Notes

INTRODUCTION

1. Dworkin (1986). The best overall review of the rule of law literature is in Tamanaha (2004). An excellent more recent overview is in Goldston (2014).
2. Waldron (2002, 137–64).
3. Index specification online at http://info.worldbank.org/governance/wgi/pdf/rl.pdf.
4. Index specification online at http://worldjusticeproject.org/?q=rule-of-law-index/dimensions.
5. Fukuyama (2010, 33–34).
6. Pinochet's Chile combined capitalism and the protection of property rights with a system of state terror against dissidents (Letelier 1976; Silva 1993). Barros (2003, 214) claims that Chile achieved a form of the rule of law because legislative power was subject to some constitutional controls; however, in view of the fact that Pinochet possessed what Barros delicately describes as "discretionary authority to restrict individual freedoms without legal justification," including "a number of extrajudicial executions," the notion that Chile satisfied the rule of law to any degree whatsoever is highly implausible.
7. On "the conventional wisdom," "the rule of law appeals as a remedy for every major political, economic, and social challenge facing transitional countries," and is "considered indispensable for democracy, economic success, and social stability" (Carothers 1999, 164).
8. See the discussion in Haggard, MacIntyre, and Tiede (2008, 205–34).
9. For the most extreme case, Walker (1988, 24–41) gives twelve requirements described over seventeen pages of text.
10. For example, Allan (2001).
11. Williamson (1990); Santiso (2001, 1–22). For an example of this kind of talk, see Fukuyama (2004, 29–30), who runs together "institutions," "state capacity," "state strength," "smoothly functioning legal institutions," and "formal, enforceable property rights" into a general notion of a state that, while it doesn't interfere in the economy, nonetheless provides solid and reliable rules of the game in which it can operate. For an apt critique of the abuse of

the concept of the rule of law by the participants in the Washington consensus, see Tamanaha (2008, 537–41).

CHAPTER 1 THE RULE OF LAW: A BASIC ACCOUNT

1. Gowder (2013, 2014c, 2014d).
2. Gowder (2013). Other obvious objections are addressed in Gowder (2014c).
3. This is the part that has been elaborated in much more detail elsewhere (Gowder 2014d, "Institutional Values"). The first few sentences of this paragraph are a close paraphrase, bordering on quotation, from the first page of that paper.
4. *Ibid.*
5. I use "coercion," "power," and "violence" interchangeably throughout; the state's coercive power is always backed up by the use or threat of violence.
6. See Raz's (1979, 30) argument that the law necessarily claims that its authority is legitimate and Weber's (1946, 83) argument that the state monopolizes legitimate force.
7. This last idea is drawn from Nagel (2005, 113–47).
8. Here, I draw inspiration from Sally Haslanger's (2012, 303) conceptual analysis of gender and race. As Haslanger argues, our concepts can be underdetermined by descriptive facts, and it is appropriate under such circumstances to build our concepts in part based on "what we want them to be," that is, on the real-world uses for our concepts. Haslanger thus defends race and gender concepts that are appropriate to pursue social justice; likewise, we should build our concept of the rule of law in such a way that it allows us to pursue legal justice.
9. It makes no difference whether we say that officials ought to be bound by "rules" or by "legal rules." I count those social rules that constrain state power or authorize its use as legal rules (for rule of law purposes) regardless of the form in which they appear. Also, I will use "laws," "rules," and "legal rules" interchangeably.
10. This idea goes back to Aristotle (Pol. 3.1287a), who asserts that equality demands that those who govern be mere "guardians" of the law. It makes a contemporary appearance in North, Wallis, and Weingast (2009), who argue that the rule of law is one facet of an impersonal social order in which institutional roles are separate from personal identities.
11. The title has also been given as "Pamcayata" and "Pamca-Paramesvara," and is usually translated roughly as "The Panchayat Is the Voice of God." I have relied on the translation by Nopany and Lal (1980).
12. Of course, not all rule of law societies have all of these features, and certainly do not instantiate them in the same way. The three principles are functional generalizations from the practices of a variety of rule of law societies.
13. Traditionally, these practices have been captured under the notion of "predictability." I have argued against the predictability conception of the rule of law elsewhere (Gowder 2013, 576–78).

14. Macedo (1994) cogently argues that this is a necessary property of general rules.
15. Burton (1992) argues that to judge in good faith in the face of legal indeterminacy or discretion is to weigh the legal reasons – the considerations given by legal sources, rather than by personal interests and beliefs independent of legal sources – in coming to a decision. This is similar to Hart's (2013) notion that discretion is not a matter of unfettered choice, but an act of sound judgment – an exercise of judicial virtues. The principle of regularity requires judges as well as other officials to engage in such a weighing process whenever they are faced with a discretionary decision. We may also understand the considerations of policy or value that can be reasonably seen as underlying a grant of discretion as legal reasons. If officials are constrained to act in good faith in this sense, they do not have open threats – they might be able to reach more than one decision, but they will not be able to reach decisions that are explainable only as exercises of unfettered will.
16. Dworkin (1967).
17. In order to satisfy the principle of publicity, subjects must be able to know and make use of these other sources of constraint: they must, for example, be able to offer unwritten extensions to de jure rules as arguments in court, or deploy social and political institutions to sanction judges for abusing their discretion.
18. The law can be public with respect to some subjects but not others (e.g., if women must rely on male guardians to appear for them in court).
19. Waldron (2011b) offers an extensive list of judicial procedures that contribute to satisfying his version of the publicity principle.
20. This argument owes much to Diver (1983), who argued that the notion of "precision" in legal rules refers to "transparency," the extent to which their words are meaningful among those who are to obey and enforce them; "accessibility," or how easy to apply they are; and "congruence," or tracking of the intentions of the lawmaker.
21. Note that a law written in Officialish has another name in the real world: a secret law.
22. To the extent her interpretation is available for use in future cases, either as authoritative or persuasive precedent, this translation process is more effective, for it confers on subjects in those cases additional epistemic and argumentative resources for use in them.
23. Cohen (2010). In the words of Judge Kozinski, dissenting from the refusal to punish a judge who issued a ruling "just because I said it": "No one knew why the district judge had done what he did – the order gave no reasons, cited no authority, made no reference to a motion or other petition, imposed no bond, balanced no equities. The two orders were a raw exercise of judicial power." *In re: Complaint of Judicial Misconduct*, 9th Circuit No. 03–89037, unpublished opinion of September 29, 2005, available online at http://caselaw.findlaw.com/9th-circuit-judicial-council/1023783.html.
24. Schauer (1995, 633–59) points out that reason-giving behavior can be an expression of relative status in this way. See also Schwartzman (2008, 1004),

who argues that giving reasons is necessary to "respect the rational capacities of those subject to their authority," and works cited therein.

25. Kramer (2007, 65–66) aptly argues that an official who makes rulings solely on the basis of her own interests shows "contempt" for the interests of those who have come before her. My position is more ambitious, since it does not depend on the official's rulings being self-interested.

26. When I say that a legal act *expresses respect* (or disrespect), I mean to invoke the conception of expressing value with actions given by Anderson and Pildes (2000, 1510), broadly speaking, to act in a way appropriate for someone who has respect for the other. For much more about how legal acts express values, see the next chapter.

27. For this reason, officials must actually be constrained, just as in the principle of regularity, to offer reasons for their uses of coercive power. If an official explains herself to a subject out of the goodness of her heart, that explanation is not a product of the official's being accountable to the subject, and cannot express that accountability. This is part of why publicity depends on regularity.

28. Compare Allan (2001, 79), who suggests that legal systems in which subjects of law are entitled to offer arguments to the decision maker and receive reasons for their treatment express respect by recruiting their acceptance of the outcome, either as fully justified or at least as "fairly adopted by [democratic] procedures enabling all citizens to exert an influence." My claim is weaker: an official act of coercion carried out pursuant to the principles of regularity and publicity might be carried out without any claim that the law applied is justifiable to the subject, but nonetheless is minimally respectful insofar as the official carrying out the coercion at least acknowledges some source of authority other than her own will that grounds her use of power over the subject, and acknowledges the subject as someone who is capable of responding to reasons.

29. Even in a state where the monarch is the final judge, the monarch cannot make every decision; most day-to-day interactions between citizens and the state will involve officials applying someone else's general judgments.

30. For more on role separation, see Gowder (2014e).

31. Shklar (1998) interprets Montesquieu's account of the rule of law as essentially concerned with protecting the populace from fear.

32. Pettit (1996, 584) has aptly caught the gist of this form of inequality in the form of the concept of "domination":

> The powerless are not going to be able to look the powerful in the eye . . . the asymmetry between the two sides will be a communicative as well as an objective reality. Conscious of this problem, John Milton deplored "the perpetual bowings and cringings of an abject people" that he thought were inevitable in monarchies. And a little later in the seventeenth century, Algernon Sydney could observe that "slavery doth naturally produce meanness of spirit, with its worst effect, flattery."

(Internal citations, footnotes omitted.)

33. See Dershowitz (2003, 275–94) on this possibility. I thank David Dyzenhaus for raising this point.
34. Here, I disagree with Allan (2001, 63), who implies that it is only "in the context of a liberal democracy" that "departures from [the weak version of] the rule of law are properly occasions of moral censure." Brettschneider (2011, 60) seems to have the right of it when he points out that "nonarbitrariness" (about which, see Chapter 3) is an "entitlement[ ] that individuals enjoy distinct from their participatory rights."
35. Gowder (2013) defends the factual robustness idea further.
36. Those in the "status egalitarian" school of thought associated with, inter alia, Anderson (1999, 287–337) and Scheffler (2003, 5–39) are particularly likely to endorse the notion that hubris and terror are forms of status or dignitary inequality. Hegel (1991, sec. 132, 215, 228, 258) offers an autonomy-centered version of the same idea, suggesting that the "right of self-consciousness," a "right to recognize nothing that I do not perceive as rational," grounded on the individual's "intellectual and ... ethical worth and dignity" entitles individuals to know the law, and also shields individuals from exploitation by those who do know the law, who would otherwise be reduced to an underclass in "serfdom." Waldron (2012) has similarly argued that the law contributes to individual dignity in virtue of the fact that it is "self-applying" – that individuals are expected to apply its commands to themselves.
37. Those who subscribe to Christiano's (2008) conception of egalitarian democracy should agree that publicity is required for what Christiano calls "public equality," a principle requiring that citizens not only be treated as equals but be able to observe their equal treatment.
38. For example, the approach in Sen (1980/2011, 195–220) would be compatible with such an argument.
39. Pseudo-Xenophon (1968).
40. Pseudo-Xenophon (1968, 479–81).
41. The term used here is ισηγοριαν, which usually means political equality. Obviously, slaves and citizens did not have political equality in Athens. Marr and Rhodes (2008, 79) suggest that a literal translation of the word as "equality of free speech" is appropriate, in which case it appears to amount to the claim, consistent with my account, that slaves were permitted to talk back or mouth off to citizens; that is, they did not need to behave deferentially.
42. "Commands backed up by the threat of violence" includes not only the traditional sort of command on which the pre-Hart positivists focused ("pay your taxes or go to jail"), but also power-conferring rules and the like that can authorize the eventual application of state violence. For example, the laws permitting citizens to make contracts are backed up with violence insofar as one consequence of breaching a contract is a civil judgment for money damages, and civil judgments are backed up by force (armed police seizing one's property, etc.).
43. Ordinary language users routinely criticize individual officials' behavior on rule of law grounds. We should understand such criticisms in one of two ways.

Sometimes they amount to the claim that *if the behavior became routine* it would threaten the rule of law. Thus, if we say to a police officer, "The rule of law gives you reason not to have beaten that citizen just because you were in a bad mood," what we mean is that his behavior is not generalizable consistent with the rule of law. Other times, they refer to the effects of an individual action on the state as a whole. For example, when we criticize a judicial opinion for offending the rule of law, we often are concerned with its precedential effect and the behavior it will authorize for other officials.

44. As Levi (1990, 403) points out, the term "institution" often goes invoked but undefined.
45. Summers (1999, 1695) calls these "devices" to achieve the more abstract goals of the rule of law. His distinction between devices and principles is essentially the same as mine between practices and institutional principles.
46. Dworkin (1986).
47. The rule of law does require that officials respect such property rights as exist.
48. For a defense of the formality of the rule of law, see Summers (1993); for a defense of the proposition that the rule of law does not require extensive property rights, see Waldron (2011a).
49. Allan (2001, 38) denies this, apparently on the misapprehension that to say that a value can be satisfied to a greater or lesser extent, or is "only a matter of degree," is to deny that it is obligatory. Characterizing Raz's view: "since [the rule of law] may be possessed to a greater or lesser degree, it should not be permitted to impede the pursuit of important governmental purposes" (*ibid.*). But a value can be a continuum rather than a binary and still be obligatory; utilitarians, for the most obvious example, can coherently say that we are absolutely obliged to maximize aggregate utility, even though aggregate utility is a continuous variable. Moreover, most political values on most accounts (saving those of value monists), be they binary or continuous and whether they generate an absolute normative "must" or not, may conflict and must sometimes be subject to trade-offs.
50. For some of the landscape, see Waldron (2008), Sevel (2009), and Raz (1979). The view that the rule of law and law itself are different tends to be associated with positivists, and I tend to accept positivism; I also tend to accept the separation between law and the rule of law. However, since nothing is at stake in that separation, this account of the rule of law ought to also be compatible with nonpositivist views.
51. Simmonds (2007, 46–54).
52. Fuller (1969).
53. Lovett (2002, 41–78); Marmor (2007); Rijpkema (2013, 806).
54. To be clear, it's not in virtue of the moral properties of regularity and publicity that law must be minimally regular and public; it's merely a pragmatic necessity of command-giving behavior. In Kantian terms, we expect moral principles to issue categorical imperatives, but the claim at issue is merely a hypothetical imperative: "If you want to effectively boss people around, then you should make sure they know your commands and can anticipate their

enforcement." Nonetheless, the state of affairs generated by officials who act in accordance with this hypothetical imperative may itself be morally valuable.

55. This is a point that Marmor (2007) seems to miss – in defending Fuller's claim that those elements of the rule of law necessary for the law to effectively function confer moral value on the state, he ignores the fact that officials can operate a "dual state" (Fraenkel 1941), in which it runs government under law for ordinary business, while still preserving a prerogative power allowing it to totally vitiate the moral value of the rule of law by disregarding legal rules when those in power so desire.

CHAPTER 2 THE STRONG VERSION OF THE RULE OF LAW

1. Just about every scholar who thinks that generality is part of the correct conception of the rule of law credits it with egalitarian moral value. This goes at least as far back as Dicey (1982, 114–15). The most interesting version of the idea is Waldron's (2012) suggestion that the general distribution of the protections of modern law represents a concept of "human dignity" that makes universal the high status previously enjoyed only by the nobility. Habermas (1996, 473) interprets Kant and Rousseau as claiming that legal generality is an egalitarian principle. Hayek (1960, 85, 209) claims that it's the *only* permissible sort of legal equality. Ignatieff (2004, 30) deploys the egalitarian view of generality to criticize the detention of Arabs and Muslims in the contemporary United States.
2. Hayek (1960, 150–55).
3. Rawls (1999b, 237).
4. Hart (1958, 623–24).
5. Raz (1979).
6. Rousseau (2003, 2.6). Moore (1985, 316) offers another minimal conception, suggesting that the "treat like cases alike" principle only requires courts to respect stare decisis.
7. As Schauer (1995) points out, the practice of giving reasons amounts to an appeal to general propositions: to say "I did X for Y" is to assert that in other cases in which Y applies, one will do X. This suggests that there can be no purely formal conception of generality with any normative appeal, because any reason for a decision, even a terrible one like "I convicted the defendant because I don't like him," is formally general.
8. This idea has made an appearance in US law, in *Royster Guano Co. v. Virginia*, 253 U.S. 412, 415 (1920) ("the classification must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike").
9. For example, Fuller (1969, 47, 51–52 n. 10) describes the version of the principle of generality that forbids law with proper names, and describes the motivation for the bill of attainder clause in US Constitution as a commitment to the principle of generality.

