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## What We Ask of Law

*The Rule of Laws: A 4,000-Year Quest to Order the World*

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**ABSTRACT.** A minimal, reasonably uncontroversial demand of any legal system is that it should stabilize a polity against both the chance hazards of ordinary violence and sudden blows of extraordinary, destabilizing misfortune. Law in the contemporary United States, though, has not so far 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 shadowing democratic politics. The gap between law's operation in practice and its ultimate aspirations toward social order—especially for the socially and economically marginal—offers a hint that something in our dominant working model of law, or its relation to an ideal of the rule of law, is awry or inaccurate.

This Book Review reconsiders some presently dominant assumptions about how a well-functioning legal system works in light of new evidence of how law has operated across a wide historical and geographic panorama. This exercise in historical and cross-cultural contextualization has implications for our choice of a sound working definition of law, and for a clear understanding of the latter's relationship to broader rule-of-law ambitions. It also bears on whether law is likely to advance or retard emancipatory projects of social reform, especially those pertaining to racial injustice. The spur 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 and different from the demotic definition of law commonly used in popular and juristic discourse alike. To illuminate its distinctive form and implications, I bring this polythetic definition into conversation with relevant elements of the leading jurisprudential theories of H.L.A. Hart and Lon L. Fuller. This is done with the aim of sparking 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 one especially pressing contemporary problem—the question of how law relates to projects of maintaining racial hierarchies or realizing their reform.



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## INTRODUCTION

Much is asked of law, but 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.<sup>1</sup> It should stabilize a polity against the chance hazards of ordinary violence and also soften the blows of extraordinary, destabilizing misfortune. But, in the contemporary United States, has law succeeded at even these fundamental tasks? It has not had a visible constraining effect on serial mass shootings of children.<sup>2</sup> It has not abated the lethal toll of violent crime,<sup>3</sup> which remains balefully associated in the public mind with racial minorities.<sup>4</sup> At the same time, it has done too little to stanch the seemingly endless flow of racialized police violence paid for and directed by the state.<sup>5</sup> The insurrection at the U.S. Capitol on January 6, 2021, suggests that law no longer seems to "break the irregular rule of the street" to allow for the tedious civility of representative, democratic politics.<sup>6</sup> Look be-

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1. See THOMAS HOBBS, *LEVIATHAN* 183-200 (Richard Tuck ed., 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> [<https://perma.cc/P4M-YXYN>].
  3. See P. Jeffrey Brantingham, Jeremy Carter, John MacDonald, Chris Melde & George Mohler, *Is the Recent Surge in Violence in American Cities Due to Contagion?*, 76 J. CRIM. JUST. art. no. 101848, at 1 (2021) (noting a thirty percent rise in homicide rates in thirty-four American cities between 2019 and 2020).
  4. On the association of race and criminality, see Jennifer L. Eberhardt, Phillip Atiba Goff, Valerie J. Purdie & Paul G. Davies, *Seeing Black: Race, Crime, and Visual Processing*, 87 J. PERSONALITY & SOC. PSYCH. 876, 881 (2004), which explores "the extent to which Black faces are brought before the footlights of attention when the concept of crime is activated."
  5. See 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 more than fifty percent); see also PAUL GOWDER, *THE RULE OF LAW IN THE UNITED STATES: AN UNFINISHED PROJECT OF BLACK LIBERATION* 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 consequences for the killing, is itself a challenge to the US's self-conception as a rule of law state . . .").
  6. Max Weber, *National Character and the Junkers*, in *FROM MAX WEBER: ESSAYS IN SOCIOLOGY* 395 (H.H. Gerth & C. Wright Mills eds. & trans., 1958) (1946). But perhaps a constitution born in an insurrection against imperial rule is unlikely to abate irregular political action. If that constitution fails to specify emergency powers to address antidemocratic movements, its capacity to address such shocks may well further be doubted. On the scope of democratic emergency powers in American law, see Aziz Z. Huq, *The January 6 Insurrection and the Problem of Constitutional Guardianship*, 37 CONST. COMM. (forthcoming 2023) (manuscript at 10-19) (on file with author).

yond 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.<sup>7</sup> Nor could it sustain a public consensus robust enough to combat the viral plague that has just taken more than a million American lives.<sup>8</sup>

Neither state nor private violence and disorder, then, is firmly circumscribed by the institutions of American law at present. To be sure, we do not reside in a Hobbesian state of nature. But for those most vulnerable to the accumulating costs of private and state violence – especially racialized minorities in the United States – that may well be rather cold comfort.<sup>9</sup> To their weary ears, solemn praise for the law might well not ring true. To borrow from W.H. Auden, it may instead sound more like a tinnitus of “impotent grandfathers feebly scold[ing].”<sup>10</sup>

And yet, the encomiums for law and a related (but not identical) normative ideal of the “rule of law” keep gushing forth.<sup>11</sup> For example, Justices of the U.S. Supreme Court – most recently Justice Gorsuch – rhapsodize “the rule of law” as preferable to the “rule of men.”<sup>12</sup> Law, Justice O'Connor once intoned, guards

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7. On the legality of many responses to the 2007 to 2009 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 BVerfG, 2 BvR 1390, 1421, 1438, 1439, 1440/12, Sept. 12, 2012, [https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2012/09/rs20120912\\_2bvr139012en.html](https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2012/09/rs20120912_2bvr139012en.html) [<https://perma.cc/N936-JGJW>].
  8. See *Coronavirus in the U.S.: Latest Map and Case Count*, N.Y. TIMES (Oct. 12, 2022), <https://www.nytimes.com/interactive/2021/us/covid-cases.html> [<https://perma.cc/UN35-68B8>] (recording 1,017,278 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. 1067, 1068 (2022).
  9. This Book 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 has 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* (Nov. 30, 2021) (unpublished manuscript), <https://ssrn.com/abstract=4014826> [<https://perma.cc/E8NL-3NMS>] (surveying the field).
  10. W.H. AUDEN, *Law Like Love*, in *COLLECTED SHORTER POEMS, 1927-1957*, at 154 (1966).
  11. In many contexts, the ideas of “law” and the “rule of law” are used almost interchangeably, such that it is often difficult to see where one ends and the other begins. To avoid confusion, let me clarify that I use the term “rule of law” to capture our aspirations toward stability, predictability, and an absence of arbitrariness, at least when achieved via the use of law. I thus understand it as a public good created by and through law. This understanding of the term is broadly consistent with the way it is used in public discourse today.
  12. See *Kisor v. Wilkie*, 139 S. Ct. 2400, 2438 (2019) (Gorsuch, J., concurring); 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’”).

against a government driven by “caprice, passion, bias, and prejudice.”<sup>13</sup> Law, said Justice Scalia, lays the groundwork for “rudimentary justice.”<sup>14</sup> It “protects the rights and liberties of all Americans . . . [W]ithout the rule of law, any rights are meaningless.”<sup>15</sup> Similarly, the rule of law is, for academic lawyers like Richard H. Fallon, Jr., “central to our political and rhetorical traditions, possibly even to our sense of national identity.”<sup>16</sup> Fallon’s position echoes across the Anglophone world. In an influential book, the English Law Lord Tom Bingham concluded that “it is on the observance of the rule of law that the quality of government depends.”<sup>17</sup> Bingham’s vision of “government . . . in accordance with established and performable norms” is indeed twice as old as our nation. It has been traced back to the thirteenth-century English jurist Henri de Bracton.<sup>18</sup> Its influence perhaps reached an acme in 1975, when the preeminent Marxist historian E.P. Thompson pronounced that “the notion of the rule of law is itself an unqualified good”<sup>19</sup> – much to his fellow travelers’ chagrin.<sup>20</sup>

Underlying many of these endorsements of law, I think, is an implicit “folk theory” of how law – that is, how a well-ordered legal system, not just a single rule or enactment – actually works to produce the social good of the “rule of

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13. TXO Prod. Corp. v. All. Res. 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.” See A.V. DICEY, INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION 181 (10th ed. 1959).
  14. Scalia, *supra* note 12, at 1179. Scalia’s point here is embedded in a larger argument about the desirability of rules over standards as legal norms. See *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. See Timothy A.O. Endicott, *The Impossibility of the Rule of Law*, 19 OXFORD J. LEGAL STUD. 1, 7–8 (1999).
  15. *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. 56 (2005) (statement of John G. Roberts, Jr., Nominee to be C.J. of the United States).
  16. Richard H. Fallon, Jr., “The Rule of Law” as a Concept in Constitutional Discourse, 97 COLUM. L. REV. 1, 3 (1997).
  17. TOM BINGHAM, THE RULE OF LAW 171 (2011).
  18. JOHN PHILLIP REID, RULE OF LAW: THE JURISPRUDENCE OF LIBERTY IN THE SEVENTEENTH AND EIGHTEENTH CENTURIES 5, 18 (2004) (quoting Allan C. Hutchinson & Patrick Monahan, *Democracy and the Rule of Law*, in THE RULE OF LAW: IDEAL OR IDEOLOGY 101 (1987)).
  19. E.P. THOMPSON, WHIGS AND HUNTERS: THE ORIGIN OF THE BLACK ACT 267 (1975).
  20. See Morton J. Horwitz, *The Rule of Law: An Unqualified Human Good?*, 86 YALE L.J. 561, 566 (1977) (reviewing DOUGLAS HAY, PETER LINEBAUGH, JOHN G. RULE, E.P. THOMPSON & CAL WINSLOW, ALBION’S FATAL TREE: CRIME AND SOCIETY IN EIGHTEENTH-CENTURY ENGLAND (1975) and THOMPSON, *supra* note 19).

law.”<sup>21</sup> I cannot point to a single place where this model is written down. It is not, to be clear, the famous jurisprudential concept of law offered by legal positivists working in the vein of H.L.A. Hart (to which I will return later).<sup>22</sup> It is a demotic rather than formal understanding. As such, it often works as a pretheoretical presupposition that can be silently put to work by the conservative jurist, the liberal legal scholar, and the Marxist historian alike. Once set forth here, I hope it will resonate. Once stated, that is, I hope it will seem sufficiently intuitive to lay claim to a measure of generality as an operative presumption behind much everyday talk of law and its relationship to the rule of law.

I call the demotic, or folk, theory of law the “conveyor-belt model of law.” It has three elements, which correspond respectively to the moments of law’s production, application, and output. First, the law typically has a temporally distinct origin in an *officially authorized* source.<sup>23</sup> This origin is known and fixed, both in time and institutional source. The law is hence capable of legitimation by its pedigree.<sup>24</sup> Second, a cadre of specialized *state* actors, usually judges, later apply

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21. In this Book Review, I use the word “law” to refer to 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 N.Y.U. L. REV. 1135, 1139 (2008).

22. See *infra* Section III.A.

23. This assumption informs many complaints about judicial overreach. See, e.g., *Obergefell v. Hodges*, 576 U.S. 644, 686 (2015) (Roberts, C.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 that bind judges.

This is one point (albeit not the only one) on which the conveyor-belt theory diverges from legal positivism: 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 *MONIST* 295, 296 (1985). Under the source’s thesis, law does not need to originate in an official source. It can emerge as custom and be recognized as such. See H.L.A. HART, *THE CONCEPT OF LAW* 44-49 (Penelope A. Bulloch & Joseph Raz eds., 2d ed. 1994) (considering customs as laws and concluding that law need not originate in a “deliberate law-creating act”).

24. 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 L. Coleman, Kenneth Einar Himma & Scott J. Shapiro eds., 2004); 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 the legal positivist model, but not necessarily the conveyor-belt model, can accommodate custom, see Neil Duxbury, *Custom as Law in English Law*, 76 *CAMBRIDGE L.J.*

that law to disputes involving new facts and parties. Law therefore has not only a proper pedigree but also a proper armature.<sup>25</sup> And third, applying that body of early forged law in new cases creates *general* benefits beyond the localized good of resolving a specific dispute.<sup>26</sup> The larger good most commonly associated with law relates not just to predictability, but also to the possibility of binding powerful actors in a society, especially those wearing badges of state authority, in ways that foreclose capricious, whimsical, or self-interested action. This last result is often captured in the otherwise vague term “rule of law.”<sup>27</sup> I call these three steps a “conveyor-belt” model because they together imagine a linear and unidirectional pathway from written law to judicial application, and then to a state characterized by the rule of law.

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 somewhat facile terms, what those actors believe themselves to be doing when they act out their roles in a formal 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. Mere parchment barriers hence work as a positive force for social good. This is not to say that law must meet a moral criterion to count as law.<sup>28</sup> It is simply a claim that law is a social fact with “normative” force and hence

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337, 339-40 (2017). The discomfort many modern American scholars and jurists have with 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, 1833-34 (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).

25. The Supreme Court often describes its relation to written law in 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)).
26. See, e.g., *Republican Party of Minn. 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.” (quoting *United States v. Will*, 449 U.S. 200, 217 (1980))).
27. On this constraining understanding of the rule of law, see BRIAN Z. TAMANAHA, *ON THE RULE OF LAW: HISTORY, POLITICS, THEORY* 63-67 (2004).
28. Cf. Constantin Fasolt, *History, Law, and Justice: Empirical Method and Conceptual Confusion in the History of Law*, 5 UC IRVINE L. REV. 413, 442 (2015) (arguing that “there is no such thing as any law that can be followed or applied without judging the justice of that law”). 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 note 172 (arguing that leaders can claim legitimation on the basis of outcomes).



desirable consequences.<sup>29</sup> Specifically, the official act of following or enforcing a duly enacted piece of law creates a positive *social* good of the rule of law – that is, the binding of powerful actors by *ex ante* rules in ways that limit capricious or arbitrary conduct.

So, what’s gone wrong? If the folk theory of law is widely held and in good working order, why doesn’t law do its core job of constraining power and creating order better?<sup>30</sup> And why does this afflict the economically and socially marginalized most of all? There are, to be sure, obvious local and contingent reasons for law’s present shortfalls that have nothing to do with our working theory of law. 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 not just of whether we are 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. Perhaps our expectation that law is a social technology capable of delivering certain social results is simply implausible. Perhaps we have overlooked law’s limitations by failing to grasp clearly some of 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 Book Review is to reevaluate some dominant assumptions about a well-functioning legal system in light of new evidence of how law operates across a wider historical and geographic panorama. With this analysis in hand, I hope to offer a new perspective on what makes law distinctive as a tool of social regulation, and thus to elucidate some of the consequences of a new 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 marks law as a transhistorical social practice, I further hope to make some progress toward understanding the relationship between law’s operation and the elusive normative ideal of the rule of law. In so doing, I hope to gain purchase on how law’s modal vectors facilitate some, but by no means all, kinds of social orderings.<sup>31</sup> In particular, I ask whether law as a mode

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29. JEREMY WALDRON, *LAW AND DISAGREEMENT* 30 (1999) (addressing the “normative understanding of law”).

30. I have set out my views of some of these local causes in AZIZ Z. HUQ, *THE COLLAPSE OF CONSTITUTIONAL REMEDIES* (2021).

31. 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, David Singh Grewal, Amy Kapczynski & K. Sabeel Rahman, *Building a Law-and-Political-Economy Framework: Beyond the Twentieth-Century Synthesis*, 129 *YALE L.J.* 1784, 1791–92 (2020). That project takes law as a given and then follows the legal realists in tracing its formative influence

of social action is oriented toward the creation of hierarchy or more emancipatory projects. To be clear, I make no claim to explain all the shortfalls in our current social order.<sup>32</sup> More modestly, I want to probe why our implicit conception of law might foster infeasible or misleading expectations.

Such queries are invited by Professor Fernanda Pirie's 2021 book, *The Rule of Laws: A 4,000-Year Quest to Order the World*.<sup>33</sup> 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 in 2112 B.C.E. with a series of clay tablets inscribed with the Sumerian dynast Ur-Namma's rules for his city.<sup>34</sup> Among the temporally final elements of the book is the 2015 promulgation of an international agreement on cross-border sales under the auspices of the United Nations Commission on International Trade Law (UNCITRAL).<sup>35</sup>

Unlike Pirie's previous monograph on similar themes,<sup>36</sup> *The Rule of Laws* is crafted for a nonspecialist 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. In particular, it can be read for the light it casts upon the three critical moments of the conveyor-belt model: law's sources, the institutional mechanisms through which it affects ordinary people, and its ensuing capacity to yield an enduring ordering of social relations.

By bringing our implicit, yet hegemonic, notions of law into conversation with Pirie's work, I hope to broach questions about both the theory and the practical promise of law in relation to the rule-of-law ideal. To begin with, an effort

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on economic and 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.

32. See *supra* text accompanying notes 2-8.

33. FERNANDA PIRIE, *THE RULE OF LAWS: A 4,000-YEAR QUEST TO ORDER THE WORLD* (2021).

34. *Id.* at 17-18.

35. *Id.* at 431-32. The United Nations Commission on International Trade Law (UNCITRAL) example does not come at the end of the book, but it is the temporally final element of the book. I offer it just to clarify the temporal sweep of Fernanda Pirie's argument, not because UNCITRAL plays a central role in that argument.

