only of legal systems, but of the entire basic structure of a state that organizes itself through law. Establishing true legal equality is not easy, but it turns out to be of more than merely formal value.

I THE LITERACY TESTS: A MODEL OF NONGENERAL LAW

I will flesh out the demands of the principle of generality through an examination of the Jim Crow literacy tests that were used to exclude African Americans from the ballot box. For analytic purposes, we may assume, counterfactually, that they were evenhandedly implemented across races. Nonetheless, I claim that the public reason conception of generality would have condemned even fairly administered literacy tests in the social context of the Jim Crow South.

Begin with some intuition. As we today interpret our history, the literacy tests could only be understood as insults to the freed slaves and their descendants, whose equal citizenship had supposedly been acknowledged by the Reconstruction amendments. By making this acknowledgment into a lie, the literacy tests implied that no matter what the Constitution said, they would never be full members of the political community.[1]

Because the enactment of the literacy tests unavoidably carried that message, the distinctions they drew between the literate and the illiterate were unjustifiable by public reasons. Consequently, the laws were not general.

Thus, at least, is the intuition. Someone might object and deny that the literacy tests carried any such message. While unfortunate, our objector might suggest that the literacy tests just so happened to pick out freed slaves for disenfranchisement; they need not carry any social meaning about their less than full citizenship.

Further pressing this objection, one might point out that we could imagine all kinds of benign literacy tests. Were a public reason available for the literacy tests from each of the first-, second-, and third-person standpoints, then they would not have *unavoidably* carried the inegalitarian expressive content.

Indeed, in the abstract, there are many plausible arguments that lead to the conclusion that one ought to have literacy tests for the exercise of the franchise. For example, there are some epistemic arguments for democracy in which democratic institutions are justified by their propensity to reach better decisions, along the lines of the Condorcet jury theorem. But for the Condorcet jury theorem to entail that democracies make better decisions than plausible alternatives, individual voters must tend, on the whole, to have a greater than .5 probability of coming to the right answer. A literacy test could usefully eliminate the voters with the lowest probability of correctness, since voting well may depend on access to complex (written) information about public policy.

This sort of argument isn't limited to those who think democracy is justified by its alleged decision-improving properties. Anyone who thinks it matters, morally, whether political decisions lead to nonfoolish policy has at least prima facie reason to want the least competent citizens to stay home, even if that reason is ultimately outweighed by countervailing considerations relating to, for example, autonomy, pluralism, the civic educational value of political participation, or the like. Take an easy example: I imagine that many readers will agree with me that it would be simply better if the members of the Ku Klux Klan kept out of the voting booth, not just because they are evil, but also because they are incompetent: they hold culpably false beliefs about race, and voting based on those beliefs does harm to the community as a whole. More generally, Jason Brennan has plausibly argued that those unwilling to put in the effort to become educated about public policy have a moral duty not to vote.[2] Literacy is a plausible proxy for minimal effort and competence.

Moreover, literacy tests may have useful indirect effects. Mill made the basic case for some kind of educational qualification for the exercise of the franchise, based on three considerations: (1) the franchise "is power over others," and ought to be exercised only by those who are qualified; (2) it would provide an incentive to acquire an education; and (3) it would communicate to the public at large that the vote is a trust to be used not for the voter's self-interest, but in the interest of the community at large.[3]

Mill's argument, in addition to being plausible, is at least apparently consistent with public reason: all three reasons could be offered to every citizen, even those thus excluded from the franchise, consistent with understanding them as equal citizens.

Importantly, Mill was clear that the state may impose only such educational qualifications as "can be fairly regarded as within the reach of every one."[4] By offering citizens the means to acquire the education necessary to the franchise (or at least conditioning disenfranchisement on their access to it), a Millian state

recognizes their legitimate stake in the polity, and attaches disenfranchisement only to choices (a) in which the public as a whole has a stake and (b) that are in the control of the disenfranchised.

By contrast, the American states that implemented literacy tests did not recognize the freed slaves' and their descendants' stakes in it by offering them the means to become qualified to vote. Quite the contrary: freed slaves had been denied an education.[5] And their descendants continued to be given inferior educations in segregated schools.

The literacy test, in the context of gross educational inequality, expressed not the civic responsibility of those denied the franchise but the state's opinion about their innate inferiority. We find this expressive content from the second-person standpoint, by following the method described in the previous chapter. Because they had been denied literacy, freed slaves and their descendants could not understand the literacy test as helping them fulfill their duty to be competent voters. And the community at large could not attribute any such understanding to them. This is so thanks to the basic normative principle of "ought implies can" (with a qualification to be described in a moment). They had been deprived of the means of becoming literate, therefore they had no such duty. In a world in which they could not be charged with a duty to be literate, African-American citizens could only have taken the laws as helping them act in accordance with reasons that already applied to them if those reasons were derived from some intrinsic duty to not vote – not because of their contingent failures to satisfy a duty of literacy but because of their inherent unsuitability for the franchise – a belief that, of course, was already manifestly present in the political culture.