10. Hayek (1960, 153, 209).
11. Examples include Hayek (1960, 150–55), Rawls (1999b, 237); Hart (1958, 623–24).
12. One might argue, in favor of the minimal conception, that it forbids legislatures from targeting people (e.g., out of malice). However, the minimal conception is insufficient to do this: even were it coherent, it might prohibit some official from enacting a malicious law against one person, but might not prohibit someone from enacting a malicious law against a whole disfavored class (such as anti-Semitic laws).
13. This is a well-known philosophical problem. Quine (1969, 119) describes it as one of defining similarity over an infinite set of possible kinds (like "red things" or "round things").
14. West (2003, 121–24) describes a similar critique of the similarity conception from the critical legal studies movement.
15. Hayek (1960, 155) points out that under the formal conception of generality officials have to be subject to the same law as everyone else. This seems intuitively important, and might make up a defense of the formal conception, except that it's impossible. Officials cannot be subject to the same law as everyone else, because they have official powers, given by law, that others lack. Since they must be subject to some different legal rules from the rest of us, we must have some criterion by which we can pick out which differences are acceptable and which are not.
16. Contrary to the position of Schauer's (2003, 205) "skeptic," this is not to claim that the principle of equality is "empty." Rather, it is to claim that the relevant conception of equality is not one that demands that people be treated identically, but instead that people be treated as equals. For more, see Gowder (2014c).
17. Cf. Amar (1996, 209–17, 226), who seems to move back and forth between an epistemic formal conception of generality and a substantive egalitarian one.
18. Cohen (2009) argues that democracy requires the giving of public reasons in order to express the equality of all citizens. His point applies equally well to the rule of law, once we accept that the rule of law too serves equality.
19. Waldron (2001, 777–81) has a similar (though more demanding) idea. He too recognizes that the principle of treating like cases alike (what he calls "the consistency value of formal justice") requires legal actors to give reasons to one another, and argues that the reasons offered must be ones that treat individuals as ends in themselves, that eschew "aggregate justifications."
20. Along these lines, Solum (1993, 738) suggests that "when the requirements of the rule of law are observed, laws and regulations are addressed to the public at large." This leads him to the idea that public reason is appropriate for "public discussion about the coercive use of state power." This notion – that state power is addressed to the public at large – also helps us understand why the rule of law requirement of generality, as the principle governing state discrimination, might be different from (and more stringent than) the moral principles governing private discrimination. In particular, purely arbitrary

kinds of distinction, such as dispreferring those whose last names begin with "A" (discussed in Segev 2014, 58), may or may not be morally objectionable as grounds for private decision, but they are surely objectionable as grounds for public decisions, just because the state is obliged to offer public reasons when it coerces people with its laws.

21. West (2003, 149); Cohen (2009).
22. Anderson and Pildes (2000).
23. Rawls (1999a, 136–37).
24. This is equivalent to Schauer's (2003, 219) worry about the "treat like cases alike" principle, even interpreted consistently with the idea that it commands us to track relevant distinctions between people. Schauer argues that the principle is "either superfluous or irrelevant," because those who wish to viciously discriminate will (falsely) suppose that there are relevant differences (e.g., between blacks and whites in the Jim Crow era). The aim of the public reason conception of generality is to provide a ground for excluding some of those supposedly relevant differences, particularly those that require the attribution of inferiority to some citizens. To the extent it succeeds in doing so, it answers Schauer's worry.
25. Rawls's own elaboration of the requirement tends in this direction. For example, he suggests that relying on controversial economic theories is forbidden by public reason (Rawls 2005, 225).
26. I borrow the phrase from Nagel (1986).
27. Anderson (1993, 17–18).
28. The possibility of making such a determination is the key point in favor of understanding public reason as expressive: it gives one some social facts on which to hang one's evaluative hat in determining the extent to which a given reason is public.
29. At any rate, the legislature need not state its reasons for enacting a law, and different members of a legislature may support a law for different reasons. (Or legislators may utter sham reasons to disguise wicked or politically divisive intentions.) Under such circumstances, the attribution of reasons for some enactment will unavoidably be constructive: we actually attribute reasons to the legislature; we do not try to guess the beliefs and values held by individual legislators.

    However, public reasons must be able to justify the actual law enacted; in order to do so, it must be possible to plausibly say that the reasons under consideration are the actual reasons for the law (sham reasons or insincere reasons are not justifying). This need not require that any actual legislators hold the reasons in question, just that it must be possible to say with a straight face that they did.
30. This point was first noticed by Baker (2001, 593), who also makes similar points about what I call the conventional nature of legal meanings.
31. Here, I follow, and basically accept, Raz's (1979, 29–30) account of law's claim to authority.

32. On the notion of laws being enacted in citizens' names, see Nagel (2005, 128–29). Nagel's argument, on its terms, is not limited to democracies, and it has long been suggested that even nondemocracies act in the name of their citizens (e.g., by Hobbes, about monarchies).
33. It is worth noting that the assertion that the laws are enacted in the name of the people in the territory is most naturally associated with the Weberian property described in Chapter 1, that is, the state's claim that its monopoly over force is legitimate. The most obvious reason to think that state force is in fact legitimate (and the one relied on by political philosophers from Hobbes and Rousseau to Nozick) is that it is in some sense attributable to those over whom it is used; the Weberian claim and the "in citizens' names" claim go together.
34. This truth, of course, is embedded deeply into our constitutional ideas. Thus, the Supreme Court applies rational basis review to every legislative act, even those not impinging on a fundamental right or protected class (e.g., *Cleburne v. Cleburne Living Center*, 473 U.S. 432 [1985]). But the idea goes deeper: positive law is purpose-driven activity (the legislature is trying to bring something about by its enactments), and purpose-driven activity is under a rational requirement to take the means necessary to achieve its ends (Kant 2002, 31–34).
35. Davidson (2001a, chs. 9–10); Lewis (1974).
36. The final quote, and the principles of coherence and charity, come from Davidson (2001b).
37. Ordinarily, these attitudes will be beliefs; however, the expressive meaning of a law could comprise some other propositional attitude. Nothing in the argument turns on this. Beliefs might be about social, physical, or normative truths, or some combination of them – a law may require attributions of beliefs about, for example, economic theories, moral claims, or the character traits of particular persons or groups. Multiple sets of attitudes may supply the expressive meaning of a law – for example, we may attribute to the legislature that enacts a regressive tax the inclusive disjunction of hatred of the poor and/or a belief in supply-side economic theory. In such a case, both would count in the candidate reasons by which the law might be justified; if either is public, the law is general.
38. Street (2010, 363).
39. However, members of the community must be able to give the laws the interpretation claimed for them – the interpretation shouldn't be routinely met with a blank stare of confusion.
40. Such meanings are established by convention, similar to Lewis's (1975, 3–35) account of the relationship between meaning and convention. In the case of symbolic meanings embedded into law, the conventions that give meaning to the symbol will also give meaning to the law: if the state commands an utterance that symbolically means X (for example, commanding redheads to wear dunce caps, and thus to symbolically send the message "redheads are stupid"), that law will mean X just because people

in the community ordinary take the utterance the law commands to have that meaning.

41. This point isn't limited to utilitarianism, but applies to all forms of moral reasoning in which evaluations of institutions depend on facts about the world. For example, one might think that the laws creating a military draft are permissible only because one's state has institutions ensuring that it fights only just wars; if those institutions go away, the draft will become impermissible.

42. I thank Enrique Guerra for pressing me to clarify why public reasons are necessary from all three standpoints. Intuitively, those reasons also must be at least basically consistent with one another, in that, for example, a reason from the third-person standpoint that entails the negation of the only possible public reason from the first-person standpoint will not suffice. However, as I do not presently have any argument for that constraint beyond the intuition, this issue must be reserved for future work. (The intuition is driven by the notion of a principle of rational consistency that spans the three standpoints, but I am not certain that such a demand is required.)

43. Conceivably, a legislator might also have enacted the law to accommodate the racist attitudes of white private citizens. However, this amounts to the same idea of inferiority as that given in the text, since it requires the supposition that it is right that the members of the subordinate caste give way to accommodate the distaste held toward them by the dominant caste.

44. Here, I disagree with Hayek (1960, 154), one of whose formulations of the ideal of general law is that a law that carves out different classes of application is acceptable to the extent it is equally acceptable to those inside and outside of the relevant group. Hayek fails to attend to the possibility of false consciousness, leading some to endorse their own social inferiority.

45. Fiss (1976) gives an anticaste principle that has been dominant in the equal protection clause literature, but, oddly, has not made an impression in the rule of law literature on generality. Jeffries (1985, 213–14) has also aptly identified this as a goal of the rule of law.

46. Gowder (2015a) gives the history of state-invented and state-warped racial ascriptions in the United States, and references to the history in Rwanda.

47. I thank Kristen Bell for drawing my attention to this line of reasoning. It was also inspired by an argument for a reciprocity-based obligation to obey the law discussed in a workshop paper by Liam Murphy, as well as Sangiovanni's (2007) argument that claims to reciprocity from fellow citizens who have contributed to the institutional framework of a productive economy give rise to obligations of distributive justice. Michelman (2002, 974–77) considers a similar idea in a very abstract way, suggesting that public reason is a "reciprocity-tending" value that might guide judges.

    Note that this conception of reciprocity is not the same as Fuller's. Fuller suggested that the rule of law establishes a relationship of reciprocity between ordinary people, who obey the law, and officials, who restrict their conduct to that consistent with the rule of law. (Fuller's explication of this point is

somewhat obscure; Murphy's (2005, 242) explanation is helpful, though her interpretation of Raz's contrary position seems seriously mistaken.) By contrast, I have argued that the rule of law does not require nonofficials to obey the law, and am instead arguing that generality establishes a relationship of reciprocity among subjects of law, who do not receive special legal privileges against one another. In other words, what matters is not that subjects *actually obey* the law, but that they are subject to the same law, and subject to sanction on the same terms if they do not obey it. However, at the end of Chapter 4, I consider an interpretation of Fuller's version of reciprocity (Rundle 2012) that is quite congenial to mine.

48. Nozick (1974, 90–95) has an influential objection to this sort of fairness argument: in the course of rejecting the argument that citizens have obligations of distributive justice in virtue of their having received the benefits of an overall system of cooperation, he suggests that it's unreasonable to demand that our fellow citizens accept their share of the costs of a public good that we've imposed on them without their consent. However, Nozick's objection does not apply here, because this argument isn't directed at those who do not consent to the public good. Those who defend unequal legal systems typically want to have those whom they oppress regulated by state power, while accepting a lighter (or no) burden of state regulation for themselves: they demand the public good, but refuse to share it. I do not propose to offer an answer to the anarchist who flat-out rejects law's demands; many philosophers have done so elsewhere.

CHAPTER 3 GENERALITY AND HIERARCHY

1. Thus Justice Harlan, dissenting in a case involving public accommodations, worried that unless full civil rights were extended to freed slaves "the recent amendments [would] be splendid baubles thrown out to delude those who deserved fair and generous treatment at the hands of the nation." *Civil Rights Cases*, 109 U.S. 3, 48 (1888).
2. Brennan (2011). Brennan disclaims the further step of claiming that those who have a moral duty not to vote ought to be disenfranchised. Still, that step is arguably available to the supporter of a literacy test.
3. Mill (1977).
4. *Ibid.*
5. Sticht (2002) recounts Southern laws against educating slaves.
6. In Kantian terms, to demand that someone who suffers from a socially imposed disability sacrifice important interests in order to spare that same society from the consequences of that disability is to disrespectfully use that person's capacity to respond to reasons as a mere means for the ends of others. It's a form of moral exploitation.
7. France (1914).
8. E.g., Mitchell (1997, 303).
9. Waldron (1991) gives an apt analysis of this problem.

10. Ripstein (2009, 278) attributes a similar position to Fichte: property rights are unenforceable against the poor who have been neglected by the political community.
11. Thus, Locke (2002, IX.123–27) argues that the state's primary end is the protection of property rights.
12. Rawls (2001, 114, 138) describes the normative space for "liberal socialism," which preserves private property rights in personal property in order to facilitate individual autonomy, but does not permit private property in the means of production.
13. Consider Hobbes's argument in chapter 15 of *Leviathan*.
14. Ripstein (2009, 280).
15. Cf. Sepielli (2013, 698), who points out that wealth and poverty can be understood as state-imposed distributions of the burdens of complying with the property laws.
16. Allan (2001) makes this suggestion first.
17. I thank Patricia Broussard for suggesting this interpretation.
18. Note that we can't be sure that a decision is nongeneral just because it fails the test of decision-maker independence – two decision makers may come out to different results because they interpret facts or exercise discretion differently, within a range of reasonable variation; by contrast, a single decision maker may vary in obviously nongeneral fashions (as by flipping a coin). For this reason, this doesn't work as a (formal) conception of generality. However, a decision that isn't decision-maker independent is at least suspicious.
19. Curtis (1991) provides a good discussion. I thank Elizabeth Anderson for suggesting I consider the Levellers.
20. Brettschneider (2011) aptly suggests that the substantive face of the rule of law is an ideal of "nonarbitrariness," which means offering citizens reasons for the state's coercion that are consistent with their equal status.
21. E.g., Fallon (1997, 8).
22. Postema (2015). In response to such examples, Postema argues that law must offer people general guidance in structuring their relationships with one another. I take this to be roughly equivalent to the claim that people must ordinarily obey the law, or at least take it as reason-giving, even in wholly private interactions that do not carry with them the taint of state power.
23. The standard account is Simmons (1979). See also Raz (1979) and Edmundson (1999).
24. What about a duty to refrain from more serious lawbreaking like violence against other citizens? It's hard to see why we might need the rule of law to impose such duties on people, or even what the law itself might add to those duties. We may need the law to *enforce* those duties, but laws such as "no murdering" are probably the least convincing cases for the application of the notion that one has a moral duty to obey the law *as such*: one is not obliged to refrain from killing people because there's a law against it, one is obliged to refraining from killing people because murder is wrong. Perhaps the prohibition of theft is a special case, since the law at least serves the settlement/

coordination function of defining the details of property rights. Still, it's hard to see why we ought to locate any such duties the property laws impose under the head of "the rule of law," understood as a condition to be achieved through states; there is plenty of social scientific evidence that often people manage to handle such matters without availing themselves of states and formal law (Ostrom 1990; Ellickson 1991).

25. This objection may be avoided by supposing that the rule of law requires states to generate obedience without requiring states to obey. However, that position seems fairly implausible: do we really want to think that the state is *obliged* to prevent people from smoking marijuana, merely in virtue of the fact that it has forbidden the behavior?
26. One railroad went so far as to challenge a Mississippi law requiring it to enforce segregated cars within the state, and took the case all the way to the Supreme Court. It lost. *Louisville, New Orleans, & Texas Railway Co. v. Mississippi*, 133 U.S. 587 (1890).
27. It may be urged against this point that even if the rule of law does not require ordinary citizens to collaborate in the enforcement of profoundly unjust law, it still, on my argument, requires officials to do so. But this isn't right: officials are not required to actively enforce unjust law, but simply to refrain from using their power illegally and, like ordinary citizens, to work to resist the illegal uses of power of others This is a position perfectly consistent with the officials of evil regimes *declining to use their power at all*, as a form of passive resistance. They may also, of course, just resign their positions. The rule of law did not give the Nazi camp guards, or the South African officials under apartheid, or any of the other standard examples routinely trotted out in this situation a reason to obey their evil orders, even though those orders came cloaked in the forms of law. I have previously suggested something approaching the opposite position (Gowder 2013), but I now think this was a mistake.
28. Many times, blacks were outright forced to flee lynch-heavy communities (Tolnay and Beck 1992, 103–16).
29. Holden-Smith (1996, 36).
30. Howard's story is reported by King (2013, 101–04). A substantially more detailed version is given in chapter 4 of Hobbs (2004). That same year, a police constable in the same county forced yet another black man to jump to his death in the same river; he got a year in jail and a thousand-dollar fine (King 2013, 104).
31. Dunn (2007).
32. King (2013, 91–93, 98–99) gives the vivid example of the case of Sheriff Willis McCall, who not only recognized and protected the ringleaders of a mob (which itself included law enforcement officers) attempting to lynch four black men accused of rape, but also allowed them to burn the houses of some black citizens unmolested, and enforced only against blacks, not against whites, an order to disarm citizens seen roaming around with guns. In general, "fewer than 1 per cent of the lynchings before 1940 were ever followed by a

conviction of those responsible" (Clarke 1998, 281). Carr (2015) collects several studies on official complicity in lynching, which universally suggest deep official involvement; the most striking statistic is that in one 50-year period, victims were kidnapped out of police custody in 80 percent of the lynchings in Georgia and 94 percent of the lynchings in Virginia.