36. Pirie's 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. See Fernanda Pirie & Judith Scheele, *Justice, Community, and Law*, in LEGALISM: COMMUNITY AND JUSTICE 1, 4 (Fernanda Pirie & Judith Scheele eds., 2014).

toward deparochializing our understanding of law fleshes out ways in which the conveyor-belt model – which I have suggested lurks somewhere 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. This model is, instead, at best contingent and at worst misleading. Pirie’s work also provides an empirically grounded perspective from which to reconsider other widely shared theoretical claims about law. Her analysis sheds light on the influential concept of law developed by H.L.A. Hart using his own distinctive brand of “descriptive sociology.”<sup>37</sup> It also has implications for claims about the “morality” of law tendered by Lon L. Fuller.<sup>38</sup> Engagement with Fuller’s work further casts useful light on the relationship between “law” and the “rule of law,” understood as a project for the constraint of state power. Finally, that definition’s implications for contemporary problematics of legality are worth exploring. I conclude by reconsidering the relation of law to one particularly important challenge to legality: the persistence and recreation of racial hierarchy and subordination in the American context.

It is helpful to unpack here the first of these points since it is central to much of what follows – that is, how the elements of law, and their relation to the rule of law, vary from the conveyor-belt model in subtle but consequential ways. In brief, Pirie’s work suggests that law indeed does have historically recurrent (albeit not invariant or necessary) characteristics. But the conveyor-belt model gets these wrong. Law, Pirie first shows, connotes rules of general application maintained by a hieratic caste. Second, it is recurrently characterized by an aspiration toward acontextual generality and atemporality. This aspiration may be best embodied in a written text. But such writings are not always or necessarily the *source* of law. Finally, law’s relation to the state and the practical fact of compliance is a contingent rather than a necessary matter.

This account differs from the conveyor-belt model along three margins. First, it identifies a subtly but importantly different *source* for law from the one assumed by the conveyor-belt model. Second, the *relationship between the law and the state* is not immutable in the way that the conveyor-belt model implies. Law is akin to ordinary commerce in that it can get along perfectly well without the

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37. HART, *supra* note 23, at v.

38. 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 L. FULLER, THE MORALITY OF LAW (1964) [hereinafter FULLER, MORALITY OF LAW] (developing this account further).

enforcement and adjudicative institutions ordinarily associated with the state.<sup>39</sup> Indeed, Pirie's historical work suggests it is the state and those who aspire to its command that are the needier, and hence the overly dependent, party in this relationship. Finally – and in some tension with Pirie's own conclusions – her 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 or linear. It is inconstant and murky. Many social goods associated with the rule of law – for example, predictability, stability, and regularity – can be realized without law, and indeed without the state. And it is possible to envisage a legal system that neither constrains powerful state actors nor adds much predictability for its subjects. Such has long been true of one of the world's great legal traditions in China.<sup>40</sup> It is possible, therefore, to have law, as well as a powerful state, without much by way of the rule of law.

One obvious worry at the outset about this kind of analysis and these conclusions is methodological: how can *historical* materials, marshaled however extensively, speak to purely *conceptual* questions about the “nature” of law? Why should history fix the present semantic content of a term such as “law”? 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 derive normative prescriptions from social facts. A short answer is that law is a concept that does not, and could not, exist detached from the long run of actual social practices and patterns of expectations held by participants in legal systems.<sup>41</sup> It is impossible to talk meaningfully of a “concept” of law independent of those practices and associated beliefs.<sup>42</sup> 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.<sup>43</sup> A society, in other words, does not use the term “law”

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39. Trade, of course, long predates law. See BARRY HAWK, *LAW AND COMMERCE IN PRE-INDUSTRIAL SOCIETIES* 14 (2016) (“Men and women in . . . nine pre-industrial societies engaged in commerce and trade . . . [C]ommerce and long-distance trade came before states . . .”).

40. PIRIE, *supra* note 33, at 14.

41. See JOSEPH RAZ, *ETHICS IN THE PUBLIC DOMAIN: ESSAYS ON THE MORALITY OF LAW AND POLITICS* 237 (1994) (emphasizing social understandings in accounts of law).

42. 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).

43. See also Kenneth Einar Himma, *Do Philosophy and Sociology Mix? A Non-Essentialist Socio-Legal Positivist Analysis of the Concept of Law*, 24 *OXFORD J. LEGAL STUD.* 717, 733 (2004) (explaining

in a vacuum. Rather, the understandings implicit in that term are unlikely to float free of earlier ways in which the term was used, or concurrent patterns of employment in other jurisdictions. As a result, reflection on the conditions of possibility of law and the rule of law can usefully begin with the study of what, historically, has recurrently been the case with law. This exercise is worthwhile in part because it can help us to get past parochial “ideas and procedures” keyed to present practice, which may cloud our perceptions and judgments.<sup>44</sup> It allows us to reach a more realistic accounting of what we plausibly ask of law because we better understand what law is, and how it produces social effects.

Pursuing this wider enterprise, I frankly acknowledge that I risk losing sight of Pirie’s ambitions for her own volume and straying from the job of the reviewer: *reviewing* the book rather than deploying it as a footstool for my own aspirations. I hope to avoid that snare. Part I, in particular, engages closely with Pirie’s text in its riches and demerits alike. That said, I shall acquit my central obligation up front: as a work aimed at a nonspecialist audience, *The Rule of Laws* succeeds marvelously. Pirie’s narrative rarely flags or loses the reader’s 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 for popular audiences. Hers covers an exhaustive breadth of human life with clarity and vigor but 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.<sup>45</sup> But reflect a moment on the absence

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how contingent linguistic practices of usage shape what we see as “law”). Kenneth Einar Himma, however, would criticize what follows here as “too thin” to establish an adequate concept of law. *Id.* at 737.

44. Bernard Williams, *Philosophy as a Humanistic Discipline*, 75 *PHIL.* 477, 493 (2000).

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

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. AFR. ARCHAEOLOGICAL BULL.* 108, 110-11 (1957) (discussing the use of Islamic law during the reign of Malian emperor Mansa Musa). But there is more to be said about precolonial African law. *See, e.g.*, WERNER MENSKI, *COMPARATIVE LAW IN A GLOBAL CONTEXT: THE LEGAL SYSTEMS OF ASIA AND AFRICA* 380-402 (2006) (briefly surveying 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

of any general text on the history of law—let alone one encompassing four millennia within and also beyond the strictures of state building—and the magnitude of her accomplishment snaps into focus. It is little short of breathtaking.

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

the lacuna in her narrative. PIRIE, *supra* note 33, at 340–41. There are some accounts of Mesoamerican law on which she might have drawn, however. See, e.g., Jerome A. Offner, *The Future of Aztec Law*, in 2 LEGAL ENCOUNTERS IN THE MEDIEVAL GLOBE 1 (Elizabeth Lambourn ed., 2017); see also Ignacio Bernal, *Durán’s Historia and the Crónica X, Appendix*, in FRAY 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 denial of African laws and their potential 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) (internal 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 (1931). 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 L. Fuller and H.L.A. Hart. Gustav Radbruch, *Statutory Lawlessness and Supra-Statutory Law* (1946), 26 OXFORD J. LEGAL STUD. 1, 7–8 (Bonnie Litschewski Paulson & Stanley L. Paulson trans., 2006) (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 LAW & PHIL. 313, 323–24 (1994).

As to errors of detail, consider two that might be corrected in a subsequent edition: Pirie describes the Talmud as having “a section of the Hebrew Torah in the centre of a page . . . surrounded . . . with Aramaic commentaries.” PIRIE, *supra* note 33, at 126. The Talmud, however, is composed of the Hebrew Mishnah and the Aramaic Gemara, which comments on the Mishnah. MORRIS ADLER, THE WORLD OF THE TALMUD 50 (2d ed. 1963) (“The Mishna was complementary to the Bible. Now an extension of the Mishna was developed. It is called the ‘Gemara,’ from an Aramaic root meaning ‘study’ or ‘instruction.’ The Gemara is sometimes also called Talmud, although the term Talmud is more generally applied to the entire Oral Law embracing both Mishna and Gemara.”). Further, Pirie states that the “Qaraite minority” of Jews “did not recognize the Torah.” PIRIE, *supra* note 33, at 218. Rather, Qaraite recognized the Written Torah, but not the Oral Torah. Meira Polliack, *The Karaite Inversion of “Written” and “Oral” Torah in Relation to the Islamic Arch-Models of Qur’an and Hadith*, 22 JEWISH STUD. Q. 243, 243 (2015) (“[T]he Karaites argued for the inauthenticity of Jewish oral tradition (‘oral Torah’), as a necessary complementary step to their reinforcement of written Torah.”). I am grateful to Eric Eisner for his insight into these points.

call the “polythetic” definition. To be clear, I cannot ascribe this theoretical claim to her (or blame her for its flaws!), even though it flows from her historical assemblage. Part II also contrasts this definition with the conveyor-belt model. Part III considers implications of a polythetic definition for key elements of the leading jurisprudential theories of Hart and Fuller. I pay particular attention to the relation of law to the state and to the rule of law, because these are points on which the conveyor-belt model and the polythetic model of law sharply diverge. Finally, Part IV takes up one practical question – 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 its propensity for emancipatory ends.

### 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.<sup>46</sup> I am not aware of another book aimed at the general reader with a like ambition.<sup>47</sup> There was a wave of scholarly interest in “legal pluralism” in the 1970s and 1980s.<sup>48</sup> This work focused largely on colonial encounters and synchronic conflicts between different

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46. But see *supra* note 45 for work that treats law as a conceptual system, rather than a social practice.

47. There have been scholarly efforts at a *tour d’horizon* of law through history. See, e.g., 1 JOHN HENRY WIGMORE, *A PANORAMA OF THE WORLD’S LEGAL SYSTEMS*, at xi (1928) (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”); H. PATRICK GLENN, *LEGAL TRADITIONS OF THE WORLD: SUSTAINABLE DIVERSITY IN LAW*, at xxii–xxiii (5th ed. 2014). Other leading texts focus on the “Western” legal tradition, see, for example, HAROLD J. BERMAN, *LAW AND REVOLUTION: THE FORMATION OF THE WESTERN LEGAL TRADITION* (1983), or train more narrowly on the history of ideas, see, for example, CARL JOACHIM FRIEDRICH, *THE PHILOSOPHY OF LAW IN HISTORICAL PERSPECTIVE* (2d ed. 1963). H. Patrick Glenn’s effort is perhaps the closest parallel to Pirie’s.

48. 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 heyday 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 Z. 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).

legal orders.<sup>49</sup> But the legal pluralism literature never generated an analogous unitary text canvassing the *historical* development of law as such. Today, interest in legal pluralism has ebbed.<sup>50</sup> So there are relatively few scholars working in the American legal academy who could pull off a book with such a wide scope.

A professor of the anthropology of law at Oxford University, Fernanda Pirie has unique standing to embark on this enterprise. Formerly a practicing barrister (like H.L.A. Hart, as it happens),<sup>51</sup> and an expert in Tibetan law,<sup>52</sup> Pirie coconvened the massive comparative law “Oxford Legalism” project.<sup>53</sup> This effort “brought together scholars from anthropology, history, and other disciplines to compare wide-ranging empirical examples.”<sup>54</sup> It has already yielded four rich and diverse edited volumes from Oxford University Press.<sup>55</sup> It is easy from just fingering the indices of those four volumes 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 aided 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

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49. Early contributions contended that legal pluralism was “most often studied . . . in the context of colonial law or the law-modernization programmes of developing countries.” M.B. HOOKER, *LEGAL PLURALISM: AN INTRODUCTION TO COLONIAL AND NEO-COLONIAL LAWS* 6 (1975).
50. A recent publication that aims to revive interest in legal pluralism is *THE OXFORD HANDBOOK OF GLOBAL LEGAL PLURALISM* (Paul Schiff Berman ed., 2020). Its editor describes legal pluralism as a “complicated descriptive account of the interaction of normative systems, the strategic action 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 *THE OXFORD HANDBOOK OF GLOBAL LEGAL PLURALISM*, *supra*, at 1, 12. Most 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.
51. *Fernanda Pirie\**, MAITLAND CHAMBERS, <https://www.maitlandchambers.com/our-people/barristers/associate-members/fernanda-pirie> [https://perma.cc/6F7B-ZJAX].
52. See Fernanda Pirie, *Legal Ideology in Tibet: Politics, Practice, and Religion*, UNIV. OXFORD CHINA CTR., <https://www.chinacentre.ox.ac.uk/research/legal-ideology-in-tibet-politics-practice-and-religion> [https://perma.cc/AJ4K-F24P].
53. The project was coconvened with Paul Dresch and Judith Scheele. Email from Fernanda Pirie, Professor of Anthropology of L., Univ. of Oxford, to author (Apr. 20, 2022) (on file with author).
54. *Fernanda Pirie*, UNIV. OXFORD FAC. L., <https://www.law.ox.ac.uk/people/fernanda-pirie> [https://perma.cc/34SD-NC3U].
55. *LEGALISM: ANTHROPOLOGY AND HISTORY* (Paul Dresch & Hannah Skoda eds., 2012); *LEGALISM: COMMUNITY AND JUSTICE*, *supra* note 36; *LEGALISM: RULES AND CATEGORIES* (Paul Dresch & Judith Scheele eds., 2015); *LEGALISM: PROPERTY AND OWNERSHIP* (Georgy Kantor, Tom Lambert & Hannah Skoda eds., 2017).



work usefully gainsays this unique epistemological foundation or its fruit. Worthwhile engagement instead must focus on the theoretical apparatus that sustains her narrative. Alternatively, it can use her account as grist for new theoretical insight into the social technology of law in wide-angle historical perspective.<sup>56</sup> I hope to do both here.

To that end, this Part spins out theoretical commitments that I see animating *The Rule of Laws* along two different axes. A history of law as a social technology has to start with a definition of its subject matter. I thus begin by fleshing out the implicit definition of law that 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.C.E.<sup>57</sup> The narrative that follows initially moves, chapter by chapter, between places and times. It starts in the cities of the ancient Middle East.<sup>58</sup> It then covers the Aryan civilization of the Gangetic flood plain;<sup>59</sup> the Zhou kingdoms across what later would be known as China;<sup>60</sup> the ancient Mediterranean civilizations of Rome and Constantinople;<sup>61</sup> Jewish and Islamic societies;<sup>62</sup> and the Merovingian, Lombard, and Saxon courts of the early Middle Ages.<sup>63</sup> Different geographical categories receive either one or two chapters apiece. In charting her trajectory, Pirie neatly reverses conventional teleologies of law. Having begun with the protostate of Ur, she first interweaves chapters on "major" civilizations with discussions of law at the "margins" of the urbanizing world (in sites such as Ireland, Iceland, Kyivan Rus', and Armenia),<sup>64</sup> and law "beyond the state" (on the Tibetan steppe, the Kabylia highlands of

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

57. PIRIE, *supra* note 33, at 17.

58. *Id.* at 17-32.

59. *Id.* at 45-70.

60. *Id.* at 71-81.

61. *Id.* at 97-122.

62. *Id.* at 123-46.

63. *Id.* at 147-69.

64. *Id.* at 175-203.

northeastern Algeria, and mafia-dominated Sicily).<sup>65</sup> There is no movement from the “primitive” to the “modern” state. Rather, 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, horizontal mosaic of historical vignettes about “law” scattered across social, historical, and institutional contexts. It is one without a single vector of monotonically increasing complexity or sophistication.<sup>66</sup>

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 term “law”?<sup>67</sup> 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 ask, *ab initio*, how that thread is braided together.

Surprisingly, *The Rule of Laws* presents no threshold definition of its central organizing taxon.<sup>68</sup> To the contrary, Pirie offers a series of negatives that eliminate obvious, demotic senses. Law, she says, has “not always recognized territorial boundaries”; it sometimes lacked “efficiency, authority, and efficacy”; and it

65. *Id.* at 393-418.

66. 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”).

67. 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 (1973). Moore underscored the imbrication of several fields, with compliance with “the law” resulting in part from pressures “probably emanat[ing] from the several social milieux in which an individual participates.” *Id.* at 729; see also Merry, *supra* note 48, at 880 (noting the “dialectic, mutually constitutive relation between state law and other normative orders”). Since 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 unable to “clearly demarcate[] a boundary between normative orders that can and cannot be called law.” Merry, *supra* note 48, at 878-79. Boundary conditions offered within that literature are 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 Janus: Rethinking Legal Pluralism*, 13 *CARDOZO L. REV.* 1443, 1451 (1991). Even setting aside the difficulty of translating the terms “legal/illegal” across cultures and histories, it is unclear what unites the use of this terminology, and why the “binary” character of a judgment should be so important.

68. 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, *supra* note 33, 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.

at times “hardly . . . contributed to the smooth running of . . . societies.”<sup>69</sup> Rather than stipulate the frame of her canvas as it is first stretched, Pirie’s method is inductive. She starts with what are indubitably examples of ancient laws, literally carved onto clay tablets and steles in the first of the Mesopotamian city-states. She then works incrementally outward by sketching other, related 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.<sup>70</sup> The contours of this “technique” emerge from a close study that starts with a set of historical “core” cases, and then pushes outward until the label ceases to be plausible. Elsewhere, Pirie has written that her process begins with “ordinary language” and heeds “form rather than function, rules more than commands, and legalism rather than conflict resolution.”<sup>71</sup> The distinguishing hallmarks of “law,” under this method at least, are the 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, 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. With both works in view, we can usefully start by asking how a definition of the word “law” might be reached.