Before moving on, I pause to describe the qualification to "ought implies can" promised a couple paragraphs ago. A law forbidding the blind from driving is obviously justifiable by public reasons: driving is a dangerous activity, and the blind do not (with current technology) have the capacity to do it safely; not killing people on the roads is a reason that counts for everyone.

But we might worry that a similar argument applies to the literacy tests. Voting is also a dangerous activity. Those who vote badly can contribute to immense human suffering by permitting ruinous wars, environmental destruction, economic collapse, and many other evils; those who lack the capacity to do it safely have reason to stay away from the polls. Notwithstanding the injustice they had suffered, someone might argue that the freed slaves simply lacked the capacity to vote safely.

The difference between the freed slave and the blind driver, however, is that the inability of the blind driver is the result (*ex hypothesi*) of nothing more than bad luck. By contrast, the state and the society at large were attributively responsible for the illiteracy of the freed slaves and their educationally deprived descendants. And this matters, in turn, for the reasons that applied to them. A citizen might have a compelling reason to sacrifice her own interests (e.g., in driving) to spare the rest of society from the ill effects of her bad luck of being blind, but it's much less fair to

demand that she sacrifice her interests to spare the rest of society from the ill effects of a disability that society has imposed on her in the first place.[6]

II THE RULE OF LAW AND SOCIAL FACTS

The foregoing reveals that we can't read a state's compliance with the principle of generality off of the face of its legal texts, or even from observing the relationship between its legal texts and the practices of its officials. In the most abstract statement of this point, because generality is an expressive ideal, and because the expressive content of any legal act is conventional and depends on social meanings that themselves depend on social facts, our evaluation of whether a law is subject to criticism will depend in part on prevailing social conditions when it is in effect.

Moreover, because the correct evaluation of a law depends on social conditions, it can change when those social conditions change. Imagine that the states after the civil war had suddenly become much more liberal, and had begun to offer a decent education to freed slaves. No longer being denied literacy, the freed slaves would no longer have had reason to object to the literacy tests (to repeat, this all assumes, counterfactually, that they were administered honestly and fairly). Ultimately, the principle of generality is an evaluative standard for a relationship between laws and an array of social facts that determine the meanings of those laws.

A *The disjunctive character of rule of law commands*

The rule of law, as a regulative principle for political states, has the power to generate at least defeasible (if not absolute) demands for its obedience. The discussion thus far has revealed a perhaps unintuitive property of this demand: it need not be a demand for the state to change anything about its legal system. Rather, it might be a demand for the state to remedy the unequal social circumstances that make its laws objectionable from the standpoint of the rule of law.

More formally, since a law is criticizable for violating the rule of law requirement that the laws be general when that law, in the social circumstances in which it is found, is not justifiable by public reasons, it follows that in order for a state to make an objectionable law comply with the rule of law, either it can abolish the law in question or it can remedy the social circumstances (usually injustices, social hierarchies) that make it objectionable. Thus, the rule of law issued a disjunctive demand to the Jim Crow South: get rid of the literacy tests, or provide African Americans with a decent education.

III THE RULE OF LAW AND THE CRIMINALIZATION OF POVERTY

Now let us move from race to class and consider Anatole France's sarcastic jibe against the law's vain pretense of equality: "The law, in its majestic equality, forbids

the rich and the poor alike to sleep under bridges, to beg in the streets, and to steal bread."[7] France's point seems to be that the laws forbidding vagrancy, begging, and theft are not general.

It's easy to agree with France. In the context of extreme poverty, those laws leave some citizens no realistic choice but to commit the very acts that have been made criminal. Hence the contemporary critique of "the criminalization of poverty,"[8] a phrase that accurately expresses the fact that a law that forbids the very poor from sleeping on the street, in a community in which some are unable to acquire anywhere else to sleep and a species in which one must sleep, is really the same thing as a law making it a crime to be poor – much like the literacy tests were really laws making blackness a disqualification for citizenship. Under such circumstances, the connection between criminal punishment and responsibility is broken, and the state expresses the scolding disapproval that goes along with criminal punishment against those citizens for something that is wholly out of their control. *No matter what you do, you're a criminal just for being alive* is the message sent to the very poor. This is a "status crime" in two senses: it criminalizes the status of poverty, and it uses criminalization to reinforce the subordinated status of those who are poor.