33. Holden-Smith (1996, 41–42).
34. *Ibid.*, 58.
35. I use the phrase "were accused" advisedly, since another common practice was the use of torture to extract false confessions from blacks accused of crimes against whites. Examples and details are given by Klarman (2000, 48–97).
36. Nor was this an unusual strategy: rogue states have often deliberately blurred the boundaries between private and public violence and used private violence to reinforce their political ends. Heaslet (1972, 1032–47) discusses one of the more prominent recent examples.
37. Carr (2015).
38. *Palmer v. Thompson*, 403 U.S. 217 (1971).
39. Gordy (1997) gives the history.
40. Cohen (2011, chs. 7–8).
41. The extent to which property rights generate open-ended threats depends on overall market conditions, as I discussed in Gowder (2014f).
42. Alexander (2012).

CHAPTER 4 EGALITARIAN LIBERTY AND RECIPROCITY IN STRATEGIC CONTEXT

1. Huth (1999).
2. Machiavelli (1997, 1.52, 3.19).
3. Suppose Louis gets some positive payoff (L) from punishing a citizen (e.g., he gets to loot that citizen's goods) and L > M. Under those circumstances, he still cannot enforce his commands: punishment of those with enough lootable goods is a strictly dominant strategy, such that the only subgame perfect equilibrium is citizen always disobeys, Louis always punishes. (Intuitively, a citizen has no reason to obey if he prefers to disobey and he'll be punished no matter what he does.) This predicts a kleptocracy similar to the Thirty Tyrants – discussed at length in the next two chapters – who executed and confiscated the goods of the wealthy without regard to whether their victims had obeyed the laws (Xen. Hel. 2.3.21, 2.4.1, Lys. 12.6–20).
4. Cf. Fearon (1997) on costly signals of willingness to use violence.
5. Of course, as in real states, we may see disobedience and punishment due to lack of information and erroneous calculation about the costs of punishment, the likelihood of discovery, and the like.
6. On audience costs, see Lohmann (2003). On audience costs in nondemocracies in general, see Weeks (2008).
7. The rules may also help Louis control Richelieu. Cf. Turner (1992, 32–33, 40–41), who finds evidence that rule of law principles with respect to clear laws

and defined punishments were pursued in Imperial China, motivated by the attempt to keep corrupt or incompetent magistrates from wasting "human and material resources for [the state's] use."

8. Even if the rule of law is established in response to the demands of nonrulers rather than by the initiative of rulers or other high officials, its establishment is still likely to give rulers the tools to precommit to carrying out threats. For, as I will show in Chapters 5 and 6, in order for the masses to establish and uphold the rule of law, they must themselves be able to credibly commit to enforcing the law as written, regardless of their substantive preferences about the content of that law. If officials who are not accountable to the masses are choosing the substance of what is to be enacted into that law, then a successfully mass-established rule of law will entail that the masses are committed to enforcing those official preferences, at least to some extent.
9. What about democratic societies? Well, they might have more or less liberty-preserving law, depending on things like the extent to which they have permanent cultural minorities, and so on. The rule of law (as discussed in Chapters 5, 6, and 8) may help them preserve their democratic character.
10. BBC World News, "Why Does Singapore Top So Many Tables?," October 23, 2013, available online at www.bbc.co.uk/news/world-asia-24428567, notes that Singapore is routinely rated extremely low crime, extremely low corruption, extremely friendly to business, extremely wealthy, and extremely low freedom, by the enterprises that study such things. For anyone who accepts both conventional conceptions of the rule of law, in which the rule of law supports both economic development (social scientists) and freedom (philosophers), and in which the rule of law is often measured with variables including property rights, crime control, and corruption (see Chapter 9), this must count as a serious anomaly. Another example is Turkey, at least circa 2013, which has been accused of having effective constitutionalism in the absence of liberal democratic rights (Isiksel 2013). For that reason, we would expect Turkey to have at least a substantial degree of the weak version of the rule of law, since the constitution too is law that might be reliably obeyed or not obeyed by the state. (However, I do have one reservation about the notion that Turkey as Isiksel describes it is a rule of law state, because the constitution in question permits its own violation through extensive "emergency" provisions.)
11. Accordingly, Singapore does have a rule of law score, from my analysis in Chapter 9, more than one standard deviation above the mean, even as Freedom House rates it below the mean on scores of political liberty, free expression, and free association. By contrast, Turkey's rule of law score ranks it just below the mean, and its Freedom House ratings all cluster around the mean.
12. Hayek (1960, 155). Assaf Sharon (2012) traces this argument back to Locke. *Federalist* No. 57 offers the point as a defense of the claim that the House of Representatives will not be able to make "oppressive measures" because "they can make no law which will not have its full operation on themselves and their friends, as well as on the great mass of the society."

13. The conception of the rule of law articulated in Chapters 1 and 2 also requires officials to apply the laws to themselves, except in those rare cases where public reasons can be offered for their exclusion.
14. See, e.g., Brian Murphy, "Saudi Arabia Partying: Elite, Boozy, and Secret," Associated Press/*Huffington Post*, December 8, 2010, www.huffingtonpost.com/2010/12/08/saudi-arabia-partying-eli_n_793997.html, reporting on leaked diplomatic memoranda describing a secret alcohol/prostitute party thrown by a Saudi prince.
15. It is far from obvious that enforcing alcohol and cross-gender fraternization laws against the Saudi elite would lead to the liberalization of those laws in the face of the strong elite as well as mass religious identity in Saudi Arabia. It might just force the rulers to limit their own hedonism – a nice result from the perspective of eliminating hypocrisy, but cold comfort to liberals.
16. Consider, for example, the rights of gays and lesbians: in heterosexual-dominated societies, officials are unlikely to be particularly concerned about preserving their own liberty to engage in same-sex intercourse.
17. *Railway Express Agency, Inc. v. New York*, 336 U.S. 106, 112 (1949) (Jackson, J. concurring).
18. Rawls (1999b, 207–10).
19. Kramer (1999, 54–55) makes two other apt points against the relationship between legal certainty and freedom. First, uncertainty about the enforcement of too constraining legal rules can effectively expand citizens' choice sets by allowing them to gamble on the nonenforcement of some law. Second, some of citizens' choices may involve interfering with other citizens' choices; legal uncertainty that chills those choices may provide an overall benefit from the standpoint of liberal liberty.
20. This also assumes that the identities of rulers are stable. This may be less plausible for individual autocracies – citizens of Rome might be justly afraid that Claudius could die tomorrow and be replaced by Nero – but more plausible for ruling parties and coalitions, military governments, and so on.
21. Kramer (1999, 69) points out that irrational rulers who impose punishment when citizens have not violated their rules thereby reduce the incentive citizens have to obey; this may actually make them more free, in practical terms.
22. Linz 2000, 159.
23. See Herndon and Baylen (1975, 493–97) on the military and political cost of Stalin's purge of the Red Army, and Birt (1993) on Stalin's paranoia in general.
24. North and Weingast (1989).
25. It might be objected that this holds for top-level rulers but not for their subordinates, who may also be vested with unconstrained power over ordinary citizens but whose preferences may be harder to know (if only because there are more of them). But that objection is unconvincing, because the same incentives apply to lower-level officials. If the neighborhood centurion hates birdbaths, he can get rid of them at a lower cost if he puts up a flyer

announcing that those who display birdbaths will be punished rather than simply punishing everyone who has a birdbath and relying on them to guess the reasons.

26. For example, Mao Zedong facilitated the Cultural Revolution by creating copious propaganda announcing to citizens what they were expected to do and guiding the Red Guards in their use of violence.
27. Obvious examples include Napoleon and Catherine the Great (1768).
28. Replacing precise legal rules with less precise principles that are to be filled out on a case-by-case basis in common-law fashion by judges does not help matters: those principles rigidify into increasingly complex rules once the precedential cases are decided.
29. North, Wallis, and Weingast (2009, ch. 5).
30. Raz (1979, 220); Wall (2001, 221–22). Hayek has a version of the argument in which he suggests that citizens who are aware of the conduct that will bring about official punishment are thereby *not coerced*, because they can plan their lives to avoid force by the state. That is obviously wrong (and quite bizarre): the threat of force is just as coercive as its actual application. Otherwise the mugger who says "Your money or your life" is not coercing you unless you're foolish enough to say "No."
31. Gowder (2013).
32. E.g., Christman (1991).
33. For a lucid presentation of this sort of autonomy ideal, see Benn (1976).
34. Moreover, as Waldron (2011a) points out, markets can price such risks (e.g., by insuring them). That offers another way those risks can be incorporated into citizens' plans.
35. I have argued elsewhere (Gowder 2014f) that the economic choices of others constitute meaningful infringements on one's freedom, in virtue of their use of force-backed property rights, to the extent they leave one without a domain of independent choice sufficient for a life that goes tolerably well.
36. This may be true of some legal rules as well. For example, Rantanen (2015) argues that US patent rights are indeterminate and malleable.
37. It is inspired by Elster (2000).
38. Like Olson's (1993) "stationary bandit" (e.g., a tyrant, as opposed to a roving bandit).
39. This corresponds to Fraenkel's (1941) account of the "dual state" in Nazi Germany. Fraenkel argued that Germany simultaneously had a functioning administrative apparatus under a (conditional) rule of law that enforced contracts, protected (some) property rights in the means of production, and so on, in order to permit the predictable and orderly working of a quasi-capitalist economic system, while simultaneously operating a "prerogative state" completely unbounded by the rule of law in all noneconomic and some economic (especially labor regulation) domains.
40. To be sure, as discussed in Chapter 6, the rule of law both requires and facilitates citizens' coordination to collectively defend themselves against official power. But this public law kind of coordination can exist without the

freedom-facilitating private law sorts of coordination the law of property and contract makes possible.

41. Hayek (1978, v. 1, ch. 5). I thank Bill Simon for pressing this point on me.
42. A similar argument could be made about systems of statutory law in democratic states, to the extent the democratic process ensures that legislation tracks community norms. Such an argument would be subject to the same objections raised here.
43. Hayek (1978, 106–10).
44. Pettit (1997, 173–77).
45. Pettit (1996, 584).
46. Pettit (2003, 394).
47. Gowder (2012b).
48. Simmonds (2007, 104).
49. At one point, Simmonds (2007, 143) seems to shift from the proposition that the rule of law is *sufficient* to secure a freedom from private domination to the proposition that it is *necessary* for "enjoying some domain of entitlement that is secure from the power of others." If by "others" Simmonds means to include state officials, then this is in part a tautology, because (the weak version of) the rule of law is constituted by the control of state power. If "others" means only private citizens, then the necessity claim is false: the example of Pinochet, who established private capitalist rights in conjunction with arbitrary state power, as well as the general claims given as far back as Hobbes, are sufficient to refute it. (From the other direction, we might also consider the arguments of contemporary anarchists or libertarians such as Nozick and Hasnas, who have imagined that freedom from private violence – and hence presumably from domination – can exist without a state at all. I am not quite sure whether those are to be believed, however.)
50. Dworkin (1995).
51. Rousseau (2003, 2.6). Brudner (2004, 127–42) gets a conception of generality much like my own out of a theory of democracy as collective autonomous self-rule. He claims that the state has an obligation to only regulate subjects by general law based on "a duty on authority to submit for validation to the rational assent of the subject such that the subject is as much ruler as subject and the ruler as much subject as ruler" (*ibid.*, 130). My conception of generality can be read as a rational assent requirement, but I deny that such a requirement applies only in states in which subjects are also rulers. Even in relationships of one-way supervision and authority, the one with authority treats the one given orders with respect only if the orders given are justifiable by reasons that count as reasons for the one given orders. A good boss, for example, gives orders to a subordinate that are justifiable in terms of the collective goals of the firm; a good parent gives orders to a child that are justifiable in terms of the child's well-being; in both cases, such orders are susceptible to interpretation in terms of compatibility with the rational assent of the one being ordered around, and that interpretation has moral value as

consistent with due respect for that individual independent of any notion of self-rule.

52. Hayek (1960, 155).
53. Raz (1979, 220–22). Marmor (2007) similarly claims that retroactive law shows disrespect for citizens' autonomy.
54. Darwall (1977, 48–49) offers a compelling account of what it might mean to respect someone's autonomy. Gerald Dworkin (1988, 4) characterizes Ronald Dworkin's notion of equal concern as a requirement of "equal respect for the autonomy of citizens." See also Hill (1973, 93–94), who argues that the servile person "does not, strictly speaking, violate his own rights," but "fails to acknowledge fully his own moral status," and thus displays a failure of self-respect in virtue of the fact that he "denies his moral equality" with others. I have further discussed the notion of what it might mean to offer an "insult" in the rule of law context in Gowder (2014c).
55. Fuller (1969, 162).
56. I thank Arash Abizadeh for suggesting this phrasing.
57. Habermas (1996).
58. Rundle (2012, 97–101, 139).
59. Rundle (2012, 130).

CHAPTER 5 ισονομια: THE DAWN OF LEGAL EQUALITY

1. In this chapter and the next, I draw from copious sources in translation from Attic Greek. With the exceptions noted, the translations in this book are those given by the Perseus Digital Library, at www.perseus.tufts.edu/. Exceptions, which appear separately in the general list of references for this book, include Aristotle (1996), Herodotus (2009), Lysias (2000), Plato (1997), Thucydides (1996), Xenophon (2009), and Pseudo-Xenophon (1968). Where particular words are significant for the argument, I have endeavored to verify the translations with my own (fairly rudimentary) Greek. Citations are typically given to original Greek texts in the style used by classicists. Also, in this chapter, "citizens" takes the narrower meaning of full members of the political community, in contrast to metics, slaves, and the like. It does not take the broader meaning (the same as "subjects") used in the rest of the book.
2. Ober (1989, 128).
3. Here, I disagree with Ostwald (1986) and Lanni (2009). Recently, Edward Harris (2013) has also taken up this question in book-length form, and also argues that Athens did have the rule of law to a substantial extent.
4. Except where otherwise noted, the details in this section are drawn from Hansen (1999) and MacDowell (1978, 214–17).
5. *Graphe* is not the only type of action that classicists typically call a "public suit," but the details of the distinction are unimportant for present purposes.
6. For discussion of this, see Schwartzberg (2013, 1049–62).
7. Fisher (1992).
8. Ober (1989, 53–103).