At the threshold, Pirie observes that “[l]aw is a category of the English-speaking world” with no necessary or precise analog even in historically related contexts such as Ancient Greek and Roman societies.<sup>72</sup> 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.”<sup>73</sup> In work published almost a century after Austin’s death, the sociologist Max Weber argued that there was a necessary relationship between law and “physical or psychological coercion . . . applied . . . to bring about compliance.”<sup>74</sup> More recently, legal scholar Simon Roberts has resisted the ideas of the “legal

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69. *Id.* at 3.

70. *Id.* at 12.

71. PIRIE, ANTHROPOLOGY OF LAW, *supra* note 36, at 9.

72. *Id.* at 4-5.

73. JOHN AUSTIN, THE PROVINCE OF JURISPRUDENCE DETERMINED AND THE USES OF THE STUDY OF JURISPRUDENCE 9 (Isaiah Berlin, Stuart Hampshire & Richard Wollheim eds., Curwen Press 1954) (1832).

74. MAX WEBER, ECONOMY AND SOCIETY 34 (Guenther Roth & Claus Wittich eds., 1968).

pluralism” movement in jurisprudence by insisting that the idea of law “is a concomitant of centralising processes” associated with “the formation of the nation state.”<sup>75</sup> Roberts would inscribe a perimeter around law to exclude, say, the Tibetan law codes that Pirie’s fieldwork elaborated.<sup>76</sup> 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.”<sup>77</sup>

On one level, these disputes admit of no resolution. Semantically, there is no way of simply looking across linguistic divides and naively asking what is “law” given the local specificity with which that English term is employed.<sup>78</sup> To the contrary, there is a quite specific way in which looking for cognates for “law” across linguistic boundaries risks serious error. As Pirie notes, the English 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.<sup>79</sup> Reflecting on her fieldwork in Ladakh, Pirie further observes that “some societies seem to do very well without law when settling disputes.”<sup>80</sup> To assume that the form and function of law in “the English-speaking world” are canonical is to miss the contingency of the relations between law and state building, and between “law” and the project of 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 scholarship<sup>81</sup> in rejecting the Scylla of state-centered parochialism (law is

75. Simon Roberts, *After Government? On Representing Law Without the State*, 68 MOD. L. REV. 1, 13 (2005).

76. *Id.* at 17 (associating law with a “process of centralisation”).

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

78. Reliance on naive translation to demarcate the bounds of law also risks making meaningful generalization impossible. Cf. CLIFFORD GEERTZ, *THE INTERPRETATION OF CULTURES: SELECTED ESSAYS* 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.”).

79. PIRIE, *ANTHROPOLOGY OF LAW*, *supra* note 36, at 5; PIRIE, *supra* note 33, at 398-99 (describing Tibetan nomadic “tribes’ laws” despite their lack of a state apparatus); Pirie, *Law Before Government*, *supra* note 36, at 215-17 (describing “[l]aw without [g]overnment”).

80. PIRIE, *ANTHROPOLOGY OF LAW*, *supra* note 36, at 6.

81. This was known as the fallacy of “legal centralism.” See Merry, *supra* note 48, at 874 (rejecting “the ideology of legal centralism,” which was “the notion that the state and the system of lawyers, courts, and prisons is the only form of ordering”); John Griffiths, *What Is Legal Pluralism?*, 24 J. LEGAL PLURALISM & UNOFFICIAL L. 1, 1 (1986) (criticizing “legal centralism” for privileging the “moral and political claims of the modern national state”).

just what we, the English-speaking peoples, in our wisdom call it). But this pushes her toward the Charybdis of definitional inflation. If law is not definitionally affiliated to the state, how can “law” be distinguished from nonlegal systems of normative ordering? These purport to instruct people on how to act on pain of social sanction.<sup>82</sup> Custom, tradition, and even fashion fall into this class.<sup>83</sup> If law is not 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, one that does not arise if “[t]he relation between custom and law is, basically, one of contradiction, not continuity.”<sup>84</sup>

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,” that is, it is a “class composed by sporadic resemblances.”<sup>85</sup> Its study hence involves a cross-cultural search for “recurrent features amongst the class of phenomena that bear a family resemblance one to another . . . without assuming we can identify a set of common or essential features.”<sup>86</sup> 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.<sup>87</sup> This approach is similar to a position developed by the English philosopher Michael Oakeshott, who argued for a jurisprudence that “seeks, rather than

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82. 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 & UNOFFICIAL L. 95, 105 (1998), which criticizes the “unstable epistemological and methodological climate” of legal pluralism.

83. Think of the “no white after Labor Day” injunction. Cf. AUDEN, *supra* note 10, at 155 (“Law is the clothes men wear/ Anytime, anywhere . . .”).

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

85. PIRIE, ANTHROPOLOGY OF LAW, *supra* note 36, at 8 (quoting 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 their possession of specified common features.”).

86. PIRIE, ANTHROPOLOGY OF LAW, *supra* note 36, 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 assumes, in the words of Joseph Raz, that “[i]t is part of our understanding of the law that certain social institutions are instances of law whereas others are nonlegal.” Joseph Raz, *Can There Be a Theory of Law?*, in THE BLACKWELL GUIDE TO THE PHILOSOPHY OF LAW AND LEGAL THEORY 324, 329 (Martin P. Golding & William A. Edmundson eds., 2005). This “part of our understanding” necessarily supplies the starting point for analogical reasoning.

87. Rodney Needham remarks on the use of polythetic definitions in biology. Rodney Needham, *Polythetic Classification: Convergence and Consequences*, 10 MAN 349, 353 (1975) (noting that “a

dogmatically delivers, a framework for explanation that relates and makes epistemically coherent . . . otherwise-partial conceptions and approaches.”<sup>88</sup> There is also here an echo of Hart’s (fleetingly made) suggestion that law is “a complex of normally concomitant but distinct elements.”<sup>89</sup> Yet Pirie’s definition is more demanding than the merely anodyne assertion that “different cultures have different conceptions of law.”<sup>90</sup> It is less law as concept, more law as observable, recountable, and iterated praxis.

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 “right” answer.<sup>91</sup> Instead, it is more profitable to list and weigh the relative strengths and weaknesses of each framing, in order to see which enables greater insight. The advantage of Pirie’s approach is that it avoids intellectual parochialism. It does not take contingent, and perhaps eccentric, features of our local experience with law as necessary or universal qualities. It also helps make sense of variation within our own cultural sphere that we might otherwise confuse. 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,

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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 *Almost This or Almost That? Must Be the Other*, BIOLOGICAL EXCEPTIONS (Oct. 29, 2014), <http://biologicalexceptions.blogspot.com/2014/10/almost-this-or-almost-that-must-be-other.html> [<https://perma.cc/N6JB-KKMK>]. 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.

88. Gerald J. Postema, *Jurisprudence, The Sociable Science*, 101 VA. L. REV. 869, 881 (2015) (discussing Oakeshott’s work on law). For another, more general gloss on Michael 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 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 & Fernanda Pirie, *Introduction: Exploring the Comparative in Socio-Legal Studies*, 12 INT’L J.L. CONTEXT 377, 378 (2016) (“The purpose of . . . comparison is generally analysis and interpretation, rather than evaluation or prescription.”).
89. HART, *supra* note 23, at 4. For discussion of this passage, see Frederick Schauer, *Hart’s Anti-Essentialism*, in READING HLA HART’S *THE CONCEPT OF LAW* 237 (Luís Duarte d’Almeida, James Edwards & Andrea Dolcetti eds., 2013).
90. Frederick Schauer, *The Social Construction of the Concept of Law: A Reply to Julie Dickson*, 25 OXFORD J. LEGAL STUD. 493, 498 (2005). Frederick 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.
91. A theory of law premised on natural law, however, would adopt a different view.

the economy, and society change. It hence invites the use of disciplined comparison across cultural contexts to understand law as a series of variations on a theme. Those variations hold the possibility of reflecting and hence illuminating each other. But they do not all need to have the same elements.

On the other hand, the disadvantage of this approach is that it is not a method amenable to replication. It supplies a hermeneutics, not an algorithm. Different scholars with subtly varying conceptions of the core case of “English-speaking law” might also extend that term in different directions. Indeed, Roberts’s approach may well be glossed as a variant of Pirie’s method of polythetic classification. He reaches a different outcome simply because of his divergent normative sensitivities. These lead him to place much more emphasis on the centripetal force of state action as a necessary element of law.<sup>92</sup> That is, he solves the problem of definitional inflation but in a different way than Pirie. He offers a polythetic definition no less than Pirie – just calibrated more narrowly.

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 legal pluralists nor their seemingly boundless alternatives all that useful as analytic categories. Both offer a fragile foundation for an extended, transhistorical, and transcultural study of law.<sup>93</sup> Both, despite their protestations at neutrality, allow their progenitors to retrace grooves cut by their own intellectual biases. Taking the state as central to law risks a patronizing ahistoricism. But to define law merely as a promiscuous, free-floating term of ordinary language that can take on different qualities under different circumstances is to abandon the project of comparison, and to allow the taxon “law” to be infinitely flexible. In contrast, Pirie’s more measured approach 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.” It hence compels an explicitly reasoned judgment as a basis for bounding the taxon of law. A measure of this method’s success, Oakeshott would say, is whether it uncovers a class of cases with enough “recurrent features” and “family resemblances” to hang together in a plausible and insight-generating way.

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92. Indeed, Pirie’s analytic frame is wide enough to encompass Simon Roberts’s core point. See Pirie, *Law Before Government*, *supra* note 36, at 221 (“The development of abstract law can . . . be important to the development of a certain type of centralized polity.”).

93. Indeed, John Austin’s positivist successors viewed him as “clearing and ordering the lawyer’s understanding of his working rules and concepts.” A.H. Campbell, *Introduction to GIORGIO DEL VECCHIO, JUSTICE: AN HISTORICAL AND PHILOSOPHICAL ESSAY*, at ix (A.H. Campbell ed., 1953).

## II. A COMMON TONGUE OF LAW

The plausibility of such a “polythetic” treatment of law turns on the way in which a core case is defined. It also depends on how analogies are made to the core case in order to define what falls in, or outside, the resulting taxon. *The Rule of Laws*, read as an application of that method, reveals a series of commonalities—emphatically *not* universal traits—that tie together the phenomena that might plausibly be translated as “law” in a wide variety of cultures.<sup>94</sup> Knitting these different elements together reveals an account of law that veers away from the dominant “conveyor-belt” model that, I have suggested, has seized 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 place the ensuing image 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 have found in her work or how I have organized them. The argument runs as follows: I start by rejecting the idea that law has a necessary relation to the state. I then identify systematicity and certain styles of argument as key to law. Finally, I posit that an elite caste of legal experts, sitting either within or outside the state, is necessary to the emergence of a legal system.

### A. *Law’s Contingent 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’s,<sup>95</sup> 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.<sup>96</sup> Law could and did chronologically precede the state and derive from nonstate institutions. Religious codes emerging from Judaism, Islam, and Vedic traditions, later adopted by various

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94. The elements of the definition are more like strands of a rope than links of a chain: They are common, but not necessary. See LUDWIG WITTGENSTEIN, *PHILOSOPHICAL INVESTIGATIONS* ¶ 67 (G.E.M. Anscombe trans., 2d ed. 1958).

95. See *supra* text accompanying notes 72-76.

96. 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.*



bodies of state law, are illustrative.<sup>97</sup> Thus, the Dharmashastras of Vedic tradition, including Manu's 5,000-plus-line catalog of rules for daily life, emerged from scholarly Brahminic communities.<sup>98</sup> They addressed business matters, such as debt, interest, partnership, and theft.<sup>99</sup> When adopted by governing bodies, they "specified which communities should make their own rules," acting as a sort of "meta-level law."<sup>100</sup> Under the Umayyad Caliphate, caliphs appointed judges, or *qadis*, to administer law. The *qadis* "probably looked to Quranic norms as much as they could," but also piggybacked on the "norms and practices" of conquered territories.<sup>101</sup> Similarly, Fatimid leaders in eleventh-century Cairo authorized the city's Jewish community to manage their own affairs "according to the law of Moses."<sup>102</sup> To the extent that law arose from a central state, it could "filter[] down" via a bureaucratic web of judges, courts, and juridical bodies – although Pirie gives the impression that this tended to happen slowly, over decades or centuries, and was never a necessary vector of law's effects.<sup>103</sup>

Indeed, she suggests that the model of law as "associated with the state and its processes of government" emerged only in the seventeenth century.<sup>104</sup> And when the state did adopt its own law, rulers often borrowed that law from an extrinsic, preexisting source. Religious texts were not the only potential objects of emulation. The Persian emperor Cyrus the Great, for instance, cribbed his

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97. See, e.g., PIRIE, *supra* note 33, at 34–38, 123–27 (Jewish law); *id.* at 45–56 (Dharmashastras); *id.* at 130–46 (Sharia); see also Merry, *supra* note 48, at 883 ("[S]tate law both constitutes and is constituted by the normative orders of which it is composed.").

98. PIRIE, *supra* note 33, at 54–56. Manu's Code, thought to be compiled over several centuries by numerous scribes, dates back at least to the fifth century C.E. (and possibly the third). PATRICK OLIVELLE & SUMAN OLIVELLE, *MANU'S CODE OF LAW: A CRITICAL EDITION AND TRANSLATION OF THE MĀNAVA-DHARMĀSĀSTRA* 3–6 (2005).

99. PIRIE, *supra* note 33, at 55–56.

100. *Id.* at 68.

101. *Id.* at 131. More than a thousand years later, the British East India Company would take the same tack. *Id.* at 350–52. Stanley 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 84, at 54.

102. PIRIE, *supra* note 33, at 212–13.

103. *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 sixteenth centuries).

104. *Id.* at 315, 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 came into being, and not all would agree with Pirie that it was an Enlightenment creation. Cf. JOSEPH R. STRAYER, *ON THE MEDIEVAL ORIGINS OF THE MODERN STATE* 12 (1970) ("The modern state, wherever we find it today, is based on the pattern which emerged in Europe in the period 1100 to 1600.").

code from Mesopotamian predecessors.<sup>105</sup> 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 thanks to the Emperor Justinian's codification.<sup>106</sup> Even when a discernibly modern state emerged, it did not extirpate parallel "legal" systems. In early Norman England, for example, kings developed a system of royal courts applying a unified system of law.<sup>107</sup> But they were not able to displace entirely a complex hodgepodge of "local, municipal, feudal, and ecclesiastical" systems that predated the Norman conquests, and that persisted alongside the king's writ.<sup>108</sup> Or take early America: as the historian Dylan C. Penningroth has explained, enslaved people in the antebellum South developed "complex networks of social relations" by which they could transubstantiate "possessions into property."<sup>109</sup> Remarkably, under one of the most brutally repressive and extractive regimes to emerge during the past several centuries, enslaved peoples developed and deployed the social technology of law – despite, if not against, a hostile and malevolent state and society.

Law, on Pirie's view, can hence coexist alongside state institutions of adjudication and coercion. It can even float above them as an unrealized, immaterial aspiration. Its relation to coercion, *pace* Weber, is contingent and not constitutive.<sup>110</sup> Her numerous examples of customary or religious law being folded into imperial enterprises show how law can indeed be layered into the state.<sup>111</sup> The finding of law persisting in Tibet and Kabylia beyond the state's writ also suggests that law can cling to life in liminal zones geographically contiguous to, but

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105. PIRIE, *supra* note 33, at 32-33.

106. *Id.* at 317-20; *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 rules and principles." *Id.* at 321.

107. TAMAR HERZOG, *A SHORT HISTORY OF EUROPEAN LAW: THE LAST TWO AND A HALF MILLENNIA* 94-97 (2018).

108. *Id.* at 97.

109. DYLAN C. PENNINGROTH, *THE CLAIMS OF KINFOLK: AFRICAN AMERICAN PROPERTY AND COMMUNITY IN THE NINETEENTH-CENTURY SOUTH* 189 (2003).

110. *Cf.* PIRIE, *supra* note 33, at 449 ("Daghestani 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), which underscores the importance of "law's coercive, force-imposing, and force-threatening dimensions."

111. More generally, legal rules depend on the "working social context in which they are found" and on the "semi-autonomous social fields on which they impinge." Moore, *supra* note 67, at 742.

standing in uneasy *détente* with, the project of state building.<sup>112</sup> The afterlife of Roman law, at least as refracted through Justinian's Institutes,<sup>113</sup> shows that law can also endure outside and past the state that engendered it.<sup>114</sup> Rather than being a tightly hitched relationship of necessity, the relation of law to the state is thus open-ended. This is so as both a descriptive and an analytic matter. There is hence at least a potential distinction between law and state power.<sup>115</sup> The former may or may not be in service of the latter. It just depends.

Pirie's separation of law and state opens analytic horizons. But it 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 aims of rule."<sup>116</sup> 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 M. Cover famously called "jurisgenesis," or the emergence of distinct normative orders up in isolated communities far from the chambers of official power.<sup>117</sup> In addition, Pirie's account avoids the potentially difficult question of determining who or what the state is.<sup>118</sup> 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 "written laws" are not "applied directly," they may still be invoked with "reverence" by adjudicators.<sup>119</sup> Such laws are not just instruments toward some practical goal of the powerful. They instead inscribe a

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112. PIRIE, *supra* note 33, 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 *COMPAR. STUD. SOC'Y & HIST.* 895, 900 (2008), which explains that "laws, codes, and rules remain omnipresent in Kabylia."