This insult is reaffirmed in the minute daily interactions of the poor with the state. The case of the homeless is instructive. If one is homeless and there are vagrancy laws, then merely to go to sleep is to be in constant danger of being turfed out of the "bed" one has made in some public space and chased away like a stray dog or a disobedient child. Being, of necessity, always engaged in lawbreaking, the homeless are constantly subject to state coercion at the will of any official who comes along and wishes to wield it. The homeless are perhaps exceeded only by those in total institutions like prisons and military barracks in the extent to which they can be ordered about.[9] And every such interaction is a further blow to the dignity of the citizen who is constantly told that his very presence in a public place and his satisfaction of the basic needs of human existence are objectionable to his fellows.

The structures of the second-person expressive content of the laws criminalizing poverty are identical to those of the literacy tests. In each case, an otherwise potentially permissible law becomes nongeneral because the regulated citizen cannot understand it as authoritative without accepting his or her own inferiority. And in each case, this failure of authority comes as a result of the fact that the reasons to which the law would ordinarily respond have become unavailable to that citizen. Thus, in the case of the criminalization of poverty, in a society in which some citizens were not reduced to destitution, one could understand the law against sleeping on the street as directed at a preexisting duty not to inconvenience one's fellow citizens in public places by doing so. But "ought implies can" again arises, where some citizens are destitute, to vitiate the preexisting duty not to sleep on the street. Everyone must sleep to exist; if destitute citizens are to sleep at all, it must be on the street. Or, evidently, in jail.

Consequently, the only way that a destitute citizen can understand the vagrancy laws as helping her satisfy reasons that already apply to her is if she assumes that her existence itself violates a duty toward her fellow citizens – that is, if she believes that she is contemptible and unfit to be a member of the community. That is the belief the community at large must attribute to her in order to understand the expressive meaning of the vagrancy law in a social context where extreme poverty exists.

Not only does the criminalization of poverty violate the rule of law on the grounds that it is not general, but it violates perhaps the most uncontroversial and fundamental rule of law requirement as well: the law's commands must be capable of being followed. That requirement is an implication of the principle of regularity, because officials have open threats against any citizen who is unable to follow the law.

Earlier, I argued that the illiteracy of freed slaves gave them no reason not to vote, because society at large was responsible for their illiteracy, not the freed slaves. Likewise, here, the argument depends on the proposition that society at large bears responsibility for extreme poverty in virtue of the way it shapes the economic constraints under which citizens live (the "basic structure," in Rawls's terms), and could do something to alleviate extreme poverty. Those are empirical questions; we need only note for present purposes that they are fairly debatable. The point is that *if* the economy gives some members of the community no practical choice but to sleep under bridges, beg in the streets, and steal bread, and *if* these conditions are in the state's control, then the laws against vagrancy, begging, and theft violate the rule of law.

A *The rule of law critique of economic injustice*

This confers a new dimension on our economic justice discourse. Recall the disjunctive character of rule of law judgments. If Anatole France and I are right that the rule of law prohibits vagrancy and theft laws in the social context of extreme poverty, then it demands an end to one or the other.[10]

States probably ought to have laws against theft. On many accounts, the definition and protection of private property is a defining purpose of political states, and this is one of the chief lines of argument against the anarchist who denies that states are justifiable in the first place.[11] Even a socialist society, though it will not have private property rights in the means of production, might defensibly have private property rights in personal goods – like food.[12] And laws against theft are constitutive of private property rights – without a law forbidding everyone else from taking away my belongings, it would be silly to say that I have a private property right in them in the first place.[13] A state with no law against theft of food may fail so completely in doing what states ought to do that it cannot defend itself against the anarchist critique. There is also a case – albeit significantly weaker – for vagrancy laws, to

the extent those sleeping on the street impose unjustifiable costs on their fellow citizens (a question on which I take no position).

The final step now presents itself. If the rule of law is inconsistent with a law against stealing food in a society in which some must steal in order to eat, and if in consequence the rule of law generates a disjunctive demand to either repeal the law against theft of food or correct the unequal social conditions in which some are starving, and if it would be impermissible for independent reasons to repeal the law against theft of food, then one fork in the disjunctive road must be blocked off. The rule of law generates the demand to put a stop to extreme poverty or abolish the laws against theft. Similar points may be made with respect to vagrancy, and to any other laws that states arguably ought to make, where such laws impose legal condemnation or boundless susceptibility to official coercion on the poor. To the extent we cannot abolish such laws, the rule of law generates the demand to put a stop to extreme poverty.