9. Cohen (1995, 56–57). The prohibition against double jeopardy can be found across several of Demosthenes' speeches; see Loening (1987, 133) for references.
10. Andoc. 1.87.
11. I focus in this section on control of elites, and of private citizens occupying roles in the jury and assembly. These are the sites for which the claim that Athens had the rule of law is most controversial. There seems to be very little disagreement about the proposition that day-to-day magistrates were constrained by law; for a discussion, see Harris (2013, 26–28).
12. Pseudo-Xenophon (1968).
13. Hansen (1999, 230).
14. The account in this paragraph is drawn from Lanni (2010).
15. Fisher (1992, 1); Ober (2005, 113–16).
16. Fisher (1992, 38–43).
17. Carawan (2007, 43–46).
18. Lanni (2009, 693, and sources cited therein) suggests that the legal system as a whole was good at restraining private violence, getting elites to pay their taxes, and so on. However, as Lanni notes, there is some debate about the extent to which private violence was actually restrained. Karayiannis and Hatzis (2012, 621) allege that Athens's legal system was also effective in serving functions such as protecting property rights and enforcing contracts. Taylor (2002, 100) points out that the assassination of Androcles and other killings leading up to the oligarchy of the 400 were "the first known political murders in Athens since the assassination of Ephialtes" (that is, in about a 50-year period – a record comparable to those of modern rule of law states; compare, for example, the four US presidents assassinated in a 98-year period: Lincoln in 1865, Garfield in 1881, McKinley in 1901, and Kennedy in 1963). Although the relative absence of political assassinations is not a direct indication of the Athenian rule of law, the relative absence of cases where people felt the need to resort to such extra-legal means of achieving political ends certainly is indirect evidence that core functions of the state were ordinarily handled in orderly fashion.
19. On the jurors' oath, Harris (2007) argues that jurors did not consider nonlegal evidence except in fixing penalties. Maio (1983) argues that the juries followed the law when it existed, and exercised something like policy-making power in the gaps. Cohen (1995) is often cited for the suggestion that the law courts simply ruled on political disputes or feuds, and that the precise legal charges brought were not material to jury decisions (e.g., Lanni 2006, 41), though I have some difficulty discerning such an extreme position in his argument. Lanni (*ibid.*, *passim*) argues that Athens had a broad notion of relevance that included extralegal evidence when consistent with justice. Carey (1996, 36) suggests that there was a strong Hellenic norm limiting the extent to which law could just be disregarded. Also see Carey (1994), Cronin (1939), and Blanshard (2004).

20. Lanni (2009, 692–94). Harris (2013, ch. 6) argues, by contrast, that juries generally rejected aggressive interpretations of the law.
21. Lanni (2009, 701–07).
22. Moreover, rule of law skeptics such as Lanni have offered no evidence that litigants asked juries to ignore the law in favor of social norms; it's striking that the extant forensic speeches pair appeals to social norms with appeals to law, and accuse their opponents of violating both. Norms seem to function as a complement rather than a substitute for laws. Allen (2000, 176–77) suggests that jurors were asked to ignore the law, but the evidence for that proposition comes from various orators who say that their opponents' demands that the jury ignore the law should be disregarded – which seems to me more likely to be tendentious characterization on the part of the orators ("My opponent wants you to cast aside the laws!") than fair summary of the opposing argument. Also, the oratorical claim that jurors should "act as legislators" (*ibid.*, 177) may be little different from the contemporary acknowledgment that common-law judges may make new legal rules, or that the Supreme Court may change constitutional doctrine. In fact, Lysias (14.4) asks the jurors to act as legislators in explicit recognition of the fact that the case will set a precedent for cases in the future – that is, that legal norms the jurors set will be at least potentially binding.
23. Lanni (2012).
24. Consistent with this approach, Thomas (1995, 64–66) suggests that the distinction between written laws and unwritten laws or binding customs developed only toward the end of the fifth century, and became politically significant primarily because the Thirty manipulated the unwritten laws for their own advantage. Ober (2008, 190–91) argues that Athenian jurors had a "shared repertoire of common knowledge, along with a common commitment to democratic values," such that they "would often align in more or less predictable ways" even in the face of formal legal ambiguity.
25. Thuc. 2.37. I thank Dan-El Padilla Peralta for drawing this to my attention. For Aristotle, see *Politics* 6.5, 1319b.40–41 and 3.17, 1287b6–7. Demosthenes also refers to the unwritten law in "Against Aristocrates" (Dem. 23.70). See also Lys. 6.10.
26. Hayek (1978) argues that the common law is superior, from the standpoint of the rule of law, to legislative enactments in virtue of the fact that the common law is discovered and evolved from community norms rather than decreed by someone's will. Like so many twentieth-century arguments, this was anticipated by the Athenians: Aristotle declared that "a man may be a safer ruler than the written law, but not safer than the customary law" (*Politics* 3.17, 1287b6–7). That passage could also be read to say that the customary law is more authoritative and less changeable.
27. Carugati (2014, 144). However, Allen (2000, 173) suggests that consistency between cases was "a core goal of Athenian judicial decisions."
28. Thus, in contemporary America, Paul Butler (1995) suggests that black jurors do and should engage in jury nullification to resist racially biased law

enforcement – or, in other words, to police the legal system's compliance with the (social as well as legal) norm of racial equality. While Butler suggests that such jury nullification is permissible because the rule of law is a "myth" (*ibid.*, 706–77), I would say that it is an *example* of the rule of law, in its chief function of controlling powerful officials.

Fissell (2013) points out that a jury's morality and a community's morality (or positive justice) can diverge, such that juries might run amok and exercise power contrary to the rule of law. This is true, and the solution is to impose constraints on juries run amok – in Athens, these constraints were probably the need for the general community to actually enforce judgments; in the United States, the appellate process makes jury nullificatory discretion appropriately asymmetric: they can free a criminal against the law, but cannot, for example, impose large verdicts or convict the innocent without being subject to at least some judicial scrutiny. I say much more about collective enforcement and a little more about informal norms in the following chapters.

29. Todd (1993, 100).
30. *Ibid.*, 113.
31. Todd (1993, 113–15); Hansen (1975).
32. Lanni (2012).
33. Harris (2013, 114–28) gives an extensive argument and evidence for the claim that the scope of litigation was limited to the complaint filed by the prosecutor. This, by facilitating a defense, further supports the principle of publicity.
34. MacDowell (1978, 64). Harris (2013, 74–75) suggests that there was a penalty for losing private suits (*dike*) as well as public suits (*graphe* – although there were other kinds of public suits as well), however, most other sources only mention a penalty for public suits (e.g., MacDowell 1978, 64–65; Hansen 1999, 192; Christ 1998, 26). Moreover, Harris's claim contradicts Demosthenes 22.27.
35. Hansen (1999, 162–63).
36. MacDowell (1978, 48).
37. *Ibid.*, 45–46. This worry is ameliorated somewhat if Lanni (2009) is right that the Athenian courts enforced a great deal of unwritten social norms, since those norms, to be norms at all (let alone to be willingly enforced by mass randomly selected juries) must have been widely known (and accepted).
38. Nightingale (1999, 107–12) argues that ordinary Athenians did not in fact have substantial legal knowledge. If true, that nonetheless does not directly threaten the conclusion that Athens comported with the principle of publicity, so long as knowledge of the laws was available (fairly cheaply) to those citizens who cared; compare Athens here, again, to modern societies – the US Code does not offend against the rule of law because citizens don't have it memorized, so long as it is relatively easy for citizens to learn their obligations and rights when they need to do so. See further the discussion by Harris (2013,

7–8), who cites evidence of efforts to make the law consistent and available to the public, and *ibid.* (11) for an argument that litigants typically agreed about the content of the law in actual cases. In view of the problems with legal complexity discussed in Chapter 4, Athens probably did better than modern societies at bringing legal knowledge to the masses.

39. Exceptions to this were in assignment to branches of the military service and mandatory "liturgies" (contributions to the military and to festivals) for the rich. For liturgies, see Ostwald (1995, 370). On military assignments, see *ibid.* (377–78).
40. For the details and a discussion of a passage where Demosthenes explains this idea, see Osborne (1985, 40).
41. Vickers (1995, 348).
42. Recall Pseudo-Xenophon's explanation of this phenomenon, discussed in Chapter 1.
43. To be clear here, the idea of democracy in Athens did not simply mean popular legislation (democracy in a minimal modern sense); rather, political equality was partnered with, and in many ways a tool of, social and economic equality; to preserve the former was to preserve the latter. Aristotle (Ath. Const. 2.1–3, 9.1) makes this clear: popular institutions were a solution to widespread oppression of the poor by the rich, culminating in slavery for debt and civil disorder.
44. Vlastos (1953, 337).
45. *Ibid.*, 350–52.
46. Ober (1989, 75).
47. Ostwald (1969, 153–54). Elsewhere, Ostwald (1986, 27) suggests that *isonomia* meant "political equality between the ruling magistrates, who formulate political decisions, and the Council and Assembly, which approve or disapprove them."
48. Ostwald (1969, 159).
49. Hansen (1999, 84). *Isegoria* is a particular term for political equality as a democratic citizen (i.e., having an equal voice in the decisions of the city). There can also be found *isokratia*, equal power, used by, for example, Herod. 5.92 in contrast to tyranny. Raaflaub (1996, 140) and Cartledge (1996, 178) both collect other terms for various sorts of equality.
50. Hansen (1999, 81–82). Rosivach (1988, 47–51) has a similar view, but argues that *isonomia* just meant political equality among those entitled to participate, which could include, for example, just oligarchs. Hayek (1960, 164–65) seems to have held the opposite view – that *isonomia* just meant the rule of law, not political equality – but he was no philologist. Raaflaub (1996, 144–45; 2004, 94–96) argues that *isonomia* shifted in meaning, first expressing the equality of aristocrats as against tyrants and only later mass democracy.
51. Rosivach (1988).
52. Rosivach (1988, 43, 56–57).
53. Lewis (2004).
54. Lanni (2009, 701).

55. Isoc. 20.
56. Dem. 19.296–97.
57. Dem. 19.313–14.
58. Andoc. 4.13. For "equality," Andocides uses *koinotes*, usually translated as "community" or "in common." It is important to note that many classicists think this speech is a forgery, although there is some debate on the question (Gribble 1997). Nonetheless, it has evidentiary value, for, as Gribble discusses, it has sometimes been thought to be a speech delivered by someone else, but may also have been a rhetorical exercise of the late fourth century. Either possibility is consistent with it reflecting genuine knowledge about and concern for the social dynamics in Athens during the democratic period. For convenience, I will continue to refer to it as Andocides 4, but the reader is advised to discount it accordingly.
59. Isoc. 20.
60. Demosthenes (Dem. 51.11) makes a similar claim: "[I]f a poor man through stress of need commits a fault, is he to be liable to the severest penalties, while, if a rich man does the same thing through shameful love of gain, is he to win pardon? Where, then, is equality for all [πάντας ἔχειν ἴσον] and popular government [δημοκρατεῖσθαι], if you decide matters in this way?"
61. Dem. 21.219–25.
62. Cohen (2005, 218–19) reads Demosthenes to argue that the jury's enforcement of the laws "regardless of the wealth or status of the defendant" is what prevents ordinary citizens from having to live in fear. In Cohen's words: "All of this reflects an understanding of criminal law and the rule of law as the bulwark of society by which impunity for any person because of their status undermines the law which is the protection of everyone. Only punishment of those who act with impunity can preserve that order." Gowder (2015d) offers an interpretation of Plato's *Crito* along similar lines.
63. Andoc. 4.17.
64. Andoc. 4.18.
65. Andoc. 4.21.
66. If Andocides 4 was genuinely a forgery composed in the late fourth century, this supports the claim of the next chapter that the Athenians learned, between the third and fourth centuries, about the importance of the rule of law for the stability of their democratic equality.
67. Aes. 3.6.
68. Aes. 3.7.
69. Aes. 3.234–35. A *rhetor* was a professional orator, seen with suspicion for his manipulative powers (Arthurs 1994). On Aeschines' pejorative use of the term in "Against Ctesiphon," see *ibid.* (6).
70. Again, Plato is in accord, pointing out that the tyrant is surrounded by enemies whom he must continually fight (*Rep.* IX.579).
71. Aes. 1.4–5. See the discussion in Hansen (1999, 74).

72. Hyp. 6.25. (Though Hyperides was a forensic orator, the speech in question was not given before a court. Also, "ruler's" in the given translation is ανδρος, which might be better translated as "man's.")
73. Raaflaub (2004, 233–35) argues based on evidence from Herodotus, Thucydides, and Euripides that "[r]espect for *nomos* made it possible to defend the community's freedom from," inter alia, "attacks by authoritarian opponents."
74. Ari. *Politics* 2.12, 1273b.35–1274a.5, as translated by Ostwald (1986, 5).
75. *Ibid.*, 5–15.
76. Ari. *Politics* 3.16, 1287a.9–24.
77. Thuc. 2.37, translated in Hansen (1999, 73). Thucydides (3.37) also gives us a version of a speech of Cleon including the claim that a city is stronger in international competition when its politicians subordinate their own cleverness to stable laws.
78. Thuc. 6.15.4.
79. Eur. Supp. 429–43. In the last line, Euripides uses the comparative adjective form of *isos*, the general term for equality, which does not have any particular political or legal connotation, in contrast to *isegoria*, generally used to refer to political equality, and *isonomia*, as discussed earlier. "Equal justice" is δίκην ἴσην, which could also be translated as "equal rights." N.b., no inferences should be drawn from the use of "reviled" in the given translation, which is rather too strong (the Greek is κακως): I would have preferred "mistreated."
80. Aeschylus, *Eum*. 680–710. See also Rottleuthner's (2005, 38) description of that passage, which he sees as a creation myth for the law, and particularly for the law captured in the notion of the impartial judge: on his account, it "lays the foundations for the precedence of the *polis* over the *genos*. On the world's stage there has now appeared a court that is formed by persons not related to the parties and that is vested with the competence to pass a binding judgment."
81. Plato, *Crito* 53b–c. I discuss *Crito* and the strength *topos* at length in Gowder (2015d).
82. Herod. 3.80.
83. Herod. 3.80.5–6.
84. Dicey (1982, 292–304).
85. Ostwald (1986, 497).
86. Carugati (2014) has criticized my prior work for conflating the notions of the rule of law and the sovereignty of law. On her account, the "sovereignty of law" means something like the supremacy of formal law as adjudicated by the judicial organs. As she aptly points out, Athens is perhaps more accurately compared to a dual sovereignty system featuring both formal and informal norms as well as centralized and decentralized institutions of enforcement. I wholeheartedly take Carugati's point. The rule of law is essentially about power being constrained by rules, and it is not, strictly speaking, necessary to take on commitments about whether any particular (or even single) entity has "sovereignty" or what kind of enforcement mechanisms are dominant in

order to judge whether a state has the rule of law. If Ostwald also maintains a rule of law/sovereignty of law distinction (and I am not sure whether he does), then he may have no objection at all to the proposition that Athens had the rule of law, wherever "sovereignty" might have been located. For present purposes, I shall assume that Ostwald, or others, meant "rule" by "sovereignty." (As an aside: it is also not clear that "sovereignty of law" in Carugati's sense of the term would be possible without the rule of law, about which see Chapter 8 of this volume.)