113. See, e.g., PIRIE, *supra* note 33, at 262-63.

114. That is, beyond the Byzantine empire that styled itself the legatee of Rome. For a recent, scintillating account, see PAUL STEPHENSON, *NEW ROME: THE EMPIRE IN THE EAST* (2022).

115. See PIRIE, *ANTHROPOLOGY OF LAW*, *supra* note 36, at 12.

116. CLIFFORD GEERTZ, *NEGARA: THE THEATRE STATE IN NINETEENTH-CENTURY BALI* 122 (1980).

117. Robert M. Cover, *The Supreme Court, 1982 Term—Foreword: Nomos and Narrative*, 97 *HARV. L. REV.* 4, 11-19 (1983).

118. Consider in that regard the response offered by a pirate after his capture by Alexander the Great, as recounted by St. Augustine: "What thou meanest by seizing the whole earth; but because I do it with a petty ship, I am called a robber, whilst thou who dost it with a great fleet art styled emperor." 1 *ST. AUGUSTINE, THE CITY OF GOD* 140 (Marcus Dods ed. & trans., Edinburgh, T. & T. Clark 1888) (426 A.D.).

119. PIRIE, *supra* note 33, at 398-99.

normative horizon. They create a “sense of moral order . . . rooted in tribal autonomy, but morally linked to the legal and religious traditions of central Tibet.”<sup>120</sup> (*Mutatis mutandis*, one might ask whether much the same could not be said about the U.S. Constitution today). Yet, at the same time, a concern about definitional inflation – that is, about whether the idea of law is infinitely extensible and whether it has a terminus – looms especially large once that idea is decoupled from the project of the state.

Pirie’s account also raises a question of how the law’s emergence relates to bodies of religious rules. Diversity again is apparent from *The Rule of Laws’* history. The links of state law to Jewish law, the Dharmashastras, and the Sharia mapped out by Pirie each reflect different ways in which religious norms can become legal norms.<sup>121</sup> A religious community might be a demographic minority, and have their norms tolerated (often the Jewish case). They might be a parallel social formation (as in the case of the Dharmashastras). Or their interests might be tightly interwoven with those of a ruling caste (such as in the Umayyad period). Various religious rules, moreover, reflected “radically diverse conceptions of divine law,”<sup>122</sup> and might be translated into secular terms through very different institutional vehicles. The *pontifices* of early Rome, for example, operated as an early version of an appellate court by drawing on “both religious and secular” customary norms and offering litigants resolutions “formulated as revelations of a secret truth . . .”<sup>123</sup> This invites the question (not explored by Pirie) as to whether different threshold entanglements between law and religious norms generated different ways of assimilating the latter, and hence predictably different sorts of relationships between secular and sectarian norms.

Nevertheless, the simple point to emphasize here is that this first element of Pirie’s account diverges fairly cleanly 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 stressed,<sup>124</sup> law can obtain *despite* the absence of a properly credentialed source.

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120. *Id.* at 400.

121. See *id.* at 34–38, 123–27 (Jewish law); *id.* at 45–56 (Dharmashastras); *id.* at 130–46 (Sharia).

122. CHRISTINE HAYES, WHAT’S DIVINE ABOUT DIVINE LAW? EARLY PERSPECTIVES 1 (2015).

123. HERZOG, *supra* note 107, at 14–15.

124. Postema, *supra* note 24, at 601–02; Duxbury, *supra* note 24, at 341 (making this point about custom in legal-positivist terms).

B. *Law's Systematicity and Casuistry*

If shearing law from the state creates a problem of definitional inflation, then it is worth pressing the question of 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 these methodological commonalities are recurrent enough to make them highly symptomatic of that taxon.

Law is, in this spirit, a distinctive genre of intellectual *system* for the general regulation of society characterized by certain distinctive styles of argumentation and related characteristics.<sup>125</sup> It typically arises as a collection 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.<sup>126</sup> A plurality of commands instead characterizes any plausible legal system.<sup>127</sup> The ensuing "system" of law always 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. Finally, the ensuing plurality of rules creates a distinctive set of problems. Of necessity, multiple norms must be reconciled, ordered, and applied. The resulting conflicts are ripe with opportunities for strategic ambiguity, sites for law's elite to extend, *sub silentio*, its own agenda. Plurality hence leads to a distinctive set of ways of resolving questions of application and reconciliation. So different legal systems, widely separated in time and place, end up being characterized by the same kinds of formal argumentative modes as well as the same end of general social regulation.

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125. Pirie uses the term "intellectual system" to describe law in other work. See Pirie, *Law Before Government*, *supra* note 36, at 208, 222, 224; PIRIE, *ANTHROPOLOGY OF LAW*, *supra* note 36, at 73.

126. In morality, by contrast, the Kantian categorical imperative operates as a single covering law. See Marcus G. Singer, *The Categorical Imperative*, 63 *PHIL. REV.* 577, 577 (1954) ("Act only upon that maxim whereby thou canst at the same time will that it should become a universal law.").

127. John Gardner has argued that there is nothing distinctive about legal norms "except that they are norms belonging to one legal system or another." John Gardner, *The Legality of Law*, 17 *RATIO JURIS* 168, 170 (2004). He argues that laws don't exist in isolation, but "[o]ne needs to distinguish legal systems in order to distinguish laws." *Id.* at 171. For a similar point about the rule of law, see PAUL GOWDER, *THE RULE OF LAW IN THE REAL WORLD* 24-26 (2016).

I want to focus here on law's common style, rather than its modal, society-wide scope. Among the most important elements of this common style are: (i) the ambition toward abstraction, in the sense of the categories in use being persistently characterized by generality across time and space; coupled with (ii) a resistance to wholly personalized, ad hoc, and situational judgments; and (iii) the distinctive use of casuistic deduction from general principles, and the related application of analogical reasoning.<sup>128</sup> All this yields a comprehensive sociolect. I hereafter use the term "systematicity" to capture this distinctive blend of a durable<sup>129</sup> plurality of norms coupled with the existence of common methodological tools for their application.<sup>130</sup>

Evidence for these claims about law's systematicity is scattered across *The Rule of Laws*. A threshold indicium of law's systematicity is the physical form that "law" takes: a durable compilation of different rules that make up a legal system.<sup>131</sup> The very first lawgivers in Mesopotamia thus "chiselled their laws onto

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128. Consider, for example, the influential idea of Lord Coke that the English common law was constructed upon a species of "artificial reason" that is the special preserve of lawyers and judges. GERALD J. POSTEMA, *BENTHAM AND THE COMMON LAW TRADITION* 16-17 (2d ed. 2019). Coke was responding to King James I's bold claim that since law was founded upon reason, he could decide cases as well as the judges. See *Prohibitions del Roy* (1607) 77 Eng. Rep. 1342, 1343; 12 Co. Rep. 63, 65 ("[T]rue it was, that God had endowed his Majesty with excellent Science, and great Endowments of Nature; but his Majesty was not learned in the Laws of his Realm of England, and Causes which concern the Life, or Inheritance, or Goods, or Fortunes of his Subjects, are not to be decided by natural Reason but by the artificial Reason and Judgment of Law, which Law is an Act which requires long Study and Experience, before that a Man can attain to the Cognizance of it . . ."). This is a particularly crisp articulation of the notion that there is a distinctive arsenal of arguments associated with legal reasoning, as distinct from other forms of reasoning.

129. By "durable," I also do not mean compositionally invariant. 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 Book 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, *supra* note 33, at 363 (mentioning the influence of "English ideas about rights and liberty" on Indian nationalists), with Rabiat Akande, *Secularizing Islam: The Colonial Encounter and the Making of a British Islamic Criminal Law in Northern Nigeria, 1903-58*, 38 *LAW & HIST. REV.* 459 (2020) (discussing how British imperial officials leveraged Sharia, and in so doing changed that legal system, in colonial Nigeria).

130. In linguistics, that term has a related but distinct usage. See Steven Phillips, Yuji Takeda & Fumie Sugimoto, *Why Are There Failures of Systematicity? The Empirical Costs and Benefits of Inducing Universal Constructions*, 7 *FRONTIERS PSYCH.* art. no. 1310, at 1 (2016) ("Systematicity is a property of cognition where capacity for certain cognitive abilities implies capacity for certain other (structurally related) cognitive abilities.").

131. 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

stone slabs” with the aim of endowing them with a “permanence” that could “outlast the authority of the lawmakers.”<sup>132</sup> 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.<sup>133</sup> 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.<sup>134</sup> Several hundred years later, magistrates of the Qin dynasty would again use bamboo strips to record specific judgments, aggregating them into a system of precedent “not unlike the English common law.”<sup>135</sup> Around the time that Prince Vladimir of the Rurikids was fashioning the first Russian laws from his capital in Kyiv with his son Iaroslav 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 the peeling bark of birch trees.<sup>136</sup> 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 to before the wide diffusion of literacy.<sup>137</sup>

But why would *written* laws antedate the broad capacity of a public able to consume such rules by reading them? 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 instead point to something more at stake in these varied efforts at making law durable. Writing instead offered a “new modalit[y]” that bespoke

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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, *supra* note 33, at 352.

132. *Id.* at 12.

133. *Id.* at 67.

134. *Id.* at 76.

135. *Id.* at 87.

136. *Id.* at 190-94.

137. *Id.* at 101 (noting that the Twelve Tables, 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 36, at 47, 48 (“Because written law could only be the preserve of the literate and the specialist, it occupied a largely symbolic or ideological position for the rest of the community.”).

the ambition to organize a society's affairs at a more general level.<sup>138</sup> It was an effort to forge "a consciously constructed system of verbal rules" using "abstract and objectively definable categories."<sup>139</sup> It reflected an ambition to transcend not just the particulars of a specific case but also the mundane circumstances of a single lawmaker or scribe toward some more durable kind of norm. Law, in short, has long aimed past the earthbound particular toward a *systematic* view of the ordered social world as a whole.<sup>140</sup> Writing, systematicity, and the urge toward universality all traveled together.

A further element of law's aspiration toward transcendent generality can be found in the verbal forms that law takes. To see these regularities, it is useful to ask what happens in their absence. Consider cases that lie beyond the polythetic 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."<sup>141</sup> Why? It was not law because there was no effort to systematize the outcomes of discrete disputes into general rule-like regularities.<sup>142</sup> Law may begin with the trceries left by discrete resolutions.<sup>143</sup> But it cannot end there. In its core cases, the category of law bespeaks an assembly of such decision points into a *system* 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. Nor will it cover every imaginable case. Even in a legal system that is mature in the sense of having endured for decades and developed a thick underbrush of rules or precedent, questions of how much generality is needful are likely to keep arising. In contemporary American law, those debates take several forms. In an oft-quoted

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

139. PIRIE, *ANTHROPOLOGY OF LAW*, *supra* note 36, at 138 (citation omitted); *accord* Fredric L. Cheyette, *Suum Cuique Tribuere*, 6 *FRENCH HIST. STUD.* 287, 288 (1970) (offering a similar formulation).

140. In the extreme, Emperor Justinian asserted that his codification of Roman law would be "valid for all time." PIRIE, *supra* note 33, at 121. For a not altogether sympathetic account of this perspective, see Thomas Nagel, *The Absurd*, 68 *J. PHIL.* 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").

141. PIRIE, *supra* note 33, at 398.

142. This was also true of the informal norms in Shasta County famously identified by Robert C. Ellickson. ROBERT C. ELLICKSON, *ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES* 4, 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 the law").

143. This seems to be the case in the Rurikid lands. *See* PIRIE, *supra* note 33, at 193-94.



essay, for example, Justice Antonin Scalia condemned the use of legal standards, as opposed to sharp-edged rules, by intimating that they might not count as law at all.<sup>144</sup> Further, the question of law's obligate generality has been sharply posed in the rare cases in which a lawmaker singles out a person or entity for distinctive treatment. This constitutional jurisprudence, which treats the demands of Article III of the U.S. Constitution upon the adjudicative branch, has been marked recently by a set of sharp disputes about how general law must count as valid under the Constitution.<sup>145</sup> 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. At the same time, it is telling that no one today suggests that a series of discrete, personalistic resolutions, lacking any sort of intellectual glue, could ever count as "law."<sup>146</sup> The idea of law as a general system is firmly rooted enough to count as definitional.

A final regularity concerns the kind of arguments entailed by law. Out of the necessary systematicity of law emerges a predictable bundle of analytic moves.

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144. Antonin Scalia's essay articulates an "image of how justice is done – one case at a time, taking into account all the circumstances, and identifying within that context the 'fair' result." Scalia, *supra* note 12, at 1176. A judge who engages in an all-things-considered judgment 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 for a specific decisional ground to count as law – which is a stronger claim than I want to press here.

145. One way in which the Court has retrenched away from a constitutional demand for generality is through its shifting understanding of the Article III prohibition on so-called rules of decisions. Hence, in *Bank Markazi v. Peterson*, 136 S. Ct. 1310 (2016), 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," *id.* at 1319 (quoting 22 U.S.C. § 8772(b)(1) (2018)), would be available "to satisfy any judgment . . . awarded against Iran for damages for personal injury or death caused by" acts of terrorism, *id.* at 1318-19. 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.* at 1317, 1322. Then, in *Patchak v. Zinke*, 138 S. Ct. 897 (2018), 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, *id.* at 910 (plurality opinion). 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).

146. The common complaint that a case or decision rule is valid in one instance only, and not otherwise, may derive from this definitional premise of law.

Law is thus characterized by what literary critics call a style.<sup>147</sup> This takes the form of several distinctive patterns of normative reasoning that all aim to create and maintain systematicity. One is casuistry: “the art of analyzing moral issues in terms of cases and circumstances.”<sup>148</sup> The other is analogical reasoning, which has a number of “overlapping features: principled consistency; a focus on particulars; incompletely theorized judgments; and principles operating at a low or intermediate level of abstraction.”<sup>149</sup> Analogical leaps require some principle determining similarities and differences – such a principle need not be explicit, but it needs to be a “legal principle.”<sup>150</sup> These features complement the abstraction that comes from understanding law not as the settlement of specific disputes, but as norms of a more general character.

Strikingly, these related methodological moves can be discerned at the very inception of Pirie’s long history of law. A seed planted early in law’s history then bore fruit many times over across subsequent legal systems. Today, in consequence, the habits of abstraction, casuistic, and analogical reasoning thoroughly shape the content of law-school class discussions. The earliest recorded laws – associated with the Sumerian dynast Ur-Namma – were crafted in the casuistic form of “if . . . then . . .”<sup>151</sup> One and a half millennia later, the Athenian states-

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147. In the art-criticism context, “style” has a different meaning. It signifies the personal, the inimitable. 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 a group are visible.”); SUSAN SONTAG, *On Style*, in *AGAINST INTERPRETATION: AND OTHER ESSAYS* 15, 32 (1966) (“Style is the principle of decision in a work of art, the signature of the artist’s will.”). I use the word style to capture the idea of regularities that unite, not quiddities that divide.

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

149. Cass R. Sunstein, *On Analogical Reasoning*, 106 *HARV. L. REV.* 741, 746 (1993) (emphasis omitted); see also Emily Sherwin, *A Defense of Analogical Reasoning in Law*, 66 *U. CHI. L. REV.* 1179, 1179 (1999) (defining analogic reasoning as follows: “[C]onfronted 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 do not 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), which defines analogical reasoning as a form of deduction from rules. Cass R. Sunstein also places more weight on the absence of “a comprehensive theory” driving outcomes than I do. See Sunstein, *supra*, at 781.

150. See Frederick Schauer & Barbara A. Spellman, *Analogy, Expertise, and Experience*, 84 *U. CHI. L. REV.* 249, 255 (2017).

151. PIRIE, *supra* note 33, at 17, 20.

man Solon adopted the similar casuistic form “almost certainly inspired by Mesopotamian laws.”<sup>152</sup> These stylistic features of law “traveled westwards, along with luxury goods, decorative arts, and the alphabet.”<sup>153</sup> The same style of reasoning was once again “adopted and adapted by the citizens of Rome” a few hundred years later.<sup>154</sup> Roman law, of course, influenced the European civil law and Anglo-American common law. The latter eschewed “broad general principles.”<sup>155</sup> It instead prized the “disciplined” practice of argumentation: based on “analogical” reasoning, “arguing from one case to the next . . . on the basis of perceived likenesses and differences . . . in the landscape of common experience . . . .”<sup>156</sup> Today, it is no stretch to say that the form of casuistic reasoning from case law to hypotheticals that is used in 1L classrooms around the United States has a historical 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. Moreover, this pedigree demonstrates that a distinctive, albeit not defining, element of law’s larger systematicity is its aspiration to systematicity and its associated methods of generality, abstraction, and casuistry.<sup>157</sup>

It is worth saying that many of the elements I have 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

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152. *Id.* at 34.

153. *Id.*

154. *Id.* at 44.

155. Postema, *supra* note 24, at 593.

156. 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.” *Id.* at 594 (emphasis omitted).