Kant, of all people, made a very similar argument. As Ripstein explains Kant's analysis, a network of private property rights can deprive one with no access to land of "[t]he innate right to occupy space"; "[i]f private owners are entitled to exclude from their land, and nobody is allowed to live on public highways, the poor could find themselves with no place to go, in the sense that they would do wrong simply by being wherever they happened to be" – that is, the law is impossible to obey.[14] This makes the poor dependent on those with wealth. The legal system is responsible for that dependence: by creating property rights in land and other resources not in the physical possession of their owners, it makes it possible for some to be deprived of the basics of existence, and accordingly to be subject to the unfettered choice of other people, inconsistent with the "rightful honor" (which I would call equal status) of those so subjected.[15] A legal system that permits this is inconsistent with what Ripstein calls the "omnilateral will" that, for Kant, is a prerequisite of sovereign legitimacy. Accordingly, on Kant's argument, the state has a duty to support the poor.

IV IS THIS STILL THE RULE OF LAW?

At this point, it will be helpful to pause to consider an objection, the answer to which will help flesh out the egalitarian conception of the rule of law. I want to claim that those who think themselves committed to the rule of law have also committed themselves to the strong ideas about social equality developed here, but perhaps those who want to resist that argument may simply deny that the strong version of the rule of law is part of what they are committed to. Why not reject generality altogether, or at least treat the strong and the weak versions of the rule of law as two independent principles that need not be accepted or rejected together?

Typically, commentators have thought that the requirement that the law be general is a demand of the rule of law. But, as discussed in the previous chapter, they have thought that this was a formal requirement, involving ideas like law being

written in abstract terms or not containing proper names. And there seems to be a natural affinity between the formal conception of generality and the rest of the rule of law, which I have described as the "weak version": the weak version is distinctively concerned with keeping state officials from abusing their power over citizens, such as by using it to retaliate against those who cross them, and hence force citizens to live in fear; the formal conception of generality can contribute to that end. For example, the rule against proper names can help keep officials from being able to legislate against their enemies. The demand that officials be subject to the same law as everyone else forbids them from giving themselves the right to ignore the personal and property rights of their fellows.

I have argued that the formal conception of generality is incoherent. However, in light of the substantial demands of the substantive conception, and its apparent lack of such a close connection with the weak version, one might think that the appropriate response to the failure of the formal conception isn't to thicken it but to drop the generality principle altogether.

That would be too hasty. There is also a close connection between the substantive principle of generality and the weak version of the rule of law. I have already pointed out one dimension of this connection: the criminalization of poverty not only violates the principle of generality, but also violates the principle traditionally associated with the weak version of the rule of law that the law must be capable of being followed. This isn't a coincidence: all law that creates status crimes will be impossible to follow and will express the social inferiority of those who are subject to it, since none will be able to understand such law as corresponding to reasons that apply to them except insofar as they see themselves as inherently criminal. Put in terms of the weak version of the rule of law, a status crime grants officials open threats against those who are thus criminalized, and such open threats cannot be reconciled with public reason, precisely for the reasons given in Chapter 1: to grant one person such arbitrary coercive power over another is to construct a relationship of hierarchy and subordination between them.

More broadly, the weak version also partially answers a question that the strong version asks. The strong version demands that we give public reasons for all legal distinctions, including the fact that officials have special powers that nonofficials don't have.[16] And the weak version constrains those powers to ensure that public reasons are, in fact, available for them. There are obvious public reasons to create officials with the power to do things like adjudicate civil disputes and put lawbreakers in jail; there are no public reasons to create officials with the power to coerce at whim. As discussed in Chapter 1, such unconstrained power carries with it a message that the one who has it is of hierarchically superior status to those who do not have it. It carries this message in part because it is not justifiable by public reasons, such that those subject to unconstrained power cannot attribute anything other than hierarchical superiority to those who hold it. Anything that violates the weak version also violates the strong version; we can conceive of the weak version as a

special case of the strong version. (This is also part of why a state cannot be general unless it is also regular and public.)

Another point of contact between the strong and the weak versions of the rule of law goes through the idea of arbitrariness. What it means for a decision, or decision maker, to be arbitrary is quite undertheorized. However, one promising candidate for an interpretation of the concept is as a failure of decisions to be independent of decision makers (i.e., judges).[17] If nothing about a case changes except the identity of the decision maker, and the result changes, we could call the result arbitrary; we would also suspect that it is a failure of generality.[18]

I have suggested that the principle of public reason gives us a test for generality of decisions within and across judges as well as for generality as applied to decisions. The worry about a ruling that varies with the identity of the judge is that the judge is importing some inappropriate reasons, independent of the law, into her decision-making process. Accordingly, the quintessential judicial violation of the principle of generality is the judge who hands out higher sentences to a criminal because of his race, or who throws out a case because she and her spouse had a fight that morning. However, this is also an act of hubris: such a judge expresses that her power is a personal possession, which she is entitled to use to carry out her idiosyncratic preferences or prejudices without regard to her obligation to have reasons for her decisions consistent with the equality of those over whom she holds power. From this, it can be seen that a judge who issues arbitrary rulings offends both the strong and the weak versions of the rule of law.