87. Hardin (2008); Eskridge (2005, 1279).
88. On the identification of the law code of 403 with the ancestral laws, see Finley (1975, 39–40).
89. Some contemporaneous recognition of this function of entrenched law can be found in Plato (*Laws* 715), who cautions against competition for office on the grounds that in such societies "the winners take over the affairs of state so completely that they totally deny the losers and the losers' descendants any share of power," leading to a cycle of retribution that can be resolved by selecting officials who are "best at obeying the established laws."
90. On the reforms that arguably did promote the rule of law, Ostwald (1999, 523) notes that the reformers forbade both magistrates enforcing unwritten law (the scope of this provision is unclear) and the enactment of laws targeting particular individuals. The codification and publication of the written laws was also an improvement from the rule of law standpoint.
91. Cohen (1995, 40–41) nicely expresses this tension through a discussion of Aristotle's worries, on rule of law grounds, about radical democracy. Lewis (2011, 25) argues that before the post-Thirty reforms, the assembly increasingly disregarded legal restrictions on its own behavior.
92. Xen. Hel. 1.7.12.
93. Colson (1985, 133) denies, contra what appears to be a prior consensus to the contrary (see sources cited therein), that the trial of the generals was illegal. The debate is immaterial for present purposes. Either the trial was illegal or the *ekklesia* had and exercised the power to execute people en masse as a kangaroo court. Both are extremely worrisome from the rule of law standpoint. On the much clearer prohibition of assembly executions after the Thirty, see Carawan's (1984, 111–21) discussion.
94. Roberts (1977, 107). Asmonti (2006, 2) gives other references for the standard account of the trial as an exceptional incident, though Asmonti argues, somewhat in opposition, that the trial actually reflected broader political worries about the distribution of power in Athenian society.
95. Xen. Hel. 1.7.35. Plato *Apology* 32b has Socrates claiming that everyone later recognized that the trial of the generals was illegal.
96. Hansen (1974, 55–61).
97. Hansen's account of the relationship between the *ekklesia* and the *dikasterion* is controversial. He cites the relevant sources (and defends himself) elsewhere (Hansen 2010). By way of caveat, as Hansen notes (*ibid.*, 525–26), the priority of *dikasterion* over *ekklesia* that he identifies may be a particularly

fourth-century (that is, post-Thirty and post–legislative reform) phenomenon.

98. Demosthenes explicitly said the two were compatible, and that the assembly could and did restrain itself: "[T]he civic body of Athens, although it has supreme authority over all things in the state, and it is in its power to do whatsoever it pleases, yet regarded the gift of Athenian citizenship as so honorable and so sacred a thing that it enacted in its own restraint laws to which it must conform" (Dem. 59.88).
99. There are good accounts by McGlew (1999) and in Rhodes (2010, 166–67); Furley's (1996) is the most comprehensive account of which I'm aware.
100. Herod. 9.5.
101. I thank Danielle Allen for suggesting this point to me.
102. Allen (2000, 178–79).
103. All dates are drawn from Rhodes (2010).

CHAPTER 6 THE LOGIC OF COORDINATION

1. Thus, the Athens case is used as an "analytic narrative" as practiced by scholars in the new institutional school of economics: an application of formal analytics to rich historical facts, as in Bates, Greif, Levi, and Rosenthal (1998).
2. The account in this paragraph and the next two is drawn, unless otherwise noted, from a combination of Ostwald (1986, 339–95) and Lang (1967, 176).
3. Thuc. 8.65.
4. Thuc. 8.66.
5. Thuc. 8.70.
6. Ostwald (1986, 387).
7. Thuc. 8.71.
8. Ostwald (1986, 401–04).
9. On the overlapping personnel, see *ibid.* (460–61, 466).
10. The account of the rise of the Thirty is taken from Ostwald (*ibid.*, 460–96) and Krentz (1982) except as otherwise noted.
11. There's some dispute about the extent of the property they stole. Krentz (1982, 81–87) suggests that the property expropriations of the Thirty were overstated, and that they may not have engaged in expropriations on a larger scale than the democracy did. However, Krentz's argument is unconvincing. Elsewhere (105) he suggests that the expropriations of the Thirty were on a large enough scale to raise serious problems of accounting in the reconciliation settlement. And certainly the Thirty's *throwing everyone but the* 3,000 *out of the city* suggests that they must have done something with the in-town property of those evicted – an expropriation of stunning scale all on its own, at least if we help ourselves to the modest assumption that a significant proportion of the 90 percent of citizens thus excluded had some property in the city.
12. Confirmed by both Aristotle (*Ath. Const.* 35.4) and Aeschines (Aes. 3.235).
13. Lanni (2010, 566).

14. Krentz (1982, 120) notes that "no prosecutors are known to have violated the amnesty successfully." There is, however, some dispute (*ibid.*, 120–22) about whether the oligarchs or the democrats started the conflict, shortly after the peace agreement, that led to the reconquest of Eleusis and the killing of the generals who were there. Moreover, Lanni (2010, 568) suggests that there is at least one known case where a prosecutor managed to use novel legal tactics to get around the amnesty, though she agrees that in general it was respected.
15. Kagan (1991, 163) suggests that "there is no reason to think that the exiles and imprisonments were widespread" either. However, Gallia (2004, 451) claims that Thucydides understated the crimes of the Four Hundred. On the opposite extreme, Lewis (2011, 25, 35) claims the Four Hundred "governed nonviolently." If nothing else, we can confidently say that the regime of the Four Hundred was less blood-soaked than that of the Thirty (not a terribly impressive achievement, all things considered).
16. Taylor (2002). On her account, the Athenian masses mostly quietly accepted the Four Hundred at first. Rex Stem (2003, 18, 32) suggests that fraud – the false promise that they would hand over power to a broader oligarchy of 5,000 – had more to do with their accession than force. (The false promise of Persian support can't have hurt.)
17. I infer the relative mildness of the Four Hundred also from the charges against them at their subsequent trials. Ostwald (1986, 401–04) lists a number of trials, all of which appear to be for treason or subverting the democracy, but not for murder. This would be surprising, were the Four Hundred guilty of a significant number of murders. The Athenians attached religious importance to the pollution incurred by murders (Visser 1984, 193; Blickman 1986, 193). This suggests that they wouldn't have just ignored murders committed by the Four Hundred. By way of contrast, in the post-Thirty amnesty we know that the democrats explicitly reserved the right to try murderers as such.
18. On the Corinthian War, and the Athenian politics surrounding it, Roberts (1980) has a good account.
19. Lanni (2010, 573) agrees.
20. Carawan (2006, 68–69) describes what little is known of the details of the reconquest. Strauss (1987, 114) suggests that the democrats might have taken revenge on the oligarchs had the *thetes* (lower-class citizens who served in the navy) not been seriously weakened by losses in the Peloponnesian War. However, the weakness of the *thetes* cannot explain the demos's restraint. Both the victory over the oligarchic enclave at Eleusis and the successful resistance of the men of the Piraeus against the Thirty, even supported by a Spartan garrison, suggest that it would have been common knowledge that the democrats had enough military force to impose their will on the oligarchs. Moreover, the Thirty had just murdered a number of people equal to about 5 percent of the citizens; in doing so, they must have made enemies across the social spectrum.

    Elster (2004) claims that the democrats respected the amnesty in order to reintegrate the elites into the community and again have use of their

services. But this, standing alone, is not a sufficient explanation for the difference between their behavior after the Thirty and after the Four Hundred, for the elites would also have been useful in prosecuting the Peloponnesian War.

21. Teegarden (2012, 433).
22. Siegel and Young (2009, 765) helpfully explain why cheap talk often does not facilitate credible commitment.
23. Ostwald (1986, 500–01).
24. Wolpert (2001, 46); Loening (1987, 116–19).
25. Lanni (2010).
26. Cohen (2001, 349).
27. Plato captures this sentiment nicely in the *Laws* (715d), suggesting that where the government is not subordinate to the laws, "the collapse of the state, in my [the Athenian stranger's] view, is not far off."
28. The number of votes for each side was public in addition to the outcome (Ober 2008, 193), facilitating the public use of jury verdicts as a signal of the level of social commitment.
29. This argument depends on the fact that the amnesty was imposed on the legal system by Sparta. If we accept the argument, from Carawan (2006, 57–76), that the provision giving the Thirty themselves amnesty if they passed their *euthynai* was enacted by a decree of the assembly after the original reconciliation agreement, my argument rests on the assumption that this was done for transient military or political reasons (e.g., to head off a short-term counter-revolutionary threat). This assumption, however, seems fairly plausible: right after the restoration, the Athenians must have been particularly afraid of a Spartan return, and would have had some reason to try to quickly reconcile Sparta's oligarchic allies to the community. This is also consistent with the general Athenian pattern after the war of superficial obsequiousness to their victorious enemies, and divergence at first only in secret (Rhodes 2010, 261–62). (In Gowder 2014b, I misstated the implications of Carawan's hypothesis for my argument.)
30. Lanni (2010, 589).
31. Bolt (1990).
32. Thuc. 3.84.
33. Teegarden (2012) thus has the wrong answer, but the right question, viz., how could the Athenians have credibly signaled to one another their willingness to enforce the law?
34. Thuc. 8.66, from the translation given in Taylor (2002).
35. Rhodes 2010, 169–70.
36. Buggle (2013).
37. Also see Harris (2013, ch. 9), who argues that a growing practice of using the courts to attack political opponents contributed to the fall of the democracy.
38. Christ (1998).
39. Xen. 2.3.12. The actual prevalence of sycophants in Athens is a subject of some dispute (Christ 1998).

40. Jordović (2008, 36).
41. Lys. 25.25–26.
42. Lys. 25.27.
43. Asmonti (2006) argues that the execution of the generals too was a move by the democrats against elites who were seen as a potential oligarchic threat.
44. In further support of the tentative hypothesis that the failures of the rule of law contributed to the two oligarchic coups, note that the Athenian polis suffered similar disasters in 430–427 (a major plague), 353 (defeat in the Social War), and 338 (after the crushing defeat by Macedon at the battle of Chaeronea), yet these disasters didn't go hand in hand with major failures of the law, and, after them, Athenian democracy did not collapse. I thank Josiah Ober for bringing this point to my attention. Note also that the democrats began attempting to reform their legal code after the first oligarchy fell (Rhodes 2010, 296–97), suggesting a recognition that the laws had something to do with the oligarchic threats even before that was fully driven home by the Thirty.
45. I know of no direct evidence that the amnesty was controversial, but indirect evidence can be gleaned from the fact that the council felt it necessary to summarily execute the first violator to indicate their intention to vigorously enforce it. This would not have been necessary were the amnesty met with universal approval. Moreover, again, the Thirty killed a number of people equal to a solid 5 percent of the citizen population; for comparison, this would be like killing off fifteen million Americans, or three million British. It beggars imagination to suppose that the amnesty was universally popular.
46. On the idea of credible commitment, see North (1993).
47. On the advantage of small groups, see Olson (1965).
48. This is a simplification: it may require the cooperation of fewer than all democrats to effectively resist threats. Nothing turns on this.
49. Law (2009); Hadfield and Weingast (2012, 2014).
50. In effect, the demos faced a problem of equilibrium selection: it could have ended up in a non-rule of law oligarchic equilibrium in which the rich and the powerful did what they pleased and the others suffered, or a rule of law democratic equilibrium in which the weaker masses successfully used the law to coordinate their resistance to the power of the elite.
51. Ober (2008, ch. 5).
52. Allen (2000, 181). She also (*ibid.*, 179–83) gives further oratorical references for the strength *topos*. For example, she cites a claim of Demosthenes that "laws that are masters make the jury masters," which I would read much like I read Aeschines. I would go so far as to say that all of the oratorical references she cites for the proposition that the power of the law rested on (or was even epiphenomenal on) the power of juries is evidence for, not against, the rule of law in Athens, although space only permits me to discuss this one example.

    Two other elements of Allen's account of Athenian law fit nicely into the model presented in this chapter. First is her argument (*ibid.*, 192–95) that law is a form of social memory: I would say that what the jurors do is remembered by the community as a whole, and shapes expectations about what will be

done in the future; this is how knowledge about mass commitment to the law is propagated. Second is her analysis of the characterization, in the tragic corpus, of the law as a collective possession of the people rather than of tyrannical individuals (*ibid.*, 89–93). I disagree with Allen, however, about the concept of possession in play. It seems odd to assimilate the personal *possession* of the laws, associated with tyrants, to individual authorship or legislation – after all, the democratic laws of Athens were strongly associated with the legislation of Solon, Cleisthenes, and Pericles. Rather, it seems better to associate possession with the *control* of the laws by individuals as opposed to the demos acting through assembly and jury.

53. "Civic trust" comes from de Greiff (2012, 44–48). Similarly, Dyzenhaus (2012), drawing from Hobbes, has suggested that a function of transitional justice is to provide a civic education in the rule of law. I agree, but submit that what is being taught is not the importance of the rule of law in the abstract, but that citizens may rely on one another to support it: the education is collective and interdependent rather than individual. Murphy (2010) contains a stellar discussion of the way in which rebuilding broken networks of "political trust" ought to be a goal of transitional justice. However, I do not mean to suggest that trust has some independent normative value (though it might), but rather to use it, in Levi's (2003, 78) well-known terms, as "a holding word for a variety of phenomena that enable individuals to take risks in dealing with others, solve collective action problems, or act in ways that seem contrary to standard definitions of self-interest" (or at least the first two of those).

54. Lanni (2010).

55. Blanton and Fargher (2008) attempt a more ambitious version of this, arguing that rational choice approaches to understanding collective control of the powerful (like that developed in this chapter) can help explain numerous premodern states in similar terms as have been applied to modern ones, and this social form appears quite broadly, rather than being tied to particular continents, cultures, or religions – not something that demarcates the difference between Western and non-Western societies. Obviously, this result (which I lack the global historical expertise to evaluate) is highly congenial to the theory developed in these pages.

56. This is a slight simplification, since other citizens may not have equal power to sanction the ruler; I discuss how relaxing this assumption affects the dynamics of the rule of law in Chapter 9. A second simplification, which I cannot here lift, is that I assume that citizens' preference intensities and cost tolerances are independent; in reality, a citizen who very strongly prefers the existing legal system will be willing to risk higher direct and retaliation costs to preserve it.

57. Kuran (1991, 121–25). In other work (Gowder 2015d), I discuss the application of Kuran's preference falsification idea to Athens in greater depth through a reading of Plato's *Crito*. While the preference falsification idea is most relevant to understanding the barriers to trust among a mass public seeking to hold rulers, officials, or elites to the rule of law, there is a substantial related literature, which Lohmann (1994, 2000) helpfully reviews and extends.

Johnston (1996) describes, from a sociological perspective, stages of resistance in a number of repressive states, which we may interpret as the gradual and partial revelation of antiregime preferences. One important point (suggested to me by Gary Fine) is that information among a mass public is likely to be heterogeneous; the extent to which subjects are aware of one another's preferences or views about officials will depend on social network composition. On this, see Ikegami (2000). (It may be that the claims that "civil society builds trust" and "dense networks distribute information about preferences" are essentially identical.)

58. Weingast (1997, 247–51); Hadfield and Weingast (2012); Law (2009, 759–65).
59. Hadfield and Weingast (2013, 10–11).
60. In the Hadfield and Weingast (2012) model, a preference alteration, by shock or bribery, is equivalent to reducing their inequality 8 by changing buyers' idiosyncratic logics in order to count fewer deviations as harmful to them. Conditional retaliation costs are equivalent to adding some $\pi\mu$ to the right side of their inequality 7, where μ represents the retaliation suffered by a citizen who sanctions ruler illegality and π represents a citizen's subjective probability that not enough fellow citizens will join in the sanction to preclude that retaliation.

    Note also that preference alteration by bribery must be backed up by a ruler credible commitment to be a threat to either the Hadfield/Weingast equilibrium or mine. Otherwise, those who are bribed in round *n* know that in the future, after the officials doing the bribing eliminate some of their opponents or otherwise increase their power (including by undermining community trust in one another's commitments to upholding the law against officials), they can turn on their former allies. Accordingly, so long as citizens discount the future sufficiently lightly, if they value the legal system as a whole, they should be able to resist the temptation to take a short-term bribe.
61. This model contains a number of simplifying assumptions: in the real world, C probably varies with R, and F may as well. However, for present purposes, this simplification doesn't change anything: the important idea, that revolts are more likely to be worth it the more citizens participate, can be captured in the probability term alone.
62. I assume here that a sufficiently large group of citizens can sanction the ruler enough to make her prefer avoiding a revolt (i.e., that F entails losing one's head or other very costly punishment).
63. Kuran (1989, 41–74).
64. In real-world societies, a sample of the population that is known to be representative, such as a jury or a parliament, can reliably signal the intentions of the community; accordingly, we can safely suppose for modeling purposes that such a sample can meet the overwhelming power condition in a signaling model like the one under discussion.
65. Osborne and Rubinstein (1994, 122–23, 153, 316).
66. Incidentally, signaling opposition to a law violation when one is being bribed to support it, or otherwise prefers the policy, is a costly signal. However, it is

free from retaliation and all-but-nominal direct costs; this is the point of the model; moreover, because preferences are private, one's fellow citizens need not know that such a signal incurs preference costs (i.e., for all relevant purposes this is a cheap talk model). Incidentally, cheap talk works here, though not in Teegarden's (2012) oath-giving explanation, because (a) in repeated play citizens can condition on the honesty of one another's repeated signals, and (b) in Teegarden's model actually not signaling (i.e., refusing to give the oath) would have been costly, which further reduces the credibility of the signal he proposes.