157. 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, *supra* note 33, at 27 (noting that Hammurabi’s laws “do not ever seem to have been referred to in legal cases”); *id.* at 151–52 (stating that there is “little evidence that [Justinian’s] *Corpus Iuris* made any impact on legal practices 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 law’s “recurrent feature” is a tractable claim to viability as an actual guide to some segment of the social sphere.

scholars, ridiculed to great effect by Blaise Pascal.<sup>158</sup> Indeed, the methods of (nonlegal) 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.<sup>159</sup> 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 technique for social ordering. Law can borrow methods and moves from other intellectual systems without losing its autonomy. Indeed, given the roots of much law in nonstate practices, such as religion and custom, it is perhaps hardly surprising to observe methodological bleed.

### C. *Law's Hieratic Elite*

A third commonality flows indirectly from law's systematicity. An intellectual system, like a garden, must be cultivated. It needs tending so as to expunge pests and enlarge its harvest. 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 premodern (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 without writing.<sup>160</sup> In performing this function, however, the hieratic elite need not be embedded within the state.<sup>161</sup> To the contrary, it follows from Pirie's dissociation of law and the state that a hieratic legal elite can also be entirely separate from state institutions or uncomfortably straddle their bounds.

Across time and vast geographic spans, hieratic elites at one remove from the state have summoned a body of ideas to facilitate law's crystallization as an in-

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158. For Blaise Pascal's famous critique of Jesuitical argumentation, see BLAISE PASCAL, *Letter V*, reprinted in *THE PROVINCIAL LETTERS OF BLAISE PASCAL* 194, 194-212 (O.W. Wight ed., Thomas McCrie trans., New York, Hurd & Houghton 1866) (1656).

159. For a fascinating example coauthored 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), which states: "[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."

160. Cf. PIRIE, *supra* note 33, at 181 (noting the "oral wisdom of . . . poets and lawyers" in medieval Ireland); *id.* at 186 (same for early Icelandic law).

161. That said, one might see in the existence of a hieratic elite a seed of some elements—size, social differentiation, intellectual specialization—of the nascent state.

tellectual system. In antique Rome, “the authority of the law” was closely associated with orators and jurists like Cicero.<sup>162</sup> Their authority, in turn, was tightly linked to the “independence of the law” as a system.<sup>163</sup> 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.<sup>164</sup> And after the fall of Rome, the empire’s legal traditions were kept alive by scholars and Lombardian notaries, who continued to use ancient legal forms.<sup>165</sup> Only with the emergence of a law school at Bologna did a “powerful guild” of recognizable legal scholars emerge, pouring out “commentaries, opinions, and glosses on the *Corpus Iuris*,” and hence establishing themselves as “authorities on the law.”<sup>166</sup> The “classical” form of Sunni Islamic jurisprudence was similarly “the product of the private efforts of Muslim scholars.”<sup>167</sup> Vedic scholars also acted as judges, offered valuable legitimation for kings, and “affirmed and elaborated” the emergent caste system.<sup>168</sup> Note the exception here: China, at least as early as the Qin dynasty and for several centuries thereafter, was distinct in its use of civil servants, rather than judges or scholars, to understand and apply the law.<sup>169</sup>

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 protostates such as Mesopotamia and the Indus Valley, leaders could exercise authority through physical force or by establishing the sociological legitimacy of their rule. The second option is, of course, likely to be less costly and more durable in the long term. Even today, when the state has at its disposal a far wider array of tools for keeping its populace in line, cultivating

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162. *Id.* at 114-15; HERZOG, *supra* note 107, at 21.

163. PIRIE, *supra* note 33, at 114-15.

164. *Id.* at 125.

165. *Id.* at 159.

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

167. AHMED EL SHAMSY, *THE CANONIZATION OF ISLAMIC LAW: A SOCIAL AND INTELLECTUAL HISTORY* 3 (2013).

168. PIRIE, *supra* note 33, at 61, 64-65, 206.

169. *Id.* at 81; *see also id.* at 245-49 (describing the operation of the legal bureaucracy in the Song period); *id.* at 455 (describing the centuries-long combination of “the roles of king and priest” in China and its lasting effects on the country’s legal system).

the belief that its rule is legitimate and warranted remains practically important.<sup>170</sup> Violence is rarely enough to constitute dominion even now.<sup>171</sup> Putative leaders, of course, can claim legitimation on the basis of outcomes.<sup>172</sup> But if their position depends on the persistence of success alone, they are making themselves hostages to chance and fortune.<sup>173</sup> Recourse instead to an external coterie of hieratic intellectuals, who already have some sway in society, is a more stable basis of power. These hieratic elites can ostentatiously assert the autonomy of their systematic thought from politics' vagaries and thereby provide political leaders with a vehicle to credential their rule. If that coterie is already ensconced within the state, in contrast, it is less likely that it can credibly vouch for the legitimacy of that state.

The repeated emergence of such a hieratic caste – often in communication with a leader bent upon building a state – may hence be explained as among the most frequently deployed strategies for consolidating and maintaining political rule in the early stages of state building.<sup>174</sup> The relationship between putative state builders and hieratic elites 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.”<sup>175</sup> Over time, more-

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170. I have in mind here a sociological understanding of legitimacy. See BRUCE GILLEY, *THE RIGHT TO RULE: HOW STATES WIN AND LOSE LEGITIMACY* 5 (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, 1796 (2005).

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

172. In the modern context, there is evidence that the quality of government 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. SCIENTIST 311, 311-14 (2009).

173. This observation is quintessentially associated with NICCOLÒ MACHIAVELLI, *THE PRINCE* 62 (Russell Price trans., 1998) (1532) (“And so [the Prince] must be prepared to vary his conduct as the winds of fortune and changing circumstances constrain him . . .”).

174. Pirie does not precisely say this, but briefly states that law can “both legitimate and limit power.” PIRIE, *supra* note 33, at 453.

175. *Id.* at 206. The role of religious norms here, again, may vary: A hieratic elite drawn from a specific faith tradition may benefit by shielding their religious norms from being swept away by a majority faith and its attendant practices. Or it may use its symbiotic relationship with the state to diffuse and enlarge the reach of its own local religious norms.

over, those leaders could integrate law “as a useful tool for building a bureaucratic state” and keeping in line potential rivals.<sup>176</sup> Legal institutions’ independence, on this account, is a function of history rather than an intrinsic normative value to freestanding courts and the like.

An important 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.”<sup>177</sup> Instead, “powerful emperors managed to avoid the rule of law by . . . combin[ing] the roles of king and priest.”<sup>178</sup> 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-holding officials. Pirie carefully explores how legalist and Confucian thought enabled this distinctive state of affairs.<sup>179</sup> The legalist tradition in Chinese political thought understood law as an instrument of direct, coercive state control.<sup>180</sup> 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.<sup>181</sup> Confucian thinking, with its pronounced accent on self-cultivation, hierarchy, and the force of filial bonds, emphasized values rather than laws.<sup>182</sup> 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.”<sup>183</sup> 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.”<sup>184</sup> The content of those

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

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

178. *Id.* at 455.

179. *Id.* at 86, 247-49.

180. See Erik Lang Harris, *Legalism: Introducing a Concept and Analyzing Aspects of Han Fei’s Political Philosophy*, 9 PHIL. COMPASS 155, 159 (2014). There was “bitter controversy between Confucians and Legalists from 536 [BCE] onwards.” MENSKI, *supra* note 45, at 525.

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

182. *Id.* at 9-11 (noting a “preference for education rather than law as a means by which the people should be guided”); see also MENSKI, *supra* note 45, 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.”).

183. MENSKI, *supra* note 45, at 522-23.

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

codes, moreover, was “overwhelmingly penal.”<sup>185</sup> This has been described by one commentator as a “legalist triumph but confucianization of law.”<sup>186</sup>

At a minimum, law across Chinese history diverges in this way sharply in its institutional foundations and its social effects from other kinds of law canvassed by Pirie. Nevertheless, this important counterexample does not defeat the general 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 case, 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. And as a 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. There can be law without the rule of law. This possibility is wholly consistent with law’s systematicity and its dependence on a hieratic elite. It would, though, have implications for the normative valence of the category “law” more generally.

#### D. *Law’s Normativities*

The features of law that I have picked out of Pirie’s historical account so far—systematicity, abstraction, casuistry, and a hieratic elite (but not a necessary tie to the state)—are matters of descriptive fact. They reflect either the social or institutional contexts in which law arises and is used, or else the content of law as a distinctive intellectual system. The fourth commonality of law that I want to bring out 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 normative claims. It is a familiar point that law claims to have authority in the sense of displacing other reasons for action one way or another.<sup>187</sup> But Pirie’s account suggests that the authoritative character of law is not its sole normative trait. Law is able to convey a wider array of normative connotations. This includes, but is

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185. *Id.* at 375; PIRIE, *supra* note 33, at 90-94 (discussing the Chinese law codes in the Sui, Tang, Song, and Ming dynasties).

186. Bodde, *supra* note 184, at 386.

187. *Cf.* Raz, *supra* note 23, at 305 (arguing that law “must be, or be presented as, someone’s view on what the subjects ought to do, and it must be identifiable by means which are independent of the considerations the authority should decide upon”).



not limited to, the basic claim to provide an authoritative reason for its subjects to act.

To begin with, it is worth getting clear what we mean by saying that law is somehow normative in nature. The meaning of the term “normativity” is debated among philosophers and jurists. A useful general definition is offered by the philosopher Christine M. 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.”<sup>188</sup> Normativity, on this account, supplies some or all of the elements necessary for a person to have a reason for action or inaction. This 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, albeit one that does not apply when I am not playing chess.

If the rules of parenting and chess have a relationship to normativity – that is, to an ‘ought’ as well as an ‘is’ – what distinguishes them from law? One obvious difference is scope: law purports to reach not just a narrow tranche of human activity, but to work at large in the social world. Yet another basic element of law’s normativity thus turns on its claim to being an authoritative direction, in the sense of providing a reason to act, despite resting on purely empirical facts. But Pirie’s historical survey suggests that there is a range of other normative ends that can be furthered via law. The resulting variety cannot be reduced to the simple idea of an authoritative command.<sup>189</sup> I draw out here three other kinds of normativity evident in law’s long history.

First, law has a normative character insofar as it is a technology for “imaging the real” in the sense of describing a larger moral universe against which social life plays out.<sup>190</sup> It is useful to turn to premodern law in order to see this at work. Roughly twelve or thirteen centuries ago, law served as an instrument of cosmological ordering even when it did not yield effective authoritative commands to

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188. CHRISTINE M. KORSGAARD, *THE SOURCES OF NORMATIVITY* 8 (1996) (emphasis omitted); see also JUDITH JARVIS THOMPSON, *NORMATIVITY* 1-2 (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* 2 (2014).

189. 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, *supra* note 33, at 448. None of these key terms – justice, discipline, and duty – however, is illuminating: each of these terms could be glossed in very different ways.

190. Cf. CLIFFORD GEERTZ, *LOCAL KNOWLEDGE* 184 (1983) (“[L]aw . . . is part of a distinctive manner of imaging the real.” (internal quotation marks omitted)).

individuals. Tibetan nomads hence developed a complex system for injury compensation built upon an intricate “logic of . . . status distinctions.”<sup>191</sup> Doubting that Tibetan society of the time could be quite so finely sliced, Pirie suggests that this premodern Tibetan law offered a “map for civilization,” not a “map of an existing social order.”<sup>192</sup> 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.”<sup>193</sup> Four millennia later, the first Holy Roman Emperor Charlemagne ordered the repromulgation of the *Lex Salica*. In so doing, he failed to revise and change the currency in which the compensation payments were supposed to be paid. The result was a law that could scarcely be applied “in any detail,” and yet it still expressed the Emperor’s aspiration toward “something grander” — a regime akin to that of the glorious earlier Roman emperors.<sup>194</sup> Writing of law in medieval Anglo-Saxon kingdoms, Alice Taylor makes the parallel observation that the written codes promulgated by their monarchs “projected, rather than actually governed, a unified legal community,” and as such had a “symbolic value” that quickly outran the writ of kingly power.<sup>195</sup> Only in the thirteenth century, suggests Frederic L. 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 behavior.”<sup>196</sup> Law hence could have a normative edge, even if it did not embody preemptive reasons to act or to refrain from action. Indeed, in the absence of such reason-giving force, law in the context of a fragile, nascent state could express “a very cautious yearning . . . that states might actually be able to *do* the jobs they claimed to do, to *become* what they pretended to be.”<sup>197</sup>

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191. *Id.* at 8.

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

193. DAVID WENGROW, WHAT MAKES CIVILIZATION? 129 (2010); see also NORMAN YOFFEE, 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”). On the “aspirational” nature of the Mesopotamian state’s “geographic, legal, and communitarian sovereignty,” see Seth Richardson, *Early Mesopotamia: The Presumptive State*, 215 PAST & PRESENT 3, 4 (2012).

194. PIRIE, *supra* note 33, at 153-54; see *id.* at 450.

195. Taylor, *supra* note 137, at 48. At the edges of the kingdom, for example, Welsh written 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 4-6 (2014) (summarizing the major revolt against English rule led by the famous Owain Glyndwr).

196. Cheyette, *supra* note 139, at 288.

197. Seth Richardson, *Before Things Worked: A “Low-Power” Model of Early Mesopotamia*, in ANCIENT STATES AND INFRASTRUCTURAL POWER 17, 44-45 (Clifford Ando & Seth Richardson eds., 2017).

This does not mean, however, that law must provide universal coverage. It has often been the case that law provides authoritative guidance for only some part of social life. It may leave out, for example, matters of family relations to be addressed by religious norms. Or it might leave space for a law merchant that emerges organically via custom. Even the distinction between the private and the public that weaves through liberal political thought might be viewed as a limit on the normative aspirations of legal ordering.

A second aspect of legal normativity concerns the creation of a hierarchical social order. Hence, Hindu scholars drew on Manu's Dharmashastra to produce affirmatively a phenomenal and palpable "hierarchy of social status that put the brahmins and ruling classes above . . . commoners and servants."<sup>198</sup> Law here served as a map for the active *creation* of a social order.<sup>199</sup> It suggests that law can enable people to experience a sense that they are "participating in a wider cosmological order."<sup>200</sup> Similarly, 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.<sup>201</sup> In these encounters, law is a medium in which the colonial master and their subaltern meet, clash, and find a murky, negotiated ground. And of course, the American law of slavery offers perhaps the most familiar example of a legal inscription of durable hierarchy.<sup>202</sup>

A third point overlaps with these last two but is worth drawing out separately. The law is a social technology for extracting an "ought" from an "is."<sup>203</sup> In this regard, it is different from the rules of chess or the social norms of middle-class parenting in early twenty-first-century America. Neither of these two normative orders contain an instrument for its own transformation. In contrast, law forms a distinctive form of normative ordering insofar as it is an evolutionary, rather than a static, system. I do not mean to say here that every legal system contains a set of rules for changing substantive law. But even legal regimes that purport to be sempiternal have a hieratic caste that *de facto* can alter the contents

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198. PIRIE, *supra* note 33, at 206.

199. See Pirie, *Law Before Government*, *supra* note 36, 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 . . .").

200. PIRIE, *supra* note 33, at 311.

201. See 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).

202. For a survey, see MARK TUSHNET, *THE AMERICAN LAW OF SLAVERY, 1810-1860: CONSIDERATIONS OF HUMANITY AND INTEREST* (1981).

203. This is in sharp contrast to Hans Kelsen's resistance to deriving legal validity from historical facts. See HANS KELSEN, *PURE THEORY OF LAW* 193-205 (Max Knight trans., 1967) (1934).

of primary substantive rules.<sup>204</sup> Given the existence of a hieratic caste in almost every legal system, this means none of them can commit to being wholly insulated from change.

Law, in short, can work as an aspirational blueprint for the universe, an instrument for subjugation, or a tool for social engineering. Sometimes, it is purely aspirational. Sometimes it is a bare palimpsest, a normative gesture gently brushing the cheek of lived experience. And sometimes it forms a heavy set of chains, locking the lowly in their place and keeping the gluttonous in their palaces. It is quite clear from the reach and detail of Pirie's history (albeit not said explicitly) that societies organized around diametrically divergent and mutually repugnant moral claims can deploy the law. Law can indeed 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.<sup>205</sup> Jurists under the National Socialist regime, for instance, "emphatic[ally] call[ed] for merging law with morality" so that "the . . . state's authority encompassed not only the sphere of outer freedom but also the sphere of inner freedom."<sup>206</sup> These are, to put it mildly, widely divergent kinds of on-the-ground normativity elicited by legal systems.<sup>207</sup>

Pirie's history, in sum, suggests that law's normativity takes a wide variety of forms — both in how it is used and to what ends. It is here that law's distinctiveness lies. In contrast to law, the normativity associated with, say, chess, or even parenting, has a limited scope; it applies only to a certain, limited set of activities and has only a few flavors. Law not only tends to apply to more facets of social life (and at the limit could articulate a whole cosmological order from which there is no escape) but also serves other, more ambitious ends. In many of these uses, law does not take as its modal subject the proverbial "bad man" who "cares

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204. Consider here whether constitutional law in the United States is a normative order that (i) purports to be enduring and unchanging, but (ii) in fact changes through changes in the relevant hieratic elite.

205. A point made emphatically in HART, *supra* note 23, at 200.

206. HERLINDE PAUER-STUDER, JUSTIFYING INJUSTICE: LEGAL THEORY IN NAZI GERMANY 210 (2020).

207. See PIRIE, *supra* note 33, at 447 (noting the variance in "social ambitions" of law across different historical contexts).

only for the material consequences which such knowledge enables him to predict.”<sup>208</sup> Rather, law persistently operates on the assumption that its human subjects are social creatures<sup>209</sup> and, as such, can respond to its reason-giving and world-shaping effects.