There is also a historical connection between the strong and the weak versions. One of the earliest demands for substantive legal equality came from the Levellers of seventeenth-century England.[19] The Levellers demanded substantive legal equality in the sense of the principle of generality together with the procedural protections that fall under the weak version of the rule of law. The connection between these two ideas at the time was obvious: substantive legal inequality operated through procedural inequality, as, for example, when commoners were prohibited from prosecuting nobles. Equal access to judicial resolution of disputes can be seen as the most basic form of legal equality. Not incidentally, the Levellers also went further, in the direction I go in this chapter, to include demands for socioeconomic justice, such as free schooling and access to subsistence resources in the commons.

Finally, the weak and the strong versions of the rule of law appeal to the same higher-level normative idea of respect for equals through reason-giving. The weak version demands that officials give legal reasons – that is, reasons that can be found in the law – for their use of state power. And I have argued that the giving of legal reasons amounts to a kind of respect for the general public. The strong version requires the law itself to be consistent with giving reasons that respectfully address the public at large. Both the strong and the weak versions of the rule of law in this way express the same basic idea, in its most abstract form: no use of state coercive power without giving the right (respectful) kinds of reasons for that use.[20]

It is wrong – inconsistent with the value of equality – to use the state's monopoly of force to coerce someone without being able to offer reasons for that coercion that are consistent with nonetheless treating the one coerced with respect. Both the weak and the strong versions of the rule of law denote the set of principles that tell states what they have to do to avoid that wrongness. Similarly, it's wrong, because inconsistent with the value of freedom, to coerce people without giving them some say in the matter; "democracy" denotes the set of principles that tell states what they have to do to avoid that. "Distributive justice" denotes the set of principles that tell states how to run a system of economic cooperation for mutual benefit consistent with equality. And so forth.

These considerations suggest that when we discuss the weak and the strong versions of the rule of law, we are discussing one thing, not two things. They are the same principle applied to different chronological stages of the law: the strong version to the enactment of law and the use of discretion in its interpretation; the weak version to its execution.

Before closing this chapter, we must consider one more objection to the egalitarian conception, which requires us to return to Jim Crow.

V PRIVATE POWER AND ORDINARY CITIZENS

In the preceding pages, I have set out a conception of the rule of law as a shield against the use of coercive force to create or maintain social hierarchy. However, expressed in those terms, one might fairly wonder why the coercive force under scrutiny is limited to that of states. In this section, I aim to head off that worry.

A *Does the rule of law require ordinary citizens to obey the law?*

It is popular among legal philosophers and constitutional theorists to suggest that the rule of law requires everyone, not just officials, to obey the law;[21] for they rightly suppose that there are many forms of power other than state power, and much of that power can be more significant in the day-to-day lives of ordinary citizens than that which comes with a flag and a badge. Gerald Postema, for example, reminds us that the Jim Crow South relied on not only officials but also ordinary people ignoring the law and exercising private as well as state power over black Americans.[22] To this we might add worries about the contemporary power of multinational corporations (or just domestic employers), the power of informal social norms, and the like.

I said, in Chapter 1, that the rule of law does not require private obedience to the law. Here, I further defend that position with reference to the Jim Crow South. This section will further clarify the full power of the principle of generality to combat private inequality facilitated by the state.

To start, however, a discussion of the philosophical question in the abstract is in order. For it seems silly to suggest that the rule of law – this majestic guardian against tyranny – requires citizens of the United States to refrain from smoking marijuana and drive within the speed limit.