Also, in many real-world situations described by something like the model of this chapter, citizens can act as if their fellows' signals are costly when they resist a policy, to the extent they can observe a substantial amount of political support in the community for that policy. Without knowing the preferences of their fellows, they may infer that their fellows are incurring preference costs by the mismatch between the proportion of people known to politically support a policy and the proportion of the population observed to resist it either at the signaling (jury) stage or the active resistance/rebellion stage.

67. See Gowder (2014a) for more.
68. Compare to the law merchant model of Milgrom, North, and Weingast (1990). In addition to serving as a repository of otherwise-uncertain knowledge about who violated generally accepted rules (as in the law merchant), the jury can serve as a repository of knowledge about the otherwise-uncertain appropriate application of rules to generally known acts. Also, see Gowder (2014a) for an account of the similar signaling role of constitutional courts.
69. Compare Rousseau (2003, 13) ("men as they are and laws as they might be"), and Rawls (2001, 4) on stability and "realistic utopia."
70. This suggests that more participatory legal institutions will make more of a contribution to the maintenance of the rule of law in states that have had less stable legal systems in the recent past. It is striking in this context to observe the apparent greater currency of ideas like jury nullification and popular constitutionalism in the United States shortly after the American Revolution, relative to today. However, I cannot explore this issue here.

CHAPTER 7 PARLIAMENT, CROWN, AND THE RULE OF LAW IN BRITAIN

1. E.g., the "intuitive" objection noted by MacCormick (1999, 68–69). For more, see Frohnen (2012) and Harden and Lewis (1988, chs. 2–3).
2. For simplicity, I ignore the possibility that the European Union exercises an authority that permits it to constrain Parliament. For an answer to this, see MacCormick (1999, ch. 6).
3. See, e.g., Fixed-Term Parliaments Act 2011 c. 14.
4. Terrorism Prevention and Investigation Measures Act 2011 c. 23.
5. Also, several successive Parliaments renewed an antiterrorism law permitting detention without charge for seven days, even after an adverse ruling by the European Court of Human Rights (Marks 1995). The pretrial detention

period fluctuated over the years; from 2006 to 2010 it reached a height of 28 days. Terrorism Act 2006 c. 11, sec. 23.

6. Jennings (1959, 52, 56–58) gives a litany of parliamentary violations of the rule of law, but nonetheless declares that "it is the general tendency which matters most," and that truly illegitimate laws would lead to mass opposition.
7. Sanchez-Cuenca (2003, 62).
8. Dicey (1982, 292–304).
9. As of 2011, Dicey's example was obsolete: the Fixed-Term Parliaments Act requires the cabinet to step down on a no-confidence vote.
10. Chrimes (1965, 11), and Fixed-Term Parliaments Act 2011 c. 14(3)(3), forbidding the dissolution of Parliament, and the explanatory notes thereto (online at www.legislation.gov.uk/ukpga/2011/14/notes/division/6/3), which specifically note that the statute abrogates the royal prerogative. The Parliament Act 1911 also abolished the veto of Lords.
11. See, e.g., McMurtrie (1992), taking seriously the possibility that the War Crimes Act 1991 might be unconstitutional, in virtue of its (alleged) retroactive criminal effect. Tellingly, she closes with the lament that "it is discouraging to realize that there exists no effective domestic constitutional check against the enactment of such legislation" (*Ibid.*, 149).
12. Customs can change gradually over time, including by the deliberate action of officials. Intuitively, customs that have grown up out of the practices of chronologically and geographically diverse officials and citizens are also more likely to conflict with one another than are the provisions of a written law code created with the aim of consistency and containing explicit priority rules to reconcile apparent conflicts (like the standard interpretive rule that later enactments implicitly repeal earlier ones).

    A similar problem can arise in common-law systems with conflicting precedents. Moreover, even if citizens know the constitutional customs that are currently practiced, they may not know the extent of their fellow citizens' commitment to them; indeed, there may be disagreement about the appropriateness of the customs, but this, of course, is true in states with a written constitution as well.
13. For an account of the facts, see Hart (2003, chs. 1–4).
14. Moreover, as McHarg (2008) aptly argues, a constitutional convention cannot be said to exist until it has persisted over time; otherwise there would be no way to distinguish the conventions that attach to a given official role from the individual preferences of the occupants of that role. McHarg infers from this, plausibly, that even deliberate, legislated constitutional changes (including, it seems to follow, the recent parliamentary innovations on the fundamentals of British government, such as the Fixed-Term Parliaments Act, 2011) cannot be seen as binding constitutional provisions until they are consistently implemented.
15. The details are in Hart (2003).

16. Parliament Act 1911 c. 13; Parliament Act 1949 c. 103. Anything written in this chapter about the Lords may become obsolete by the time of printing, as the powers of the Lords have been in flux for some time.
17. McMurtrie (1992) accordingly attributes the Lords' rejection of the War Crimes Act to constitutional worries. Of course, this rejection did not in fact lead to popular resistance to the law, perhaps because the public supported it, or perhaps because they were nonetheless unable to coordinate.
18. For what it's worth, the independence of the judiciary is provided for, to some extent, by statute. See Constitutional Reform Act 2005 c. 4(2)(3).
19. The House of Lords may also simply criticize the bill. It has a constitution committee that publishes reports on the constitutional implications of proposed bills and actively scrutinizes parliamentary business.
20. At least one former Law Lord has suggested that judges are obliged to narrowly construe acts of Parliament to the extent possible to make them compatible with the constitution (Bingham 2007).
21. This optimistic picture of what empirical political science might observe is complicated by the possibility that leaders in Commons might look down the game tree and not proffer bills likely to generate objections from the Lords and the judiciary, thus eliminating the evidence for their own constraint. However, we may still observe such objections in situations where the Commons fails to correctly apprehend the extent to which proposed laws are objectionable; recent events in the context of antiterrorism legislation, discussed later in this chapter, offer at least one example of such a circumstance.
22. *Regina v. Secretary of State for the Home Department, Ex parte Simms* [1999] UKHL 33 [2000] 2 AC 115, per Hoffman.
23. The Human Rights Act creates other devices by which political pressure might be brought on Parliament to comply with the rule of law. Most interestingly, it requires a minister proposing a bill to either declare the bill's compatibility with the act or "make a statement to the effect that although he is unable to make a statement of compatibility the government nevertheless wishes the House to proceed with the Bill" (sec. 19). (Of course, the minister might just lie.) The act also requires judges to interpret legislation to be compatible with the Convention to the extent possible.
24. Gardbaum (2013) gives the most complete account of the functioning of nonbinding judicial review.
25. *A v. Secretary of State for the Home Department* [2004] UKHL 56; [2005] 2 AC 68.
26. The details are given by Bogdanor (2009, 72–73).
27. *Re M.B.* [2006] EWHC (Admin) 1000; *Secretary of State for the Home Department v. MB* [2006] EWCA Civ 1140. For more details of the reception of these matters in the British courts, see Pether (2008, 2283–91).
28. Nor is this a new trend: Justice Brennan (1988) traces it throughout US history. In Britain, there have been several low points of the rule of law since the Glorious Revolution; possibly the most dramatic was the Black Act, enacted in

1723, which permitted summary execution of proclaimed offenders for such grave crimes as poaching and cutting down trees (Thompson 1975, 22).

29. Hilton (1965).
30. Henry Bracton, *De Legibus et Consuetudinibus Angliæ*, Samuel E. Thorne translation (1968), v. 2, 87 (online at http://hlsl5.law.harvard.edu/cgi-bin/bracthilite.cgi?Unframed+English+2+87). (Legal historians these days do not tend to think that Bracton actually wrote the treatise that bears his name.)
31. Hatcher (1981, 9).
32. Hatcher (1981, 15–18).
33. Importantly, the lords controlled the courts in which villeins would have had to dispute the extent of permissible noble exactions – the unfree brought suit in manorial courts, not royal courts (Ault 1923, 7–8, 127); see also the sources cited by Clarkson and Warren (1940, 483–84). Note, however, that the restriction to manorial courts may have applied only to *land* held in villeinage, not personal litigation brought by villeins – see Briggs (2008) for the distinction. Moreover, unlike the ordinary manorial court, comprised of the baron and his free tenants, the court to which villeins must appeal was, at least on some accounts, judged only by the lord's steward (Maitland 1908, 49). Maitland expresses some skepticism about this conventional view, for reasons not explicitly given but that seem to revolve around the worry that, if this were true, villein interests would be totally unprotected; this subsection suggests that Maitland's skepticism on those grounds can be relieved, since, even if the barons did in fact totally control the courts to which villeins must appeal, the villeins could have coordinated to defend their customary rights.
34. Hilton (1949, 127–29); Ault (1954, 386–89).
35. Skinner (1998).
36. There can be no doubt that the earlier phase influenced the latter; to note just one detail, the Long Parliament ordered Coke's *Second Institute* published in 1641 (Holt 1993, 74).
37. Christianson (1993, 119–27).
38. I draw the language from the 1297 version, the most important part of which is chapter 29, as enrolled on the British statute books, with the "traditional" translation given by the British government online at www.legislation.gov.uk/aep/Edw1cc1929/25/9.
39. The classic defense of the claim that medieval Englishmen were concerned more with "liberties" qua specific legal privileges than with the unitary, normative notion of liberty is Pollard (1926/1972); see especially p. 153. Harding (1980) gives much more detail on the topic. The term "liberties" was used in this way at least into the eighteenth century. Thus, in the Pennsylvania Charter of Privileges (1701), describing the constitutional structure of the Pennsylvania colonies, we find a references to the "divers Liberties, Franchises and Properties" granted by William Penn to the residents of the territory, as previously described in the Frame of Government of the Province of Pennsylvania (1682); for its part, the Frame describes the form of government of Pennsylvania and its electoral rules, not anything like the standard

liberal liberties, and does not refer to individual liberty in the unitary, normative sense, though that document also contains a preamble that appears to make use of a unitary conception of liberty.

40. Pollock and Maitland (2010, 379).
41. Hyams (1980, 320).
42. Harding (1980, 424) cites a passage of the treatise known as Bracton in which the author notes that villeins are free under a Roman definition of having "the natural power of every man to do what he pleases, unless forbidden by law or force."
43. 28 Edward III, cap. 3; *Statutes of the Realm* I, 345. Holt (1993, 63) suggests that the universal language in the quoted statute of Edward III was not meant to extend due process rights to villeins. Rather, it was a reaction to the narrowing sense of "freeman." In 1215, it was understood that the *liberi homines* comprised all citizens above the status of villein. In 1354, however, the term took a narrower meaning, so the language was revised in the statute of Edward III to make clear that it referred to all citizens.
44. On the purchase of such privileges, see Holt (1992, ch. 3). Particularly, see a charter, reproduced *ibid.* (67–68), describing as "liberties" concessions like the number of horsemen the local royal official was allowed to keep, and the courts to which local residents were allowed to be summoned. Maddicott (1984) gives an in-depth overview of the municipal liberties.
45. Further support for this interpretation can be gleaned from the verb "disseised" in chapter 29 – to disseise a freeholder was to take his land ("freehold"), and, particularly, refers to the taking of land by the feudal lord who had granted it (hence the assize of novel disseisin, targeted against lords who seize tenants' land; see Milsom 2003, 104–06), suggesting by implication from the phrase "disseised of his Freehold, or Liberties, or free Customs" that liberties can be disseised just as can land, and were thus also property interests granted by the king.
46. Holt (1993, 47).
47. Milsom (1976, 36).
48. *ibid.*, 25. Milsom's view of novel disseisin is controversial (the debate is described by Brand 1992, 212–25), but the controversy (over the extent to which lords had untrammeled power beforehand) is not material to the point here. (I thank Tom Gallanis for drawing my attention to the controversy.)
49. On the myth that the Magna Carta is the source of the jury trial right, a myth that apparently took in, among others, Blackstone, see Darbyshire (1991, 742–43).
50. Holt (1992, 328).
51. Thus, Selden, 400 years later, points out that "if I bring an appeal of murder against a nobleman, which is my suit, he shall not be tried by his peers; but if he be indicted for that murder which is the King's suit he shall" (Johnson et al. 1977 [hereafter JKCB], 151). That is, the Magna Carta protected specifically against being both accused and tried by the king, qua legal superior.

Darbyshire (1991, 742) suggests that the demand is "for a tribunal in which they would not be judged by their inferiors," but this is an implausible interpretation in the context of increasing royal jurisdiction in which the barons were at continual threat of being judged by the king and summarily deprived of their property; moreover, if this was the danger against which the Magna Carta guarded, it was notably ineffective: there's evidence that lords were put to judgment by their free tenants in their own manor courts shortly thereafter (Ault 1954, 389).

52. Maddicott (1984, 52).
53. On this, it nicely fits the administrative power model of Greif (2008) and De Lara et al. (2008); the barons attempted to increase their own administrative power in order to protect the substantive legal concessions given them in the rest of the charter.
54. Holt (1993, 49).
55. Waldron (2012).
56. Again, I say "all" only in the same sense that they might have said "all" in Athens – all full-fledged citizens, or *liberi homines* – a putatively universalistic class that in fact excluded, inter alia, villeins, slaves, sometimes various sorts of religious dissenters, and other nonmembers or subordinate members of the political community.
57. The details of the Five Knights Case are drawn from Hart (2003, ch. 4).
58. Arbitrary imprisonment (for refusing arbitrary expropriation) was not the only rule of law issue in the Five Knights Case: there was also some suspicion that the King's advisors had tampered with the court records (recounted in Willms 2006, 97–99).
59. E.g., JKCB 1997, 45, 122–23.
60. Brooks 1993, 87. Brooks (*Ibid.*, 88) also quotes an anonymous common lawyer: "If we would perfectly execute justice wee must make no difference betweene men for their frends[hi]p, parentage, riches, pov[er]tye, or dignitye."
61. Judson (1964, 4–6).
62. Quoted *ibid.* (44–46).
63. Stone (1966).
64. On the disappearance of the middle class, see *ibid.* (28–29).
65. On the correlation of status with wealth, and the threat to status from loss thereof, see *ibid.* (39–40) and also Heal and Holmes (1994, 13–15, 97–99).
66. From a report to Lords, in Coke (2003, 1244).
67. JKCB (64), on March 22 (internal citations omitted). Harding (1980, 429–31) discusses the "franchise" at some length and concludes that the term referred to discrete jurisdictional privileges of the sort noted earlier (i.e., to run one's own courts, etc.). See also Maitland (1889, xxxii–xxxv), who describes numerous additional examples of these liberties/franchises.
68. On March 25, there appear two interesting turns of phrase. From Eliot, referring to imprisonment and to sending citizens overseas: "How do these concur with the liberty of free men?" And from Phelips: "I suppose it will appear evidently that liberty is the stamp of a free man." (Both on JKCB 99.)

Here, both seem to be using "liberty" in its indivisible liberal or republican sense, but to be declaring that it is a marker of status. That is, neither Eliot nor Phelips simply refers to liberty, but also refers to a particular category of person who is to hold it, denoted by "free man" used as a status term. (Phelips's statement would read particularly bizarrely if "free man" were understood as the possessor of liberty, rather than *liber homo* status: "liberty is the stamp of one who has liberty"?)