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There is another, quite separate strand to Pirie’s claim about normativity that I have bracketed so far. She claims that laws have “defined and limited how power should be exercised” across diverse historical and institutional contexts and, as such, produced “the rule of law.”<sup>210</sup> This posits not only that law is associated with *some* sort of normative claim, but also that it generates a very specific kind of normative effect. This is the thought that law forges “limit[s]” on how “power”<sup>211</sup> (however 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 L. Fuller.<sup>212</sup>

#### *E. The Conveyor-Belt Model of Law Reconsidered*

Let us return, before turning to that complex question, to the conveyor-belt model of law. Recall that I suggested that this lies behind much contemporary talk about law and the rule of law. Recall too that this model has three elements: that the law has a temporally distinct origin in an officially authorized source,

208. Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 459 (1897). This rational-actor model has more generally been subject to considerable criticism from different fronts. For a recent summary, see Dante A. Urbina & Alberto Ruiz-Villaverde, *A Critical Review of Homo Economicus from Five Approaches*, 78 AM. J. ECON. & SOCIO. 63 (2019). See also Toshio Yamagishi, Yang Li, Haruto Takagishi, Yoshie Matsumoto & Toko Kiyonari, *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).

209. 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.”).

210. PIRIE, *supra* note 33, at 311.

211. *Id.*

212. See *infra* Section III.B.

that its application must be channeled through a cadre of specialized state actors (typically judges), and that their application of law to social life yields the generalized social good called the rule of law.<sup>213</sup>

Pirie's work has the salutary and bracing effect of showing that there is no piece of this model that holds true in any simple sense. 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.<sup>214</sup> At its inception, law has often been substantively parasitic on exogenous customs or religious norms. These are worked up and maintained by a hieratic elite, which is often to be found outside the state. The consequent vectors of law's normative influence are also varied. Law works as social aspiration or an imperial vanity as often as it offers practical, authoritative guidance for individual action. And it does not always involve the state and its agents.

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 practice of law as observed transhistorically. We need, instead, a more complex account of law that decenters the state and takes account of the many ways in which law can be invoked by both officials and 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 some influential theoretical claims about law. It is also a lens 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 general theorizing about law and its benefits. Specifically, I develop implications from the polythetic conception for some features of canonical works by H.L.A. Hart and Lon L. Fuller. The first of these analyses brings into sharp focus the distinct analytic contribution of the polythetic definition. It also helps us think about the relation of law to the state. The latter points toward a reconsideration of law's linkage to the rule of law – the issue that I bracketed at the end of Part II.

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213. I have not explored here the question of how the conveyor-belt model of law came to be. One hypothesis is that it relates to, or echoes, the medieval jurists' project of building an "ontological ground on which [a] structure of laws and rights" could be built, despite "a human life that can be neither wholly naturalised or wholly politicised." ANNABEL S. BRETT, CHANGES OF STATE: NATURE AND THE LIMITS OF THE CITY IN EARLY MODERN NATURAL LAW 7 (2011).

214. 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 (1939) (offering a "plea for merchants' law to be recognized, and to be further made for merchants").

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*.<sup>215</sup> Hart's immensely rich work has been foundational on many important questions. Its influence continues to be felt in mainstream public-law discussions in the United States, even if it is more cited than actually read.<sup>216</sup>

I want to focus on one strand of Hart's argument, which touches closely on Pirie's contribution: Hart opens his work by characterizing it as a piece of "descriptive sociology."<sup>217</sup> He then offers a seemingly historical account of the movement from a "primitive" to a "developed" legal system.<sup>218</sup> He goes on to famously argue that "[t]he union of primary and secondary rules is at the centre of a legal system," even if it is "not the whole" of that system.<sup>219</sup> I want to focus here on two elements of Hart's account upon 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.

Let me concede up front that there is no settled, single understanding in the voluminous literature on *The Concept of Law* in respect to either point. Even the seemingly anodyne opening genuflection toward "descriptive sociology" remains an object of lively debate.<sup>220</sup> So I will do my best to make clear how I

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215. HART, *supra* note 23.

216. 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 (1979)*, 36 OXFORD J. LEGAL STUD. 459, 460-62 (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.

217. HART, *supra* note 23, at v.

218. *Id.* at 91-95.

219. *Id.* at 99.

220. *Id.* at v. For competing interpretations, see Frederick Schauer, *The Limited Domain of the Law*, 90 VA. L. REV. 1909, 1911-12 (2004), which notes 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), which reviews JULES COLEMAN, *THE PRACTICE OF PRINCIPLE: IN DEFENSE OF A PRAGMATIST APPROACH TO LEGAL THEORY* (2001) and asks: "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 philosophical analysis." PIRIE, *ANTHROPOLOGY OF LAW*, *supra* note 36, at 17.

understand Hart and upon whose readings I rely before bringing to bear the insights from Pirie's analysis. To begin with, I spell out two different ways of understanding Hart's historical story about law's emergence. I use Pirie's work to consider which of these interpretations is more fruitful and how the resolution of this debate casts further light on Hart's account. I then draw Pirie's history into conversation with Hart's core account of a legal system and in particular the central role Hart assigns to officials. The following Sections then consider the relation of law to moral norms as depicted in Hart's and Fuller's work.

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

Hart's *The Concept of Law* begins by rejecting John Austin's command theory of the law to make space for a "fresh start."<sup>221</sup> His ostensible aim is then to describe a "modern municipal legal system."<sup>222</sup> Hart begins this new account by offering the reader a generalized historical narrative – a genealogy – of how law comes into being. Hart's genealogy posits two eras of social development. Movement from the first to the second marks a transition "from the pre-legal into the legal world."<sup>223</sup> The first stage is a "primitive" society.<sup>224</sup> This society lacks a "system" of laws. It is instead striated by "primary rules of obligation."<sup>225</sup> Such a society, however, experiences "defect[s]" of uncertainty, immobility, and inefficiency that "require supplementation."<sup>226</sup> To remedy these "defects," "secondary" rules of recognition, change, and adjudication emerge.<sup>227</sup> These are used by "officials" to isolate, adjust, and apply primary rules.<sup>228</sup> It is the resulting "union of primary rules of obligation with such secondary rules" that "characterize[s]" law.<sup>229</sup>

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

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221. HART, *supra* note 23, at 80.

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

223. *Id.* at 94.

224. *Id.* at 91.

225. *Id.* at 91-92.

226. *Id.* at 92-93.

227. *Id.* at 94-97.

228. *Id.*; *see id.* at 117.

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



lacks “specifically legal concepts with which the lawyer is professionally concerned.”<sup>230</sup> 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.<sup>231</sup> This implication suggests that law, as such, emerges only when the state reaches a certain threshold of complexity.

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 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.”<sup>232</sup> On this view, Hart’s argument simply has nothing to do with “how actual legal systems in general emerge, or even whether one legal system has ever so emerged.”<sup>233</sup> Similarly, Nicola Lacey suggests that Hart was not very concerned with the correspondence between his argument and empirics.<sup>234</sup> In a slightly different register, Leslie Green reads Hart’s theory as “plac[ing] law firmly in history.”<sup>235</sup> 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.”<sup>236</sup> But even he dismisses the specifics of Hart’s story as “wooden” and “fictional.”<sup>237</sup> Consistent with these readings, Hart begins his account by asking readers to “imagine” a society without “a legislature, courts, or officials of any kind.”<sup>238</sup> This framing suggests he does not intend to offer a historically grounded account.

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230. *Id.* at 93, 98.

231. *See id.* at 94 (describing secondary rules as a “remedy” that are used for “supplementing” an extant system of primary rules).

232. John Gardner, *Why Law Might Emerge: Hart’s Problematic Fable*, in READING HLA HART’S *THE CONCEPT OF LAW*, *supra* note 89, at 150, 151.

233. *Id.* A similar reading is offered by Philip Pettit, who describes Hart as engaged in a “counterfactual exercise” that “should be distinguished from 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).

234. Nicola Lacey, *Analytical Jurisprudence Versus Descriptive Sociology Revisited*, 84 TEX. L. REV. 944, 953 (2006) (“Hart was relatively impervious to historical and sociological criticism, precisely because he saw his project as philosophical and therefore immune to the charge of having ignored issues that seem central to historians and social scientists.”).

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

236. *Id.*

237. *Id.* at 1698.

238. HART, *supra* note 23, at 91.

On the other hand, at least one recent commentator reads Hart to be offering an abstraction closely calibrated to historical facts. Coel Kirkby suggests that Hart relies on “fundamental social data for his analytical generalizations.”<sup>239</sup> 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 thought.”<sup>240</sup> Further, Kirkby argues that “the step from the pre-legal [world] into the legal world is . . . an *evolution* of primitive societies bound by custom to modern societies of individuals mediated by law.”<sup>241</sup> There is some textual evidence, contends Kirkby, to support this reading. For example, Hart points to the “many studies of primitive communities.”<sup>242</sup> He also refers to “rules . . . always found in the primitive societies of which we have knowledge” to what “is confirmed by what we know of primitive communities,” and to the “history of law.”<sup>243</sup> And 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.<sup>244</sup>

Another possibility – somewhat in between the polar opposite readings offered by Gardner and Kirkby – is the idea of genealogy as functional explanation. In a late work, Bernard Williams 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.”<sup>245</sup> On Williams’s account, a genealogy can be fictional in the sense that it abstracts quite a way from the particulars of a specific historical trajectory. Yet it can nonetheless be explanatory because it “represents as functional a concept, reason, motivation, or other aspect of human thought and behaviour, where that item was perhaps not previously seen as functional.”<sup>246</sup> A genealogy, understood in this sense, is a generalization distilled out of plural and complex histories as a way of accentuating the “functional,” even as it sacrifices particulars and variances of

239. Coel Kirkby, *Law Evolves: The Uses of Primitive Law in Anglo-American Concepts of Modern Law, 1861-1961*, 58 AM. J. LEGAL HIST. 535, 559 (2018).

240. *Id.* at 556.

241. *Id.* at 557 (internal quotation marks omitted).

242. HART, *supra* note 23, at 91.

243. *Id.* at 91-93.

244. *See id.* at 291-92.

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

246. *Id.* at 34. There is a second, more critical, sense of the term that does not apply here, which involves a closer-to-the-grain reading of historical pathways. *See* Michel Foucault, *Nietzsche, Genealogy, History*, in LANGUAGE, COUNTER-MEMORY, PRACTICE: SELECTED ESSAYS AND INTERVIEWS 139 (Donald F. Bouchard ed., 1977). I do not think Hart is using “genealogy” in Michel Foucault’s sense, and so I leave the latter to one side.

specific historical paths. Importantly, while a genealogy in this sense has some relation to historical facts, it can be calibrated as 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 "law" as a historical matter? I think it can—and asking the question usefully brings into focus how the polythetic definition of law is both novel and distinctive. The evidence marshaled by Pirie suggests that such a sequence does not track law's modal historical path. This offers persuasive grounds for reading Hart in the way that Gardner, Lacey, and Green do. To the extent that Kirkby 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, Hart's genealogy of law can do scant functional work. There are three reasons for such skepticism.

First, Pirie's evidence shows that law tends to emerge outside state institutions and prior even to the coordinated efforts at formal rulemaking that warrant the label of a protostate.<sup>247</sup> In Europe, for example, "customs" and "practices" were borrowed and cast into written form by *soi-disant* kings and emperors.<sup>248</sup> 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 practical problems of political rule that emerge in the Mesopotamian Bronze Age. In this capacity, it happens to persist, *mutatis mutandis*, in the global market of digital goods and services covered by UNCITRAL.<sup>249</sup> The distinctive qualities of this intellectual system, such as its reliance on analogic and casuistic modes of reasoning,<sup>250</sup> do not arise because "a simple form of social control must prove defective and will require supplementation."<sup>251</sup> 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."<sup>252</sup> From Hammurabi onward, laws have been reduced to writing even when they do not seem to have

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247. See *supra* text accompanying notes 97-106.

248. PIRIE, *supra* note 33, at 150-51 (describing the origins of *Lex Salica*).

249. *Id.* at 431-32.

250. See *supra* text accompanying notes 125 and 130.

251. HART, *supra* note 23, at 92.

252. *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 W. J. Waluchow, *The Many Faces of Legal Positivism*, 48 U. TORONTO L.J. 387, 394-95 (1998).

ever been referred to in legal cases.<sup>253</sup> Nor have their putative subjects always been able to read (and hence understand) them. There is “little evidence” that even the Justinian *Corpus Iuris* made any impact on legal practices of the time.”<sup>254</sup> Neither of these examples of codification seems a historical outlier. Yet neither was adopted in response to a *functional* need for a focal point to facilitate coordination and compliance in the face of uncertainty.<sup>255</sup> Again, this is inconsistent with the idea of an evolution from simple to complex legal forms driven by functional needs.

Third, as Jeremy Waldron has observed, it is “wrong to think that secondary rules are the only ways of remedying the defects . . . in a simple society of primary rules.”<sup>256</sup> 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 more parsimonious expedient of identifying and empowering a hieratic caste. The hieratic caste need 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 would be no functional necessity for any *noncompositional* rules of recognition, change, or adjudication – that is, verbal rules that are independent of, and supplementary to, rules to affirm and sustain the brute fact of a hieratic group’s composition.<sup>257</sup> Provided the group is socially homogenous enough and defined by sufficiently convergent interests, they may never need to formulate, or even imagine, rules of change, adjudication, or recognition. In Rome, for example, Cicero underscored “the im-

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253. PIRIE, *supra* note 33, at 27.

254. *Id.* at 152; *see also* Richardson, *supra* note 197, at 28 (explaining that gaps in Babylonian law were “not just partial and occasional, but wholesale and regular: virtually none of Hammurabi’s ‘laws’ found their way into the relevant contracts and legal processes where one might expect to find them”).

255. More generally, there is some reason to worry about functionalist explanations for social phenomena. In perhaps the famous and most influential genealogy, Friedrich 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. FRIEDRICH NIETZSCHE, *ON THE GENEALOGY OF MORALS: A POLEMIC* 15 (M.C. Scarpitti trans., 2013) (1887); *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 as to what the genealogy of the kind Hart offers can illuminate.

256. Jeremy Waldron, *All We Like Sheep*, 12 *CAN. J.L. & JURIS.* 169, 173 (1999).

257. 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.

portance of the jurists” as “interpreters of the law” capable of asserting “the authority of the law.”<sup>258</sup> Islamic law was initially “unsystematic” and “not at all comprehensive.”<sup>259</sup> It nevertheless worked in practice because the Umayyad and Abbasid empires relied on scholars, or *uluma*, and *qadis* to formulate working rules derived from both religious principles and local “norms and practices.”<sup>260</sup> In short, it may not be necessary to have freestanding *rules* of recognition, adjudication, and change in order to enable the settlement, application, and change of legal rules. There hence need not be “internal”<sup>261</sup> rule following at work among officials and no sincere criticism for deviations. 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.<sup>262</sup>

To the extent that there is ambiguity in *The Concept of Law*, therefore, Pirie’s evidence supplies powerful reasons for rejecting Kirkby’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.<sup>263</sup>

## 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.<sup>264</sup> Further, the rule of recognition “provid[es] the criteria by which the validity of other rules of the system” can be assessed, including

258. PIRIE, *supra* note 33, at 114.

259. *Id.* at 129.

260. *Id.* at 129–31. 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 ulema 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.

261. HART, *supra* note 23, at 55–57.

262. If I were to christen this theory, I would call it the conspiracy theory of the law.

263. This still leaves interesting questions open. Hart, for example, suggests that his book concerns “the clear standard cases constituted by the legal systems of modern states.” *Id.* at 3. But in what sense, or to what extent, are those distinct from “non-modern” legal systems? Pirie pushes us to see through many superficial differences, raising a question as to whether Hart can indeed limit his inquiry in that way.

264. *Id.* at 100.

unwritten custom.<sup>265</sup> It is a matter of official practice, that is, the criteria officials converge upon and accept from an internal point of view. Hart describes the relevant “official world” as encompassing “the judiciary,” “the legislature,” and other tribunals established by the state.<sup>266</sup> He also distinguishes officials from “private citizens.”<sup>267</sup> Here, 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 as “officials.”<sup>268</sup> Cotterrell’s suggestion is, in my view, ultimately a fruitful one, but it is unsupported by a close reading of Hart’s text.<sup>269</sup> 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.<sup>270</sup> But he never said that “officials” could be nonstate actors.

Pirie’s historical account suggests not only a contingent relation between law and the state but also a strong historical likelihood that it was not state officials but a hieratic elite *standing at a remove from the state* that initially fabricated and maintained law as an intellectual system.<sup>271</sup> These elites were drawn into symbiotic relations with the state. But they were not always absorbed into it. This resulted in complex and ambiguous arrangements where the boundaries of “the

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265. *Id.* at 105; *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).

266. *Id.* at 122; see also Green, *supra* note 235, 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 official has for accepting the rule of recognition.” Julie Dickson, *Is the Rule of Recognition Really a Conventional Rule?*, 27 OXFORD J. LEGAL STUD. 373, 375, 381 (2007). At one instance, Hart briefly mentions an “umpire or scorer” as a kind of official. HART, *supra* note 23, at 102. Clearly, these are not *state* officials, but I think Hart is best read in this passage as offering a nonstate analogy to illuminate understanding of how a legal system works.