There are two strong objections to that position, an objection external to the rule of law and an objection internal to it. First (the external objection), many philosophers of law have argued – and those arguments seem convincing – that there is no general moral obligation for ordinary citizens to obey the law.[23] But the following three claims are incompatible: (1) there is no moral obligation for ordinary citizens to obey the law, (2) the rule of law imposes moral obligations, and (3) the rule of law requires ordinary citizens to obey the law. Abandoning the first runs against those convincing arguments just mentioned.[24] Abandoning the second makes talk about the rule of law rather pointless. We must abandon the third.[25]

Second (the internal objection), partial satisfaction of the rule of law is possible (it is a continuum, not a binary), and partial satisfaction of the rule of law is better than no satisfaction of it. For example, the Jim Crow South, while evil partly because the law was radically not general, was morally better than the antebellum slave South, in virtue of the fact that the law was *somewhat* more equal with respect to blacks. Nonetheless, as in the Jim Crow South, a partially satisfied rule of law may be compatible with profoundly unjust laws, even if the full satisfaction of the strong version would preclude them. And those unjust laws may, and in the Jim Crow era did, attempt to recruit ordinary citizens into their implementation. For example, a racist law may forbid private citizens from offering unsegregated public accommodations – again, this happened in the South, even over the objections of, for example, railroad companies that did not wish to segregate their passengers.[26] Or it may simply command ordinary citizens to quietly acquiesce in gross injustices against themselves, rather than defiantly resist them.

If the rule of law requires ordinary citizens to obey the laws, it would require – or at least offer some defeasible reason in favor of – citizens to obey even such evil laws. In doing so, it would perpetrate injustice, and might in fact bring it about that partial satisfaction of the rule of law is worse than no satisfaction of it. While this may simply be a moral truth – perhaps the rule of law has the potential for great wickedness in its partial implementation, so we ought to consider denying the second claim in the external objection after all – in view of the fact that we ordinarily think that the rule of law is a moral good, it is worthwhile to strive to find a version of the concept that does not have these objectionable properties.[27]

That being said, rule of law does impose some obligations, pragmatic if not theoretical, on ordinary citizens. Once we leave pure philosophy and enter the domains of history and social science, this will be seen quite clearly: the only thing that keeps the rule of law going in many (perhaps all) societies is the commitment of ordinary citizens to use the law to coordinate their resistance to the illegal use of coercive power (see Chapters 6 and 8).

Moreover, the boundary between ordinary citizens and the state can sometimes be quite porous. This will be clearest in Chapter 5, when the Athenian case is discussed. It does not overmuch compromise the position defended here and in Chapter 1 to suppose that the rule of law regulates the coercion not only of those who actually have the power of the state, but also of those who pose a real prospect of forcibly seizing it, or who, more generally, have such power that they genuinely compete with the existing government for monopoly control over the use of force in the jurisdiction – that is, have a real prospect of assuming the Hobbesian and Weberian properties.

I shall say, then, that the rule of law requires ordinary citizens – and officials – to exercise any major, state-level coercive power that they happen to hold over one another only in ways permitted by law, and to refrain from seizing such unregulated power. Its requirements apply in the first instance to officials simply because officials by definition have major coercive power over ordinary citizens. And it requires that ordinary citizens as well as officials be willing to coordinate their actions to hold other ordinary citizens and officials responsible for not using or acquiring major, state-level coercive power except as permitted by law. But that's it. It doesn't require a general obedience to the law, or a society regulated by some kind of legal ethos. Moreover, the rule of law not only permits citizens as well as officials to sometimes disobey the law, but, when the law calls for gross injustices, a full understanding of the rule of law requires it. By obeying the law's command to discriminate against and ultimately murder the Jews, for example, the Nazi officials flouted the rule of law.

In short, the state is something like the core application of the rule of law, while other kinds of arbitrary power are on a periphery, instances of which nonetheless might be subject to critique on rule of law grounds in virtue of their taking on some of the properties that we usually apply to the state. Even once we step far enough away from the state to admit of the prospect that democratic Athens can be praised under the rubric of the rule of law for restraining the power of rich would-be oligarchs, we can't step far enough away to say, for example, that a street gang, even a powerful one, represents the failure of the rule of law. A street gang typically does not exercise power under a claim of right, the way states typically do and the way the Athenian oligarchs tried to do, and this is a morally critical feature. Even in Athens, as we shall see in a couple of chapters, much of the heart of the opposition of the masses to the oligarchs was that their exercises of power came packaged as hubris, a claim of high status, and with it, the entitlement to use power to act out that status.

B The Jim Crow challenge

The case of the Jim Crow South remains a critical challenge to the proposition that the rule of law only demands that the state's violence, or private violence that assumes the attributes of statehood, be controlled. In the Jim Crow South,

organizations such as the Ku Klux Klan, as well as unorganized bands of white citizens, frequently inflicted violent terror on black citizens, and, in doing so, reinforced the grossly subordinate status that blacks held in these communities. In particular, the practice of lynching not just blacks who were accused of crimes against whites, but also blacks who had simply offended whites, brutally solidified the racial hierarchy in the South.[28] Yet, at the same time, the Klan probably didn't have major coercive power to the same extent as, for example, a local warlord in a failed state or the oligarchic elites in Athens. It was an organized mob, not a serious competitor for the monopoly of force in the jurisdiction.