Later, Selden specifically suggests replacing the phrase "subject of England" with "free man" in the text of a proposed Parliamentary resolution against exactions, forced loans, and the like (JKCB 289), which again seems to suggest the equivalence of the *liber homo* with an equal citizen in the political community.

69. JKCB 148.

70. Later, he adds, "The law is for every man, the process only for freemen" (JKCB 158). This may be a reference to the fact that villeins were, at least in theory, given justice as an act of their lords' grace (i.e., in manorial courts controlled by their lords, as discussed at the end of section I) rather than being entitled to claims of right in the royal courts. If so, then the comparison between citizens subject to royal at-will imprisonments and villeins makes more sense, for such citizens would likewise have no authority to enforce their legal entitlements, but would receive them only at the grace of the king. Littleton suggests something similar: that due process of law applies only to those above villein status (JKCB 335). Sherfield argues that the law protects villeins from imprisonment (JKCB 189), but it is not clear whether he thinks villeins have the right to judicial process to enforce that protection. Compare these ideas to those of the Levellers (discussed in Chapter 3), who directly recognized the relationship between access to process and social status.

71. JKCB 150–51.

72. At least until 1271, Jews could own land in freehold; after then, they appeared to have property rights strong enough to make loans. See Herman (1993, 53–55) for the statute barring Jews from holding freehold land, and Jewish property rights up until that point. Note in particular that when a Jewish lender foreclosed on land, the sheriff "required the villeins [of that estate] to do fealty to him" (*ibid.*, 53). It seems most reasonable to understand the Jews as free citizens of higher status than villeins but of lower status than Christians. I have been able to find at least one royal charter (which also refers to an earlier charter) granting Jews (some or all Jews – it is unclear) the right to "reside in our land freely and honorably," serve as witnesses, pass property to heirs, and have trial by peers (Charter of Richard I, reprinted and translated in Jacobs 1893, 134–38). See also Pollock and Maitland (2010, 494–500), who argue that the Jews were freemen with respect to all except the king.

Of course, the expulsion was still in effect when Selden was speaking, so the "old time" to which he referred must just have been that period up to 1290, when the Jews were expelled. On the other hand, Hyams (1974, 287–88) notes that the status of Jews was often compared to that of serfs in the relevant period – but this

comparison is implausible unless we're to believe that serfs had sufficiently strong property rights to get in the business of moneylending. Also, Selden later says that "the Jews are in the same degree with slaves" and the insane in being subject to confinement by proclamation (JKCB 259), but this is in the present tense, and appears to refer to the state of affairs after the expulsion.

73. This is a nonstandard usage, but not a wholly unfamiliar one: cf. Charles James Fox's 1800 parliamentary speech, "On the Refusal to Negotiate with France" (online at www.bartleby.com/268/4/7.html; accessed March 3, 2014): "The right honorable gentleman who opened this debate may remember in what terms of disdain, or virulence, even of contempt, General Washington was spoken of by gentlemen on that side of the House. Does he not recollect with what marks of indignation any member was stigmatized as an enemy to this country who mentioned with common respect the name of General Washington?"
74. JKCB, 71–72.
75. JKCB, 66.
76. JKCB, 71.
77. JKCB, 75.
78. Green (1879, 154).
79. Again from a report to the Lords, in Coke (2003, 1246–47).
80. There's also a claim that the king sullies his hands by personally imprisoning people, which Coke credits to Fortescue (JKCB, 192).
81. JKCB, 191.
82. JKCB, 57.
83. This may have been the case under law. The records of the parliamentary debate of March 21 reveal an open question as to whether two MPs returned by Coventry were eligible to sit in Parliament despite their "being no freemen"; that is (as I read it), they were of subcitizen status, and thus not eligible for political office (JKCB, 44).
84. Brown (1954, 865–83) gives the legal structure of Massachusetts freemanship in some detail.
85. Cf. *Ibid.* (873), recounting a case in which a court gave a servant "liberty to dispose of himself," and then freeman status four years later, and another in which a nonfreeman "inhabitant" owned real estate.
86. The Charter of Massachusetts Bay: 1629, available at avalon.law.yale.edu/17th_century/mass03.asp.
87. Somers (1993, 593–94).
88. *Ibid.*, 603.

CHAPTER 8 THE LOGIC OF COMMITMENT

1. Gowder (2014d). Of course, our classification of cases of the rule of law in the real world also depends on our account of what the rule of law is. That should be unsurprising: observation is theory-laden. Ultimately, we end up with a

holistic relationship between the concept of the rule of law and our empirical observations.

2. Hadfield and Weingast (2014) agree that the rule of law is independent of political institutions, and that it is fundamentally about achieving coordination, though they flesh out the details differently from the way I do.
3. Eskridge (2005). Reenock, Staton, and Radean (2013) offer and empirically support an account of legal institutions according to which they support political compromise by allowing citizens to coordinate to sanction rulers for violating that compromise.
4. This is an instance of the general problem of self-binding discussed by Elster (1979).
5. This is also how Olson's (1993) stationary bandit manages to collect rents. She creates the rule of law in order to guarantee the power of those who control her authority (independent judges, decentralized military forces in the hands of nobles, rebellious masses, or whoever), so she can credibly commit to allowing economically productive activity. In doing so, and in recruiting the support of these actors (judges, nobles, masses, etc.) to hold her to those constraints, however, she also recruits their support for the legal system that permits those exactions that she still allows herself.
6. We might imagine a stationary bandit who binds herself as well as subordinate officials, or we might imagine a stationary bandit who binds only her subordinates, not herself.
7. Robinson, Torvik, and Verdier (2006, 447–68) suggest that patronage is one of the causes of the resource curse.
8. Greif (2008).
9. This may be how customary legal norms that provide broader rights than formal rules, such as those discussed in the previous chapter, come about: those who are protected by formal rules suddenly need the help of others to enforce them.
10. Cf. Olson (1965).
11. See Boyd and Richerson (2008, 314) for these classic assumptions of natural selection. This kind of evolutionary account requires the supposition that these exogenous shocks actually happen, but of course they do, being generated by, inter alia, external political competition, technological development, migration, and economic, religious, and social change.
12. These strategic intuitions run on the top of far more complexity. Consider the hypothetical case of a state with a powerful elite group from which most officials are drawn, and two groups of ordinary citizens of roughly equal power, but with unequal legal rights, which have the capacity to resist elite depredations only when working together. If the elite were unable to use bribery to undermine that cooperation, it would make sense to predict that the status quo distribution of legal rights granted to each of the two ordinary-citizen groups would persist, absent exogenous shocks to the balance of power in the community, in view of the likelihood that the only options accessible to the worst-off group would be to

defend the existing state of affairs against elite threats or fail to cooperate and watch their situation get worse after the elites take over altogether. In a world in which they may be bribed, however, they have a third option: accept a slight improvement in their existing situation as a bribe in exchange for defecting from the cooperative arrangement with the other group, allowing the other group to be wholly exploited. Of course, such a strategy would be unhelpfully myopic in the context of long-term interaction, as the elite could make a similar offer later to the other (now more oppressed) group; these dynamics quickly become intractable when we consider issues like the impact of social prejudice on inequality (and vice versa). On the whole, however, the overarching evolutionary claim remains plausible; moreover, progress toward testing some (though not all) refinements in this category is made in the simulation given at the end of this chapter. The simpler claim will do for now.

13. Arguable historical examples could include the late Prussian monarchy (Ledford 2004); the Chinese imperial system, particularly as evidenced and influenced by Legalist thought (Turner 1992); the reforms attempted by Catherine the Great in Russia (Griffiths 1973, 325–27, 332–33); and the law of the Islamic Caliphate from the Prophet through the Ottoman Empire (Baderin 2003, 89; Hallaq 2005, 182–92; Jennings 1979, 152).
14. Riker (1988).
15. Courtright (1974, 249–67).
16. Karim (1971, 61–80).
17. Ta-Nehisi Coates, "Nonviolence as Compliance," in *The Atlantic*, April 27, 2015, available online at www.theatlantic.com/politics/archive/2015/04/nonviolence-as-compliance/391640/.
18. Hart (1997).
19. For example, Steyn (2006) suggests the necessity of independent judges for the rule of law, as does Ferejohn (1999, 366–68). For a similar view from someone with rather significant experience in the matter, see Archibald Cox's (1996, 565–84) discussion.
20. Lohmann (2003, 97) similarly argues that what she calls a "fiat institution" will be effective only "when the political commitment to the institution is backed up by an audience that can and will execute state-contingent punishment strategies."
21. Gowder (2014a). A more elaborate account of how this mechanism works is given by David Law (2009, 723–801).
22. As we saw recently in the wave of state-constitution legalizations of gay marriage in the United States.
23. Gardbaum (2013).
24. For a general discussion of the role of information cascades in mass resistance to their governments, see Ellis and Fender (2011) and Lohmann (1994, 2000).
25. Doyle (2002, 76–77).

26. Relatedly, democratic institutions may help people develop political knowledge and skill in coordinating that, in turn, may make it less costly for them to coordinate to defend the rule of law.
27. A genuine democracy may not only be necessary for the strong version, but may also be sufficient for it, depending on the demandingness of one's conception of democracy. Those deliberative democrats who hold a conception of democracy according to which the interests of all must be taken into account just read the strong version into their accounts of what democracy is.
28. The strong version of the rule of law may be required for approval-democracies, for on the account that I am giving elsewhere of them (or, more carefully, for an approval-conception of popular sovereignty), they require a general acceptance of the core practices of the state; if there is such a general acceptance, it would seem to follow (absent extreme cases of false consciousness) that those core practices are understood to treat all as equals.
29. Law and Versteeg (2013, 926–29).
30. I have said more about the relationship between the rule of law and democracy in Gowder (2015b).
31. A real-world example of such a strategy can be found in one important account of the rise of racialized slavery in Colonial America. In Allen's (2012) account, the racial categories that were attached to enslavement were essentially invented by the planter elite and the governments they controlled, particularly in Virginia in the late seventeenth century, in order to split a nascent alliance between workers of European descent and workers of African descent (see the discussion in Gowder 2015a).
32. This is consistent with the general method proposed by Epstein (1999, 48).
33. This is what Epstein (1999, 52) refers to as "sweep[ing] the parameter space," although it would be more accurate to say that I sample, not sweep, the parameter space: not every possible parameter setting is tested. (The reason for this is a matter of brute combinatorics: the number of possible settings of even one parameter, such as the distribution of 10,000 goods over 1,100 people, is mind-bogglingly large.) As he notes, it is much harder to sweep "the space of possible individual rules" for agents' decisions, although I have attempted to ameliorate this problem by making as much of agents' decisions as possible depend on randomized parameters.
34. Axelrod (1997, 18).
35. All supplemental material for this book is available at rulelaw.net.
36. In order to reduce the search space for this maximization problem (which is otherwise subject to combinatorial explosion), bribes may only be given to groups in increments of budget (.1), where the budget is the total number of goods available, less the amount assigned to the elite in the status quo ante. As paying out the whole budget has a maximum payoff equal to the payoff achieved with certainty by not attempting to overthrow, elite utility for that strategy is not calculated. An alternative approach would use an optimization algorithm more sophisticated than the simple grid search I have implemented, but this simulation is already a gross approximation of a complex dynamic

pattern; deploying fancier algorithms to allow a more granular optimization would not make a meaningful improvement.

37. Goods are set as follows: first, the elites are randomly assigned a proportion of the goods between .1 and .4, which are divided equally among them; then the remaining goods are assigned randomly one at a time to each member of the mass with equal probability.
38. Power is assigned the same way as are goods, except that the elites share ranges from .2 to .49, and the distribution is constrained such that no member of the mass has as much power as a member of the elite. In order to ensure adequate variance in the resulting data, in 25 percent of the runs, both goods and power are allowed to dramatically vary from these initial assignments, concentrated in the first mass subgroup.
39. Each member of the mass is assigned to a subgroup from a uniform distribution over the available groups.
40. In order to motivate this behavior, we may imagine that the elites are punished by a one-round loss of goods, but experience no further consequences, or that they are removed and replaced; it makes no difference, for we may safely assume that a sufficiently powerful group of resisters may choose a punishment sufficiently severe to deter elites.
41. E.g., Greif (2008). However, the existence of bribable subgroups in the mass can, when one such subgroup is particularly powerful, roughly model the idea of an intermediate level of elite who may be induced to enter coalitions either upward or downward.
42. This is because they vary with others in the expected ways. For example, the subjective probability the elites have in a group participating in a revolt ought to decrease with the bribe paid to that group; the model conforms to that.
43. Full data, plus R code to run the simulation and subsequent analysis, are available at rulelaw.net.

CHAPTER 9 THE ROLE OF DEVELOPMENT PROFESSIONALS: MEASUREMENT AND PROMOTION

1. Santiso (2003, 119).
2. Krygier (2006, 129–61). Krygier argues that before we try to promote the rule of law, we should figure out the ends that it's meant to serve – a claim that I obviously endorse.
3. Thompson (1975, 262–63).
4. Faculty biography of Ebrahim Afsah, available at http://jura.ku.dk/english/staff/research/?id=422468&vis=medarbejder (visited May 4, 2014).
5. Afsah (2012, 128).
6. *Ibid.*, 137.
7. *Ibid.*, 137.
8. *Ibid.*, 145.
9. Mattei (2003, 383–448).

10. *Ibid.* (445–46). This disdain for non-Western legal systems has been described elsewhere as "legal Orientalism" (Ruskola 2002).
11. E.g., Carothers (1999, 2003); Kleinfeld (2012); Kleinfeld and Bader (2014). Most recently, the contributors to Marshall (2014) have offered various versions of the strong case for bottom-up development; this volume gives an excellent overview of the territory. For an important critical discussion of bottom-up rule of law development, see van Rooij (2012).
12. This point holds true not just for outsiders attempting to create the rule of law in other nations, but also for central governments attempting to do so in their own. For more on the problems of centralized, top-down institutional imposition, see Scott (1999). For an analysis that uses the case study of Kosovo to make points similar to those of this chapter, including a focus on the importance of norms rather than formal institutions, and on actually attending to local cultures and traditions, see Brooks (2003, 2275–340). See also the discussion by Upham (2002), who points out that a "legal system is too complicated to be planned from the top down," such that supplanting local institutions with foreign legal institutions may do more harm than good once those new institutions fail. For a history of the rule of law development industry's attempts to deal with "legal pluralism," and the prior attempts of some in that industry to supplant traditional legal systems with centralized state-run systems like those in the North Atlantic liberal democracies, see chapter 2 of Grenfell (2013); for a general discussion of the potential and perils of relying on local institutions, see Tamanaha (2011).
13. For an overview of the *panchayats*, see Klock (2001, 275–95).
14. This is meant to be an example rather than a specific institutional prescription for India, a country in which I have no expertise. Those with expertise in India have, in fact, criticized attempts to work through the *panchayats* (e.g., Galanter 1972, 53–70). The point is that this is the type of strategy that should be considered and empirically tested, and policy makers should work with those who actually do possess local expertise.
15. This tradition extends beyond today's developing world. In medieval Ireland, for example, the Catholic Church had a role in enforcing some economic regulations, for example, by punishing contract breakers (Watt 1998, 168, 175).
16. Buscaglia and Stephan (2005) aptly discuss other factors favoring local methods of dispute resolution.
17. Fiseha (2013, 118–19) also attributes this property to traditional adjudication, although this argument is mated to a confused equation of traditional adjudication with the rejection of positive law, which misses that customary law is consistent with legal positivism.
18. Pistor (2002, 97–130).
19. For an account of such phenomena at an even higher level of generality that includes individual psychologies, see Boyd and Richerson (2008, 305–23).
20. Blattman, Hartman, and Blair (2014).
21. *Ibid.*, 107.
22. *Ibid.*, 118–19.