267. HART, *supra* note 23, at 116-17.

268. ROGER COTTERRELL, *LAW, CULTURE AND SOCIETY: LEGAL IDEAS IN THE MIRROR OF SOCIAL THEORY* 37 (2006).

269. The textual evidence on this point largely runs in one direction. In chapter ten, Hart discusses international law, but neither of the two “objections” he analyzes illuminates the question whether nonstate officials can be, or were at his time, the relevant social group among whom the rule of recognition was held and applied. HART, *supra* note 23, 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, *supra* note 77, at 450-51 (associating Hart with a “unitary model” organized around the state).

270. HART, *supra* note 23, at 109, 117 (noting how there is an “essentially factual” question of “practice” that lies behind “statements of validity”).

271. See *supra* text accompanying notes 162-176.

state” might well become increasingly blurred. This relation raises the interesting possibility that the rule of recognition would comprise simply whatever rules that this group of nonstate actors happens 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 nonstate 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 nonstate elite that can operate as a site for rulemaking. At the same time, the gap between hieratic and political elites enlarges the possibility, recognized by Hart,<sup>272</sup> that law will be used to advance the former’s social projects without regard to their costs to rulers or to other sectors of the polity. Promotion of the caste system by Brahminic scholars aimed at consolidating and enhancing their own social standing illustrates this possibility.<sup>273</sup> Law there provided a device to maintain social hierarchy favoring a specific elite, notwithstanding the tide of shifting social and political conditions.<sup>274</sup>

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 centers around what counts as the validly enacted content of the U.S. Constitution, which operates as supreme law within the jurisdiction.<sup>275</sup> 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 a blend of either 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 hypothesize that a majority of those jurists are in practice responsive in a fairly direct and mechanical way to ideological appeals

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272. HART, *supra* note 23, at 117 (warning of a society in which “only officials might accept and use the system’s criteria of legal validity” as perhaps “deplorably sheeplike; the sheep might end in the slaughter-house”).

273. PIRIE, *supra* note 33, at 206.

274. See SUSAN BAYLY, *CASTE, SOCIETY AND POLITICS IN INDIA FROM THE EIGHTEENTH CENTURY TO THE MODERN AGE* 25-26 (1999) (noting the fluid nature of Indian caste and identifying the 1650-1850 period as pivotal to its formation).

275. 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 Kent 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.

by copartisans that are cloaked in the appropriate “constitutional” garb.<sup>276</sup> 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 no reliable index of the actual causal, motivating, or binding quality of legal arguments. The United States’s supreme law, on this view, depends not just on a hieratic elite of judges but also on the parastatal organs that successfully influence their beliefs about what counts or does not count as valid law. This revised account of the rule of recognition opens up the possibility that we are not just governed by a Court acting as a de facto “super-legislature”<sup>277</sup> but by whatever tight-knit group of intellectuals and interest groups can persuade the Court as to what the law is or is not.

Of course, I do not expect that all readers will be persuaded by this brief sketch of the present political economy of constitutional adjudication in the United States. My more limited point is that there 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.<sup>278</sup>

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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 commonly ignored possibilities. Specifically, 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 a just-so story. And law is not

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276. 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).

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

278. For an excellent account of the Hart’s “separability thesis” as a coherent theory, see Leslie Green, *Positivism and the Inseparability of Law and Morals*, 83 N.Y.U. L. REV. 1035, 1038-44 (2008). “The separability thesis,” Green argues, “is not ambiguous, nor absurd, nor obvious. On the contrary, it is clear, coherent, and false.” *Id.* at 1038.



necessarily tightly linked to officials, as opposed to a parastatal elite that can determine the scope and content of supreme law.

This, in concluding, raises a question about the scope of Hart's theory. Recall that Hart describes his account as training upon a "modern municipal legal system," as distinct from a "primitive" one.<sup>279</sup> Yet those two categories are not distinguished by their temporality. The polythetic definition of law further identifies commonalities between these two categories in a way that blurs the distinction—including the presence of a hieratic caste. If that definition holds, it is not clear why the presence of officials wielding secondary rules should mark out an important distinction between the "modern" and the "primitive." But how then should the scope of Hart's theory best be drawn?

### 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,<sup>280</sup> 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.<sup>281</sup> Among those he accepts is the notion that the practical realization of the "principles of legality" — intelligibility, nonretroactivity, and the feasibility of actual compliance — is to some extent a prerequisite for effective "social control," but is at the same time "compatible with very great iniquity."<sup>282</sup> He rejects the idea, though, that "enactments which enjoined or permitted iniquity should not be recognized as valid."<sup>283</sup>

This last claim is often juxtaposed with Lon L. Fuller's position that a "total failure [to meet one of an enumerated number of principles of legality] does not simply result in a bad system of law," but "in something that is not properly

279. HART, *supra* note 23, at 239-40.

280. Jules L. Coleman, *The Architecture of Jurisprudence*, 121 YALE L.J. 2, 5 (2011) (asserting that there is a conventional wisdom to the effect that "there has been no more ardent proponent of the separability thesis than H.L.A. Hart").

281. HART, *supra* note 23, at 202-12.

282. *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.").

283. *Id.* at 208.

called a legal system at all,” and thus no “moral obligation” to obey such law.<sup>284</sup> Hart’s response to Fuller, 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.<sup>285</sup> Law might excel qua law, and still be pervasively and comprehensively unjust.<sup>286</sup>

If the account developed in Parts I and II does suggest some linkage between law and legality, it is rather different from the one Fuller posits. To begin with, the polythetic account of law offered in *The Rule of Laws* does not suggest a necessary connection between law and the expectation of general compliance. Law that cannot guide, for instance, is not a “total failure” from the perspective of its progenitor. Neither Hammurabi nor Justinian, recall, crafted laws that were or seemed intended to be followed.<sup>287</sup> 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, in addition to its role in providing authoritative reasons to act.

More importantly, even if law can work as a guide for practical conduct by meeting the “principles of legality,” its potential to ground moral obligations in the sense that Fuller intends is doubtful. On Fuller’s account, legality vouchsafes a “particular quality of relationship between the lawgiver and the legal subject,” characterized by “reciprocity.”<sup>288</sup> This “reciprocity” arises 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 to be the idea that Pirie embraces.<sup>289</sup> But overall, *The Rule of Laws* yields little evidence to support

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284. FULLER, MORALITY OF LAW, *supra* note 38, 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”).

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

286. HART, *supra* note 23, at 185-86 (“[I]t is in no sense a necessary truth that laws reproduce or satisfy certain demands of morality, though in fact they have often done so.”); Green, *supra* note 278, at 1051 (“The fact that [the requirements of certain legal sources] would, on balance, be morally wrong does not absolve the courts of their legal duty to apply them . . .”). Jeremy Waldron has persuasively suggested that there is a “basic contradiction” in Hart’s responses to Fuller. Waldron, *supra* note 21, at 1157-60. I am emphasizing here one strand of that contradiction.

287. *See supra* text accompanying notes 253-254.

288. RUNDLE, *supra* note 284, at 92.

289. PIRIE, *supra* note 33, at 311 (“[I]n most legal systems, the laws also defined and limited how power should be exercised . . . . This is the rule of law . . .”).

that proposition. Law instead can stand at some distance from the rule-of-law project of constraining state power.

Pirie offers several 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.”<sup>290</sup> But it is not at all clear that the historical incidence she assembles is probative on this point. Perhaps it demonstrates the *possibility* that law can be deployed to modulate power. But it offers no certainty on this score. In particular, Pirie’s account of imperial law in pre-Communist China suggests that law need not have any constraining effect at all on a particularly powerful state.<sup>291</sup>

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.<sup>292</sup> A related theory of constitutional origins highlights how a sovereign’s credible commitment to honoring property rights can facilitate desirable economic growth.<sup>293</sup> On both these accounts, the sovereign submits to legal constraints not because they generate a relationship of reciprocity. Rather, doing so advances some other policy goal. These accounts may or may not apply persuasively in particular cases.<sup>294</sup> But they illustrate the idea that law may be used to generate *enabling* constraints. The latter might enable those who already wield influence while leaving the marginal in the wind. For example, the protection of property rights, which is often associated with the rule-of-law ideal, may

290. *Id.* at 14.

291. *Id.* at 71-72, 311. 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.

292. 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 to procure “insurance” through constitutional designs which protect their interests by facilitating their eventual return to power).

293. 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 most typically “by being constrained to obey a set of rules that do not permit leeway for violating commitments”).

294. Douglass C. North and Barry R. 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, 1785-86 (2003).

well be associated with an overall increase in the ability of the powerful to act without accounting for the interests of the impoverished and socially marginalized.<sup>295</sup> Whether or not their emergence is for the better can fairly be debated in some cases.

A different possibility is that law is necessary but not sufficient for the constraint of power. It may, for example, provide the intellectual template through which such constraint can emerge. In one of her earlier works, Pirie gestured at this possibility. 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.”<sup>296</sup> But this does not fit the historical evidence. On Joseph R. Strayer’s famous account of the state’s emergence, the impersonality enabled by law is not so much the handmaiden of legality as an instrumentality of state power.<sup>297</sup> And on Quentin Skinner’s view, it is only at the end of the sixteenth century, as marked out by the 1576 publication of Jean Bodin’s *Six Livres de le République*,<sup>298</sup> that jurists started to write of “something of more impersonal significance that rulers must preserve if they wish to avoid a *coup d’état* . . . .”<sup>299</sup> The abstraction of law in Bodin, as in the work of Hobbes a century later, does not mark out an effective constraint on those wielding power. This comes later.

Pirie’s argument might be reworked as follows. It could be posited that the creation of an impersonal conception of the state may have been 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 kind to bind and limit state power. But I am skeptical. None of those sentiments seems to me adequate on their own terms to generate much by way of predictable friction on the flexing of state power. As Hannah Arendt’s meditation on the Adolf Eichmann trial suggested, loyalty to an abstract institution and bureaucratic orientation toward the diligent execution of policy choices—shorn entirely of extrainstitutional moral

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295. For an exploration of this dynamic in respect to contemporary American law, see Aziz Z. Huq, *Property Against Legality: Takings After Cedar Point*, 109 VA. L. REV. (forthcoming 2023) <https://ssrn.com/abstract=4050962> [<https://perma.cc/2BDZ-DSS7>]; and JEREMY WALDRON, *THE RULE OF LAW AND THE MEASURE OF PROPERTY* 61–65 (2012), which develops a similar point.

296. Pirie, *Law Before Government*, *supra* note 36, at 221.

297. See STRAYER, *supra* note 104, at 6 (describing the origin of the state in terms of “the formation of impersonal, relatively permanent political institutions”).

298. JEAN BODIN, *LES SIX LIVRES DE LA RÉPUBLIQUE* (Paris, Jacques du Puys 1576).

299. Skinner, *supra* note 96, at 328.

reflection—can facilitate the worst as well as the best in humanity.<sup>300</sup> Even the mundane operation of supposedly benign regulatory agencies can lead to undesirable forms of mission creep.<sup>301</sup>

Pirie's most categorical assertion of the connection between law and constrained power comes, revealingly, at the end of a chapter discussing the historical emergence of procedures for ascertaining truthful testimony, whether by ordeal or oath. In most legal systems, she says, "the laws . . . defined and limited how power should be exercised . . . . This is the rule of law . . . ."<sup>302</sup> 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."<sup>303</sup> Alas, I do not see what in her amplitudinous and eloquent history supports that optimism. Surely, it is a good thing that we (mostly) don't torture people for their testimony. But we are still a long way from a punitive apparatus of criminal law that honors the dignitary and equality interests of suspects and victims alike.

I share Pirie's professional desire to assign what I do and teach the secure status of a moral benediction. But I see 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[]"<sup>304</sup> of the law as polythetic category to achieve this salutary effect. Societies are too varied, the ambitions toward which "power" aim are too plural, and the force of legal constraint too inconstant to support a comfortable certainty. Instead, the best we can do is to acknowledge, with regret, that the history Pirie recounts provides surprisingly limited evidence of law's constraining effect on "power," however that term is defined.

There is a second reason for concern about both Pirie's optimism and Fuller's claim about "reciprocity": 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."<sup>305</sup> She does not back

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300. HANNAH ARENDT, *EICHMANN IN JERUSALEM: A REPORT ON THE BANALITY OF EVIL* 287 (Penguin Books 2006) (1963) ("Except for an extraordinary diligence in looking out for his personal advancement, [Eichmann] had no motives at all."); see ZYGMUNT BAUMAN, *MODERNITY AND THE HOLOCAUST* 20-23 (1989).

301. For a criticism of bureaucratic regulation of sexual conduct in roughly this register, see Jacob Gersen & Jeannie Suk, *The Sex Bureaucracy*, 104 CALIF. L. REV. 881, 883-84 (2016).

302. PIRIE, *supra* note 33, at 311.

303. *Id.* at 453.

304. PIRIE, *ANTHROPOLOGY OF LAW*, *supra* note 36, at 9.

305. PIRIE, *supra* note 33, at 43.

this claim up with any evidence of actual constraint being experienced by Ur Namma or his successors. Writing of medieval Ireland, Pirie again postulates that laws “must have given articulate people greater confidence to stand up to authoritarian behaviour.”<sup>306</sup> But this again seems doubtful. Is it not 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, the irrelevance of legal constraints may well have been a sharp 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 comes to manifestly evil regimes: history teaches that judges can be among the first to stumble, headlong and heedless, into the murk of evil, so long as it can be framed in the correct casuistic form.<sup>307</sup> 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 cheap talk best reserved for graduation ceremonies.

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 a new, more equitable equilibrium between ruler and ruled.<sup>308</sup> But there is a good number of powerful counterexamples. For instance, Vedic scholars of the Indian subcontinent had influence over the Rajputs, who depended on scholarly benediction for legitimacy.<sup>309</sup> There is little evidence, though, that they used such power for anything other than the selfish goal of reifying social status in the form of a caste system.<sup>310</sup> More generally, we should anticipate that hieratic elites will bend not toward the general good, but rather toward their own idiosyncratic and selfish interests.

Here again, Chinese law looms large as a counterexample. On Pirie’s account, “the Chinese thought of their law as a system of norms created by their rulers to bring order to a great empire.”<sup>311</sup> Under the sign of Confucian conformity to

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306. *Id.* at 183.

307. On the “exasperating” failure of German 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 (1948).

308. PIRIE, *supra* note 33, at 139 (arguing that the ulema of the Abbasid caliphate “insisted on the rule of law” as against “powerful caliph[s]”); *id.* at 114-15 (same for Roman orators such as Cicero).

309. *Id.* at 64.

310. *Id.* at 64-65.

311. *Id.* at 95.

familial and social hierarchy, emperors could successfully resist the “possibility that they could be judged according to their own laws.”<sup>312</sup> Instead of reciprocity, the “Legalist Confucian” model that characterized Chinese law for two millennia was characterized by an “ideal of political meritocracy.”<sup>313</sup> Today, the Chinese political leadership, comprising the Chinese Communist Party and its leadership, is not constrained by law in the reciprocal sense Fuller suggests.<sup>314</sup> Contemporary Chinese law “simply does not attempt” to constrain state power, even as it aims to use law to achieve policy ends.<sup>315</sup> Some commentators suggest that social endorsement of law might eventually generate “political” constraints on the Party.<sup>316</sup> But that seems at best a dim and distant hope.

It is true, as I have said, that 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 Leslie Green’s words, law “contains obligation-imposing norms” and as such has “moral pretensions.”<sup>317</sup> But to recognize as much is to say “nothing about their soundness.”<sup>318</sup> The social technique of law, indeed, may engender a perverse “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.”<sup>319</sup> While legalism can be a “civilized” ambition, stabilizing an aspiration toward “decent government,”<sup>320</sup> it can also work great harm, even evil, if it enables participants in the legal system to forego their own moral judgments.

In short, by demonstrating the heterogeneity of moral commitments advanced through law, Pirie’s account gives us ample reason to be skeptical of claims that morality works as a necessary condition precedent for ranking either a particular rule or a legal system as a whole as “law.” Her account confirms Hart’s

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312. *Id.* at 96; accord GLENN, *supra* note 47, at 324.

313. DANIEL A. BELL & 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” in China).

314. Taisu Zhang & Tom Ginsburg, *China’s Turn Toward Law*, 59 VA. J. INT’L L. 306, 316 (2019).

315. *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. 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.”).

316. Zhang & Ginsburg, *supra* note 314, at 317.

317. Green, *supra* note 278, at 1048-49.

318. *Id.* at 1049.