Still, perhaps that claim is too fast. The white power structure as a whole may have similar properties to those of the oligarchic elite in Athens: they had quite a lot of power, and may have achieved a de facto monopoly of force insofar as they came to use violence against others in the community with near-total impunity. And they certainly exercised that violence based on a claim of right, rooted in a narrative of racial superiority.

According to the Tuskegee Institute, through 1968, there were 4,742 reported lynchings, 3,445 of which were of blacks.[29] If the egalitarian conception of the rule of law cannot tell us something about what went wrong with such a reign of inegalitarian terror under the eye of the authorities, then something is seriously amiss with the conception.

Here is a sense of the stakes. Willie James Howard, a 15-year-old black boy who worked at a soda stand, sent a love letter to a white coworker on New Year's Day, 1944. In response, her father and two of his friends seized him from his home at gunpoint, tied him up, and forced him to jump to his death in a river, all in front of his father, who was later forced to sign an affidavit saying the boy jumped voluntarily.[30] Howard's killers were never prosecuted, and even his grave – his hasty burial without a death certificate having been ordered by the white sheriff – went unmarked until 2005.[31] Surely the rule of law has *something* to say about this?

But Howard's case illustrates the instrumental complicity of state authorities in private racial terror. Local law enforcement allowed lynch mobs to take blacks accused of crimes against whites from jail and kill them; declined to identify, let alone prosecute, the perpetrators; and sometimes, as was apparently true in Howard's case, actively impeded any chance that anyone else would have to prosecute the killers. Sometimes, law enforcement officials were actually among the gangs carrying out the lynchings.[32] And the complicity of law enforcement was instrumental in the prevalence of the phenomenon: at those rare moments where local officials actually tried to put a stop to the lynchings, they largely succeeded.[33] Moreover, consistent with the egalitarian theory of the rule of law, the lynchings were part of a conscious state attempt to enforce the subordinate status of blacks. Thus, Dixiecrats in Congress fought an antilynching law specifically on the grounds that it would embolden blacks to demand "the social equality long promised them

by ignorant northern do-gooders," and the lynchings would no longer be necessary "when the white race asserts its supremacy to all races."[34]

What this reveals is that the lynchings were enabled largely by a failure of the rule of law on the egalitarian conception: had officials complied with the principle of generality, and used their official powers to punish whites who committed crimes against blacks to the same extent they did to punish blacks who were accused of committing crimes against whites, the Klan's reign of terror would probably have been dramatically curtailed.[35] The rule of law provides ample grounds to critique their behavior, and if the rule of law had been established in the South, the lynchings would have been brought to an end, or at least would not have been nearly such a pervasive phenomenon.[36] Jim Crow was a case of "state-sponsored terrorism."

By contrast, we don't need a rule of law critique of the behavior of the private citizens who made up the white mobs. Murder is wrong no matter who does it. There are ample moral principles available to criticize their evil behavior. The rule of law is a condition to be established by and through the state, and by limiting the rule of law to a critique of the state's behavior, we enable ourselves to see what the state did distinctively wrong in handling the lynchings: it withdrew its protections unequally from black citizens.

Indeed, supposing that the rule of law requires private obedience to the law other than in the case where private power approaches the Hobbesian and Weberian properties is to pose the danger that we might actually assimilate lynchings to the rule of law more generally. Carr makes just such an argument: because the history of lynching suggests that it was typically defended as a way to preserve or impose law and order against supposed uncontrollable criminality by marginal groups, he argues that lynching is inextricably linked to the rule of law, and that a critique of lynching is also a critique of the rule of law.[37] Carr's argument is compelling – but only if we allow him to assimilate "the rule of law" to "law enforcement."

Such a version of the rule of law is normatively quite unappealing just because, as Carr identifies, it comes wrapped up with all kinds of pernicious social control strategies. But we can recover the rule of law from Carr's critique by holding on to the position that the rule of law, like satire, punches up: we simply cannot describe mob violence by the powerful against the powerless, even in the name of law and order, as action in support of the rule of law. By contrast, mob violence directed against the powerful *can* support the rule of law in the right conditions – a riot against police brutality or a rebellion against a tyrant can be effective ways of constraining the powerful. But that constraint must be applied to the powerful. Indeed, with the conception of the rule of law as fundamentally egalitarian in hand, this seems obvious. Of course it sometimes licenses violent action by the weak and subordinated against the powerful, but not the other way around. That is what an egalitarian political ideal must do, where the modifier "political" serves as a reminder that violence is always on the table.