23. *Ibid.*, 120.
24. *Ibid.*, 113, 119. Fiseha (2013, 114–15) argues that "community dispute resolution mechanisms" have the dual role of resolving disputes between individuals and generally quelling violence by "restoring broken relations and putting order in the community," in contrast to centralized state mechanisms that fail at "dealing with the psychological and cultural traumas that often trigger retribution."
25. Bassiouni and Rothenberg (2007) point out that the "formal" justice sector in Afghanistan is widely seen as corrupt and lacking legitimacy, while the "informal" justice sector, including local institutions known as the *shura* and *jirga*, is generally seen as legitimate, as is Islamic law. The *shura* and *jirga* mainly operate by deploying community disapproval of those who they condemn (Checchi and Company 2005), and thus are particularly promising sites, based on the theory given in Chapters 6 and 8 of this book, for promoting the kind of civic trust, on a local level, necessary to develop the rule of law: they call upon ordinary people to signal their support for their judgments and willingness to impose sanctions on those who violate them. Souaiaia (2013, 11) notes that there is substantial historical precedent for local Islamic mosques taking on a governance role in the failure of central governments.
26. Kleinfeld and Bader (2014).
27. *Ibid.*, 15.
28. *Ibid.*, 17.
29. One key problem with the use of local and traditional institutions to implement the rule of law is that, in many contexts, they have traditionally excluded or actively carried out the subordination of women. However, efforts to actively encourage women's participation in local institutions have shown some success. US/World Bank support of the National Solidarity Program, a locally oriented public works program in rural Afghanistan, has placed a number of women in nontraditional leadership roles in local councils (Coleman 2010, 188–92). Drumbl (2004, 349–90) suggests that the international community could encourage traditional institutions to include women.
30. Stromseth, Wippman, and Brooks (2006, 337).
31. Special Inspector General for Afghan Reconstruction, report to Congress of April 30, 2014.
32. Cf. Carothers (1999, 257–70), who describes the lack of "local ownership" in development projects. External actors may lack "input legitimacy," in Krasner and Risse's (2014) terms.
33. The "design thinking" process is described by Stanford's Hasso Plattner Institute of Design at http://dschool.stanford.edu/use-our-methods/ (accessed March 3, 2014).
34. For example, the Parsons Design for Social Innovation and Sustainability (DESIS) lab at the New School (www.newschool.edu/desis/) has sponsored projects relating to New York City public housing and other social services. Also see Soule (2013).

35. In particular, commercial legal reforms may make matters worse. The object of rule of law development is to build widespread support for the rule of law, and institutions that allow the subjects of law to coordinate in its defense. The citizens of developing states are not stupid, and can tell if external rule of law development efforts are intended to benefit the country's social and economic elite and foreign corporations associated with the states that are sending the development agencies, rather than the immediate legal needs of ordinary people. Such efforts can be expected to induce cynicism and opposition from the neglected populace.
36. Ginsburg (2011, 271–74); Skaaning (2010, 449–60); Ringer (2007, 178–208); Nardulli, Peyton, and Bajjalieh (2013); Merkel (2012).
37. E.g., Davis (2004, 141–61).
38. Ginsburg (2011, 275–77).
39. Krever (2013, 131–50).
40. Skaaning (2010).
41. See the sources cited by Haggard and Tiede (2011, 676), as well as the discussion by Rios-Figueroa and Staton (2008).
42. Skaaning (2010) and Haggard and Tiede (2011, 677–78).
43. More extensive literature reviews can be found in Skaaning (2010), Haggard and Tiede (2011), Rios-Figueroa and Staton (2008), Davis (2004), and Haggard, MacIntyre, and Tiede (2008).
44. See Saisana and Saltelli (2012).
45. Variable specification available online at http://info.worldbank.org/governance/wgi/index.aspx. For an apt critique of the conceptualization problems, in the (roughly equivalent) language of construct validity, see Thomas (2009, 38–41).
46. "Note that not all of the data sources cover all countries, and so the aggregate governance scores are based on different sets of underlying data for different countries." *Ibid.* The Bank insists that its data are suitable for cross-country comparisons (Kaufmann, Kraay, and Mastruzzi, 2011), on the grounds that "all of our sources use reasonably comparable methodologies over time" (*ibid.*, 15), but this is nothing more than a blunt (and imprecise) assertion.
47. Kaufmann, Kraay, and Mastruzzi (2007). Alarmingly, this paper also scornfully dismisses the poor conceptualization objection as "definitional nitpicking" (*Ibid.*, 23–24).
48. *Ibid.*, 7–8.
49. Haggard, MacIntyre, and Tiede (2008, 221–27) note that some of the correlations we would expect between Bank governance indicators and some of the other measures used for the rule of law are surprisingly weak. See Gowder (2014e) for more on the relationship between corruption and the rule of law.
50. United Nations, *Rule of Law Indicators: Implementation Guide and Project Tools* (2011).
51. Nardulli, Peyton, and Bajjalieh (2013, 139–92).
52. Starr (1936, 1143–52). On "sham constitutions" in general, see Law and Versteeg (2013). It might be possible to get something useful out of the

Nardulli et al. measure by weighting it with the Law and Versteeg constitutional performance scores.

53. E.g., works cited by Lissitzyn (1952, 257–73), Hazard (1947, 223–43), and Schlesinger (1955, 164–82). There is also a rather odd one-page bibliographic entry (Sharlet 1974, 156), which at least hints at the existence of a 144-page bibliography of them, and claims that the aforesaid bibliography is incomplete.
54. Organisation for Economic Co-operation and Development (2008, 31–33).
55. Rios-Figueroa and Staton (March 26–27, 2008).
56. Van Schuur (2003, 141).
57. *Ibid.*, 150. Other models, such as the Rasch model, are even stricter.
58. *Ibid.*, 145. Local stochastic independence may be dubious, also, reliability statistics will be inflated because of the large number of items; very little should be inferred from this scaling exercise.
59. I thank Alejandro Ponce of the World Justice Project for permitting me to use the WJP data. Unfortunately, due to confidentiality concerns relating to the expert respondents, the WJP has requested that the item-by-item raw data not be further shared. The text of selected items is available online at rulelaw.net.
60. Straat, van der Ark, and Sijtsma (2013, 75–99).
61. However, the impact of this limitation should not be substantial. Three years is ordinarily not a period in which we would expect to see radical changes to a country's legal system. Exceptions include those countries that were involved in the Arab Spring, and countries that had coups. States that are potentially problematic on these grounds include Lebanon, Morocco, Thailand, Turkey, and the United Arab Emirates.
62. This (unlike the other relationships) is not linear. As the plots suggest, there appears to be substantially more rule of law variation in the lower income levels than in the higher income levels. However, after log-transforming the variables, the strong relationship between the two can be seen (see the charts in the appendix to this chapter).

CONCLUSION A COMMITMENT TO EQUALITY BEGINS AT HOME

1. Just a handful among many: Scarry (2010), Steyn (2004), Satterthwaite (2007), Drumbl (2005).
2. Keister and Moller (2000).
3. Lessig (2011).
4. See David Kirkpatrick, "Mubarak's Grip on Power Is Shaken," *New York Times*, January 31, 2011, www.nytimes.com/2011/02/01/world/middleeast/01egypt.html; Katherine Marsh, "Syrian Soldiers Shot for Refusing to Fire on Protesters," *The Guardian*, April 12, 2011, www.theguardian.com/world/2011/apr/12/syrian-soldiers-shot-protest. Similar refusals were noted in Tunisia and Libya (Silverman 2012).
5. See the discussion of administrative power in Greif (2008) and De Lara et al. (2008). For a nuanced discussion of the implications of military privatization for the control of state-level violence, see Avant (2005).

6. For a general account of the European discrimination against Muslims (which is not focused on the criminal justice system), see Modood (2003).
7. NAACP "Criminal Justice Fact Sheet," available online at www.naacp.org/pages/criminal-justice-fact-sheet (visited December 19, 2013).
8. Anwar, Bayer, and Hjalmarsson (2012).
9. Hurwitz and Peffley (2010, 460).
10. Franklin (2013).
11. Alexander (2012).
12. For example, Alexander (2012, 7) cites statistics showing similar rates of drug offenses for whites and blacks, even though blacks are by far the disproportionate targets of the drug war.
13. For an argument that the state is in fact responsible to a substantial degree for this poverty and inequality, see Gowder (2015a). On the relationship between poverty and crime, see Hsieh and Pugh (1993); Pridemore (2011).
14. Hurwitz and Peffley (2010, 464).
15. Chaney and Robertson (2013, 483).
16. Wu, Lake, and Cao (2013).
17. Tuch and Weitzer (1997, 643) found "a precipitous decline in approval ratings," particularly among black citizens, following a series of widely publicized police beatings of black citizens, and black and Latino citizens held more disapproving attitudes toward the police longer after these incidents than did whites. Obviously.
18. Perez, Berg, and Myers (2003).
19. Harris (2001, 412–13).
20. Critical race theorists call this the "interest convergence" thesis: advances in the standing of minority groups tend to come about only when they happen to be in the interests of the majority (Bell 1980).
21. Western and Pettit (2010, 11). By contrast, whites in the same age cohort have an imprisonment risk by age 30 of barely 5 percent (*ibid.*).
22. Danny Vinik, "An 18-Year-Old Baltimore Rioter Faces a Higher Bail Than the Cop Accused of Murdering Freddie Gray," *New Republic*, May 2, 2015, www.newrepublic.com/article/121702/baltimore-rioter-gets-bail-above-freddie-grays-alleged-cop-murderer.
23. Frank Stoltze, "'Rough Rides' in Baltimore Police Cars Are 'Screen Tests' in LA," KPCC radio, May 2, 2015, www.scpr.org/news/2015/05/02/51400/rough-rides-in-baltimore-police-cars-are-screen-te/.
24. Bill Keller, "David Simon on Baltimore's Anguish," The Marshall Project, April 29, 2015, https://www.themarshallproject.org/2015/04/29/david-simon-on-baltimore-s-anguish.
25. Leonard Levitt, "NYPD v. Bill de Blasio: Why New York's Mayor, Police Are at Odds," *Reuters*, December 31, 2014, http://blogs.reuters.com/great-debate/2014/12/31/nypd-v-bill-de-blasio-why-new-yorks-mayor-police-are-at-odds/.
26. *Ibid*. Keldy Ortiz, Steven Trader, and Barry Paddock, "Police Union Silent Day after Commissioner Bratton Acknowledged NYPD Slowdown," *New York*

Daily News, January 10, 2015, www.nydailynews.com/new-york/nyc-crime/police-union-quiet-bratton-acknowledged-nypd-slowdown-article-1.2073467.

27. Larry Celona and Bob Fredericks, "City Housing Puts Workers in Bright Vests in Fear of NYPD Shootings," *New York Post*, May 25, 2015, http://nypost.com/2015/05/25/city-housing-puts-workers-in-bright-vests-in-fear-of-nypd-shootings/.

28. Firings: Timothy Williams, "San Francisco Police Officers to Be Dismissed over Racist Texts," *New York Times*, April 3, 2015, www.nytimes.com/2015/04/04/us/san-francisco-police-officers-to-be-dismissed-over-racist-texts.html. Content of texts: Aleksander Chan, "The Horrible, Bigoted Texts Traded among San Francisco Police Officers," *Gawker*, March 3, 2015, http://gawker.com/the-horrible-bigoted-texts-traded-between-san-francisc-1692183203.

29. Extortionate practices: Radley Balko, "How Municipalities in St. Louis County, Mo., Profit from Poverty," *Washington Post*, September 3, 2014, www.washingtonpost.com/news/the-watch/wp/2014/09/03/how-st-louis-county-missouri-profits-from-poverty/. Arrest warrants: Monica Davey, "Ferguson One of 2 Missouri Suburbs Sued over Gantlet of Traffic Fines and Jail," *New York Times*, February 8, 2015, www.nytimes.com/2015/02/09/us/ferguson-one-of-2-missouri-suburbs-sued-over-gantlet-of-traffic-fines-and-jail.html. Original court record of arrest warrant numbers: https://www.courts.mo.gov/file.jsp?id=68845. According to Balko, even higher ratios of arrest warrants to residents can be found in Grandview, Independence, and, astonishingly, Kansas City, Missouri. Unsurprisingly, Balko also reports a number of racial disparities in these practices.

I find the occupancy permit notion most astonishing. In order to move to a new residence in Ferguson, one apparently needs to show up in person with a stack of documents and $80. From an FAQ section of the Ferguson city website, as of my visit to it on May 5, 2015:

> 1. Do I need an occupancy permit?
> Yes. Occupancy permits are required for both residential and commercial properties. All permits must be paid in person; cash, checks, money orders, debit or credit cards are accepted.
> 2. What is required to get a residential occupancy permit?
> To get a residential occupancy permit, you will need proof of ownership or authorization to occupy residential property form, a photo ID, birth certificates for children to show proof of relationship, a complete application, and the $40 fee.
> *An inspection is required when there is a change in occupancy and/or ownership. The inspection must be requested by the property owner and a fee of $40 must be paid separate from the occupancy permit fee. The fee must be paid in person; cash, checks, money orders, debit or credit cards are accepted.

www.fergusoncity.com/Faq.aspx?QID=71. This kind of obscure, bureaucratic, and expensive regulation is a ready-made tool to give police open threats in the

brute pursuit of municipal banditry. The poor, unable to pay the $80; the working poor, unable to find the time to show up in person, dig up things like their children's birth certificates, and arrange for an inspection; and the uninformed, unaware of the regulation's very existence, become susceptible to official coercive power at will. It's also striking just how far from the assumed norm of American culture this is. Who would imagine that you have to dig up a bunch of documents and get a special license from the government after an inspection to move to a new apartment, or show up for a second round when, for example, a romantic partner moves in with you? This kind of regulation smacks of the sort of tale American schoolchildren in the 1980s were told about the Soviet Union, all internal passports and officious bureaucrats covering the ordinaries of day-to-day life with a miasma of long lines and forms to be filled out in triplicate. Nor does the oppressive potential of such regulations go unused. The most egregious abuse shows up on page 81 of a March 4, 2015, report of the US Department of Justice, available at www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson_police_department_report_1.pdf, where we learn of at least two cases in which calling the police to report a "domestic disturbance" (which I read as meaning "domestic violence") got the complaining witness (i.e., *victim*) either summonsed or arrested for an occupancy permit violation; in one horrifying case the victim was arrested because the boyfriend, who (as I read it) was the alleged *perpetrator* of the domestic violence, was not listed on the occupancy permit. The capacity for that kind of outrageous arbitrary abuse of power is what an open threat looks like in a country that makes a show of the rule of law.

30. Spencer Ackerman, "The Disappeared: Chicago Police Detain Americans at Abuse-Laden 'Black Site,'" *The Guardian*, February 24, 2015, www.theguardian.com/us-news/2015/feb/24/chicago-police-detain-americans-black-site.
31. Slobogin (1996, 1040) gives the name and (*ibid.*, 1041–44) describes its prevalence.
32. Worrall (2001).
33. For example, Balko (2013, xii–xiii) recounts a 2010 nighttime SWAT raid in Columbia, Missouri, to serve a warrant for marijuana possession, which involved the shooting of several pet dogs, in a house with a 7-year-old child. The ultimate charge: possession of a marijuana pipe.
34. Krieger, Kiang, Chen, and Waterman (2015). American police have also been criticized for neglecting violence against blacks (Kennedy 1997, 29 et seq., especially 69 et seq.).
35. Gowder (2015a, 373–85).
36. In principle it is possible for courts (or pardon boards) to collect data on the extent of criminal behavior (facilitated, for example, by special verdict forms) in a given time period as well as sentences by race, and then retroactively lower the sentences for racial minorities until race no longer predicts sentence length after controlling for criminality.