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

320. Judith N. Shklar, *In Defense of Legalism*, 19 J. LEGAL EDUC. 51, 51 (1966).

view that the benefits of a system of rules can be made available on a “quite restrictive or discriminatory basis.”<sup>321</sup> And the historical 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.”<sup>322</sup>

#### IV. LAW AS POLYTHETIC CATEGORY IN CONTEMPORARY PRACTICE

It is hardly news that the aspiration toward legality in its most public-facing form confronts many obstacles today.<sup>323</sup> This Part takes up one facet of the resulting challenge. Violent crime and state lawlessness in crime control both have intimate, if complex, historical, ideological, and material connections to the production of racial hierarchy.<sup>324</sup> It is therefore appropriate to ask whether a polythetic account usefully sheds light on law’s relation to racial dynamics or its capacity to mitigate the 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 to try to illuminate variation within the United States, or across different decades of its history, with an analytic category crafted to work across national (and imperial) boundaries over centuries and millennia. A synthetic category designed to encompass variation within the taxon of law can’t do too much to illuminate the different ways in which law can be deployed either to advance or to undermine projects of racial hierarchy under specific historical circumstances. Most immediately useful to this end 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 and metastasize.<sup>325</sup> Work by Alice Ristroph and David Alan Sklansky illuminates the important question of how violence has been imagined as a problem in the recent American past, with close attention to the roles

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321. Waldron, *supra* note 256, at 174.

322. PIRIE, *supra* note 33, at 311.

323. See *supra* text accompanying notes 2-8.

324. 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), which argues that “[r]ather 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 . . .”

325. ELIZABETH HINTON, *AMERICA ON FIRE: THE UNTOLD HISTORY OF POLICE VIOLENCE AND BLACK REBELLION SINCE THE 1960S* (2021) (offering a sweeping and incisive account of Black struggles against police violence from 1968 to the 2020s).



of race and gender.<sup>326</sup> But there is work that attempts to draw a shorter line between the rule of law and racial subordination as an American problem. Perhaps the most pertinent example is Paul Gowder's 2021 book, *The Rule of Law in the United States: An Unfinished Project of Black Liberation*. This offers a "panoptic view of the American rule of law and its connection to the borders of membership," taking account of racial dynamics.<sup>327</sup> By mapping the relationship between Gowder's and Pirie's work in this Part, I aim to develop some contemporary implications of the polythetic definition of law.

On Gowder's view, law has been constitutive of the social forces that have generated and sustained 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.<sup>328</sup> He adopts David Brion Davis's view of slavery as a fundamentally legal institution.<sup>329</sup> On this account, property, which is often seen as central to the rule of law,<sup>330</sup> operates as an unraveling vector of antilegality in the antebellum era. Law, as Pirie's work anticipates, works against the rule of law. Gowder then stresses the 1850 Fugitive Slave Act as a key legal instrument of Black oppression.<sup>331</sup> In contrast, he gives surprisingly short shrift to post-Reconstruction state and federal laws that worked to maintain the color line.<sup>332</sup> Like many others, Gowder decries the sheer breadth of contemporary criminal law, which invites dangerous discretion without effective ex post checks on illegal force.<sup>333</sup> On the other side of the ledger, he underscores the legal creativity of Black Americans, even at moments of intense social and political stress, in finding ways to

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326. 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).

327. GOWDER, *supra* note 5, at 17.

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

329. "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 dominium.").

330. See Huq, *supra* note 295 (manuscript at 3-4) (collecting sources to this effect and developing an argument that property rights can pose a threat to legality principles).

331. GOWDER, *supra* note 5, at 54-56.

332. See Aziz. Z. Huq, *The Private Suppression of Constitutional Rights*, TEX. L. REV. (forthcoming 2023), <https://ssrn.com/abstract=4072800> [<https://perma.cc/Q6XC-MB7B>] (discussing Jim Crow contract law and the legal infrastructure of housing law as instruments for the maintenance of structural subordination).

333. GOWDER, *supra* note 5, at 116-21.

articulate claims to “equal legal rights and full citizenship.”<sup>334</sup> He thus draws attention to subaltern efforts to counter the hegemonic normativity of law—a strand largely absent from Pirie’s narrative.

The value of an intervention such as Gowder’s is its particular tracing of the ways in which law and racial hierarchy interact. His engagements with this circuit beget skepticism. American law, he concludes, lacks “tools necessar[y] to effectively control the abuse of power.”<sup>335</sup> Time and again, popular demands for reform pressed by Black and Brown interests are (when successful) litigated out of existence<sup>336</sup> or simply ignored.<sup>337</sup>

All this is timely and valuable. But what an account such as Gowder’s cannot offer is an evaluation of law’s immanent, untapped potential as an instrument for or against racial hierarchy. It is hard to tell from Gowder’s account, for example, whether the dismaying trajectory he traces might have yielded different, less racially iniquitous effects had the law been used more wisely. Perhaps slaveholders had so “vast [a] breadth and fierce confidence of the proslavery political vision” that they would have always overwhelmed any rectificatory project advanced through law in the early Republic.<sup>338</sup> That is, Gowder’s account does not help us understand whether the choice to use law, as opposed to other techniques of social organization, contributed to hierarchy or equitable social structures.<sup>339</sup> Nor does he ask how recurrent social features of law either conduce or inhibit racial reform.

It is here that the polythetic account of law can shed some light. But I want to insist that this insight is very modest and should not be overstated. By drawing attention to the recurrent elements of law, the latter account tees up the question of law’s general orientation toward projects of either hierarchy or liberation.

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

335. *Id.* at 175.

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

337. See Aziz Huq, Robert Vargas & Caitlin Loftus, *Governing Through Gun Crime: How Chicago Funded Police After the 2020 BLM Protests*, 135 HARV. L. REV. F. 473, 475 (2022) (documenting strategies used to deflect the Black Lives Matter protest demands in Chicago).

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

339. In particular, Paul Gowder might have said more about the way in which “the sexualized violence against, and captivity of, Black people” constituted “condition[s] of possibility” for basic elements of the American constitutional order, such as our system of presidential elections. FRANK B. WILDERSON III, *AFROPESSIMISM 197-98* (2020). The ability to inter such “condition[s] 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 Judith N. Shklar’s pejorative sense. SHKLAR, *supra* note 319, at 5.

Corroborating Gowder's generally pessimistic conclusions, the polythetic account of law hints that there are good reasons for being pessimistic about law's reformist and redistributive tendencies. The headwinds against racial reform are instead woven tightly into its warp and woof. This conclusion must be offered only very tentatively: the best we can say is that there is a built-in tendency for law, as such, to reinforce rather than unravel invidious hierarchies given its constituent parts. But we should be careful not to leap to conclusions about how strong, or how pervasive, that tendency may be.

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 run at least, about law's redemptive potential in four ways.<sup>340</sup>

First, the polythetic account holds that law is an intellectual system characterized by casuistic and analogic reasoning. It relies on general categories as a means of pushing beyond specific cases.<sup>341</sup> This tendency toward abstraction makes it a capacious vessel for hierarchy-creating projects because it tilts our attention away from the specifics of human individuality, corporeality, and experience. Race is not a natural or biological category. It reflects and nurtures a knot of unequal, corrosive social relations.<sup>342</sup> The moral implications of race cannot be grasped without attention to the particular indignities and despoilings that embed and embody racial categories. But legal terminology and modes of argumentation offer an embarrassing array of opportunities for avoiding this recognition by self-exculpation, evasion, or obfuscation.<sup>343</sup> The very exercise of abstraction creates a risk that the moral wrong of race will be missed or purposefully avoided. To do law is, in some measure, to extricate oneself from the realm of human pain and hurt, where the harms of domination and subjugation live. Formality and casuistry in reasoning instead likely enable a numbing of the moral sense with the anesthetic of legalism.

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340. A broader view of what "law" is that 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 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.

341. See *supra* text accompanying notes 108-127.

342. Sally Haslanger, *Gender and Race: (What) Are They? (What) Do We Want Them to Be?*, 34 *NOÛS* 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).

343. The classic study is ROBERT M. COVER, *JUSTICE ACCUSED: ANTISLAVERY AND THE JUDICIAL PROCESS* (1984).

Second, the taxon of race needs to be stabilized and propagated through society because it lacks a biological or presocial predicate. It must be hammered into a single substance 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 direct sense, well-adapted to that task. And the casuistic nature of legal reasoning means that the law may be quickly adapted to the creation of racial categories via technologies for producing and disseminating taxonomical nomenclatures. So law and legal institutions repeatedly play important roles in stabilizing and disseminating racial categories through “the extension of racial meaning to . . . previously racially unclassified relationship[s], social practice[s, and] group[s].”<sup>344</sup> Of course, many of the instrumentalities of “racist” regimes work primarily through law.<sup>345</sup> But even when a court adjudicates a racial-discrimination matter, it necessarily makes determinations of racial identity. Law in this way reifies categories of racial identity.<sup>346</sup>

Third, it is plausible to think that law is better able to create than reverse racial hierarchy. Because law is persistently organized around abstraction, casuistry, and analogy, it is well-suited to the reification of social categories such as race. Once created, law’s categories may be sticky.<sup>347</sup> The close linkage between law and a hieratic elite suggests there will often not be sufficient motivation to decouple law from hierarchy’s creation and maintenance. In this vein, Hart wrote pessimistically that “[s]o long as human beings can gain sufficient cooperation from some to enable them to dominate others, they will use the forms of law as

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344. MICHAEL OMI & HOWARD WINANT, *RACIAL FORMATION IN THE UNITED STATES* 111 (3d ed. 2015); see also Neil Gotanda, *A Critique of “Our Constitution Is Color-Blind,”* 44 STAN. L. REV. 1, 35 (1991) (discussing the “statutory histories of state racial classification schemes”); IAN F. HANEY LÓPEZ, *WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE* 3-6 (1996) (same); Ariela J. Gross, *Litigating Whiteness: Trials of Racial Determination in the Nineteenth-Century South*, 108 YALE L.J. 109, 111-56 (1998) (same). 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).
345. GEORGE M. FREDRICKSON, *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).
346. 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 . . .”).
347. Though not dispositive, the history of colorblindness as an equality principle casts doubt on the ability of courts to dissolve racial categories by simply ignoring them. 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”).

one of their instruments.”<sup>348</sup> To be sure, other potential roles for law are bidirectional. For instance, law can play a role in both concentrating and distributing the material advantages (e.g., schooling, housing, and a clean environment) and material encumbrances (e.g., convictions and removal orders) that partially constitute race. And while antidiscrimination law can play an important role in dismantling racial hierarchies, many observers have raised concerns about its efficacy and its vulnerability to capture by a dominant group.<sup>349</sup> But my point here is simply that law may have *more* tools for creating hierarchy than it has for engendering emancipation.

Fourth, law is associated as a sociological matter with a hieratic elite responsible for generating and maintaining its integrity as an intellectual system. This elite is unlikely to be representative of the population as a whole. It does not arise through anything akin to all-encompassing social contracts imagined by thinkers such as Hobbes or Rousseau.<sup>350</sup> Law’s hieratic elite is likely then 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.<sup>351</sup> In perhaps the most influential treatment of intellectuals’ role in politics, the Italian theorist Antonio Gramsci similarly observed 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.<sup>352</sup> Gramsci imagined the possibility of a new class of “organic” intellectuals capable of standing alongside working people.<sup>353</sup> 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.”<sup>354</sup> It would, with this history

348. HART, *supra* note 23, at 210.

349. The classic account is Reva Siegel, *Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing State Action*, 49 STAN. L. REV. 1111, 1131-35 (1997); see also Aziz Z. Huq, *What Is Discriminatory Intent?*, 103 CORNELL L. REV. 1211, 1222-23 (2018) (critiquing the doctrine with a focus on evidentiary rules and presumptions).

350. For a very helpful summary and comparison of Rousseau’s and Hobbes’s approach to the idea of a social contract, see Peter J. Steinberger, *Hobbes, Rousseau and the Modern Conception of the State*, 70 J. POL. 593, 596-98 (2008).

351. PIRIE, *supra* note 33, at 206-07.

352. ANTONIO GRAMSCI, *The Intellectuals*, in SELECTIONS FROM THE PRISON NOTEBOOKS OF ANTONIO GRAMSCI 3, 17 (Quintin Hoare & Geoffrey Nowell Smith eds. & trans., 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”).

353. *Id.* at 15-16.

354. JEREMY BENTHAM, *Petition for Justice*, in 5 THE WORKS OF JEREMY BENTHAM 444, 496 (Edinburgh, William Tait 1843).

in mind, be surprising if the social technology of law, so reliant upon the actions and choices of a small, specialized elite, tended often or easily toward emancipatory projects benefiting all. Indeed, the history Pirie recounts offers little basis for confidence that the hieratic elites responsible for husbanding the 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 as saying that law can *never* be a vehicle for racial progress. That would not be true. My more modest claim is that the social practices and dispositions that ordinarily comprise law are such that any effort at its deployment toward racial justice will confront built-in headwinds. Thus, an aspiration that "reason would someday be the currency of law"<sup>355</sup> may well be noble and even life-sustaining for some of us. But it is also an assertion of hope against experience. It is one more example of the vital, empowering delusion that gets some of us up in the morning — that this time, just this one time, in *my* lifetime and not that of my children or their children, justice and legality will rhyme.

## CONCLUSION

Law has had a four-thousand-year run. As social technologies go, this is not a bad lifespan. So now is not a bad time for a reckoning. Drawing on that history, *The Rule of Laws* offers readers an excellent 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 talk 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 their *Gemeinschaft* against exile, loss, and conquest. But it is also a scalpel to carve social and racial caste, as well as a hammer for empires 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 capacity to constrain the abuse of private or public power is very easy to overstate. As an instrument of Judith Shklar's "liberalism of fear," in particular, it is inadequate, at least standing on its own.<sup>356</sup> To tie one's hope for a decent respect for humanity to the mast of law, therefore, seems vain.

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355. Mark Tushnet, *Thurgood Marshall and the Rule of Law*, 35 *HOW. L.J.* 7, 22 (1991).

356. Judith Shklar, *The Liberalism of Fear*, in *POLITICAL LIBERALISM: VARIATIONS ON A THEME* 149, 156-57 (Shaun P. Young ed., 2004).

Instead, returning to W.H. Auden again, it might be better to “at least confine / Your vanity and mine”<sup>357</sup> 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 modest matter.

*The Rule of Laws* is about the past. In closing, it is worth asking whether that past offers a basis for prediction. That is, should we assume that the histories of law, so assiduously tracked by Pirie, will be extended forward into the future? There is some reason to think that the future, though, will not look like law’s past. Law is simply a technology. Any technology can be superseded if a cheaper alternative emerges. After four thousand years, the end of law is, perhaps, in sight because of the development of new technologies of prediction and control that will be cheaper and more effective than law. The most important of such tools are the machine-learning algorithms that 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 rules<sup>358</sup> and displace judges.<sup>359</sup>

This regime may have destabilizing effects on the basic building blocks of polythetic model. Machine-learning tools can jettison any preprogrammed decision rules and instead infer their own rule for action based on large pools of data. A written network of rules and precedent will no longer be needed. Machine decisions will also no longer be scrutable to lawyers or lay persons. As a result, a new hieratic elite of programmers and data scientists will emerge to husband the law. Compounding that pressure for change, demands for justice in an algorithmic legal system are more likely to press toward the expungement of human judgment from the law rather than conduction toward familiar institutions such as the judicial hearing.<sup>360</sup> The polythetic model, like the conveyer-belt model, will lose its grasp on actuality.

Just as law has had an unstable and contingent relationship with the project of creating predictable constraints on the abuse of private and public power, so

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357. AUDEN, *supra* note 10, at 156.

358. OMRI BEN-SHAHAR & ARIEL PORAT, *PERSONALIZED LAW: DIFFERENT RULES FOR DIFFERENT PEOPLE* (2021) (analyzing the possibility that legal rules could be adapted to the specific behavior and capacity of individuals based on the use of machine-learning and other computational tools to crunch large volumes of personal data).

359. Eugene Volokh, *Chief Justice Robots*, 68 DUKE L.J. 1135, 1156-77 (2019).

360. Aziz Z. Huq, *A Right to A Human Decision*, 106 VA. L. REV. 611, 686-88 (2020).

too machine-prediction tools are as capable of enabling abusive forms of governments as they are of alleviating tyrannical rule.<sup>361</sup> Indeed, in the limit case, it is possible to imagine the use of machine-learning tools becoming so intensive and intrusive that its regulatory effects are entirely detached from any aspiration toward legality. Machines will facilitate such tight control of human behavior that those in power no longer have any practical incentive to stay their arbitrary violence and cruelty. If that happens, the technological substitute for law will decisively break from legality. The contrast to Pirie's characterization of law over the millennia could not become any sharper.

Whether and how algorithmic tools will overtake human-made and human-applied law, of course, remains to be seen. Some of the predictions made on behalf of artificial intelligence are more plausible than others.<sup>362</sup> 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. It helps us crisply grasp the key components of a legal system, an insight that may still prove portable under conditions of a more radical forthcoming technological shift. Yet, if the most ambitious of the 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 sometimes prevails through disaster, to predict with confidence how this new technique for knowing and shaping the social order will unfold. But 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.

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361. China's extensive use of machine learning in surveillance has become the leading case study. See Mariano-Florentino Cuéllar & Aziz Z. Huq, *Privacy's Political Economy and the State of Machine Learning: An Essay in Honor of Stephen J. Schulhofer*, 76 N.Y.U. ANN. SURV. AM. L. 317, 332 (2021).

362. 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 & Aziz Z. Huq, *The Democratic Regulation of Artificial Intelligence*, KNIGHT FIRST AMEND. INST. COLUM. UNIV. (Jan. 31, 2022), <https://knightcolumbia.org/content/the-democratic-regulation-of-artificial-intelligence> [<https://perma.cc/W3M3-3T64>].