Against the objection that I have said that the rule of law is a principle guarding against the use of state coercive power, and that the complaint against officials' complicity in lynchings is about the *failure* to use state coercive power against homicidal racist whites, I have two responses. First, it's not true that officials merely declined to use their official power to protect blacks. In many cases, they actively used their official power to aid lynch mobs, as by turning over blacks who were in the jails to the mobs and participating in cover-ups and intimidation of witnesses and those who would seek justice for victims. Second, the principle of generality is about the use of coercive power, not individual acts of coercion: choosing to use coercion against some citizens but not others with no public reasons to justify the distinction is still a violation. (Imagine, for example, a state that enacted the following law: "No one shall be prosecuted for stealing from redheads." That law would obviously be nongeneral, even though its effect is to reduce the absolute number of instances of state coercion, because the state uses its power unequally.)

It might be further objected that the South could simply have complied with the rule of law, on this argument, by abandoning law enforcement altogether. Had it disbanded the police and sheriffs in toto and simply abandoned the territory to the white mobs, lynchings would still have happened (indeed, they probably would have increased), and, we may safely assume, the disparity in social and economic power would have kept blacks from successfully fighting back in the lawless world. Does the rule of law license this result?

To answer that objection, I again note that the rule of law need not give us a reason to criticize anarchy. If the Southern states had been so eager to permit racial violence that they surrendered their monopoly over violence altogether, then we have ample normative principles with which to criticize them. One reason to have a state is that it can protect the weak against the strong, and Hobbes gives us a perfectly adequate reason to say that a supposed state that makes no effort to control private violence at all loses any entitlement to the name. We do not need the rule of law to reach this result.

In reality, the Southern states would never have surrendered their monopoly over violence just to avoid being required to enforce the laws equally. We saw this when the civil rights movement finally began to win: the Southerners kicked and screamed and fought in the courts and in the streets, but ultimately acquiesced rather than allowing their territory to descend into anarchy. They did, occasionally, shut down some nonessential services – the city of Jackson, for example, notoriously closed some swimming pools in order to keep them from being integrated. But even Jackson kept a number of other public recreational facilities open, involuntarily integrating them rather than closing them down.[38] In Arkansas and Virginia, segregationists managed to shut down the public schools, but that attempt at defiance lasted only a year.[39]

The rule of law gives those who would deprive some subjects of the protection of the laws in order to reinforce the subordinate status of those subjects a choice:

surrender to anarchy altogether, or protect all within the territory equally. This is the true power of the ideal of general law: it strongly forbids what some have called "rule by law," or the practice of imposing laws on those whom one would subordinate but not on the subordinators. And that is enough to command an end to hierarchical structures like Jim Crow, even when much of the active work in enforcing the hierarchy is left to private citizens.

For these reasons, ultimately, the state was so complicit in the racial terror of the Jim Crow South that it may be justifiable to say that the Klan and other "private" white racists really were part of the state. By working together, private racists and public officials subjected blacks to a regime of unconstrained violence that reinforced the claimed high status of all whites (hubris, the Weberian property) through the use of unanswerable violent threats (terror, open threats, the Hobbesian property). It is that combination of public and private power that made Jim Crow racial terror so menacing and so evil; it is what generates rule of law objections to it.

To close this chapter, we may note two important implications of this argument. First, it also applies to further explain the rule of law objections to economic inequality with which this chapter began. Property rights, as Cohen has pointed out, are licenses to use the state's coercive power to interfere in the choices of others.[40] Consequently, property rights can generate open-ended threats because officials and other private citizens working together can wield the state's coercion at will over the one who is, for example, homeless.[41] This kind of combined private–state action depends on the active participation of officials wielding the state's coercive power, and ought, for that reason, to count against a state's regularity for much the same reason that the US Supreme Court, in *Shelley v. Kraemer*, attributed the private racist covenants of a seller of land to the action of the court called upon to enforce them.

Second, the state remains complicit in the unconstrained uses of power over African-Americans, through (inter alia) the practices of racist policing that have rocked America's cities in recent years. I take up this point again in the Conclusion, but it is important to see that what Michelle Alexander has rightly called "The New Jim Crow"[42] – the pattern of unequal criminalization as well as official violence directed at African-Americans – genuinely is a story of continuation, not difference. The abuse of the institutions of the state to deploy a field of unconstrained susceptibility to violence around the bodies of African-Americans, and thereby to enforce racial status hierarchies, has been a constant factor in American history from slavery to Jim Crow to mass criminalization, and it is vital to understand how and why it must be resisted, not *just* as racism or as violence but as a warping of the ideals expressed by the notion of government under law, based on public reasoning among equals, and the institutions meant to manifest those ideals in the world.