

# Trust and the Rule of Law

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## 1. Introduction

My interest in this chapter is in the relationship between cultures of trust and the rule of law. It is widely affirmed that the rule of law is a core requirement for a flourishing society. A central part of its value is that it creates a stable social order, in which relationships are reasonably predictable, being subject to constraints that are both publicly known and enforced. These facts enable people to plan their lives and projects with a degree of security. Although a stable social order has obvious affinities with a culture of trust, the two are not the same thing. A stable social order requires only that change should not occur too fast. A culture of trust is a richer phenomenon. As I shall argue, in a society marked by a culture of trust, there is a rational, default assumption that others are trustworthy across a suitably wide set of social interactions. This assumption is upheld by social norms which mandate trustworthiness, and which are embedded.

The central contention of this chapter is that there is a reciprocal relationship between the two. The rule of law promotes a culture of trust, while a culture of trust promotes the rule of law. Conversely, the absence of the rule of law undermines a culture of trust, and a culture of distrust inhibits and undermines the rule of law.

The reciprocal relationship which I identify consists of normative interrelations between trust and the rule of law. By this, I mean that the normative principles which uphold the rule of law, and the fact of general compliance, which is a constituent part of the rule of law, provide key premises and principles for normative practical reasoning that also uphold cultures of trust. The reverse is also true. Normative principles which uphold cultures of trust, and the fact that social norms, which mandate trustworthiness, are embedded, provide key premises and principles for normative practical reasoning that also uphold the rule of law. That these normative interrelations exist is not an empirical claim. It is wholly possible that actual behaviour is not guided by the practical reasoning that I seek to elucidate, perhaps because it is guided by countervailing practical goals or principles, or is systematically irrational. Nonetheless, numerous studies have established empirical correlations between the level of generalized trust within a society and

compliance with various elements of a legal order. This includes, for instance, tax compliance (Scholz and Lubell, 1998; Hammar et al., 2009); corruption in general (Putnam et al., 1993; Uslaner, 2008; You, 2018), as well as among police officers and the courts (Rothstein and Stolle, 2008); democratic governance (Uslaner, 2008; Jamal and Nooruddin, 2010); and, more recently, unusual restrictions imposed to restrict the spread of SARS-CoV-2 (Petherick et al., 2021). These results are consonant with my argument.

It is not surprising that the rule of law supports a culture of trust, and that its absence has a corollary undermining effect. While the rule of law is a richer, more complex doctrine than simple compliance—what Joseph Raz calls the ‘law and order interpretation’ (2009/1979, p. 212)—the social achievement in establishing obedience to law should not be underestimated. It is an historic concern that, unless an authorized, public interpretation of rules is effectively enforced, with those rules enjoining respect for others’ person and property, and contributions to public goods as required, so the willingness to comply with and support those principles of respect and public contribution would be eroded or would not exist at all. In other words, a sovereign legal order is required to enable cooperation. (John Rawls terms this ‘Hobbes’ thesis’; 1999, p. 211.) As widespread compliance with the law enables cooperation, so habits of trust may emerge.

The more interesting direction of the relationship is the reverse, concerning the ways in which a culture of trust influences the rule of law. A deep theme from economics is that institutions, especially the market and the law, are ways of ‘economizing on virtue’ (Brennan and Hamlin, 1995). Moralized attitudes such as trust may be appropriate in intimate relationships. But in the impersonal settings that characterize a large-scale modern society, it is incentives and contracts that provide the key basis for order. In a classic statement of this view, Oliver Williamson asserts that this separation is not accidental. Outside of intimate relationships, human behaviour should be assumed to be calculative, in which people pursue their self-interest with guile, and with limited cognitive capacity. Yet calculativeness drives out trust. ‘I subscribe to the notion of economizing on trust... [T]rust, if it obtains at all, is reserved for very special relations between family, friends, and lovers’ (Williamson, 1993, pp. 483, 484). Williamson is representative of a larger strand of work from new institutional economics, in which institutions are viewed as substitutes for trust, rather than as complements (Tabellini, 2008; Alesina and Giuliano, 2015; Rose, 2019, pp. 8–13). If the rule of law is a substitute for trust, there is no dependence relation. I argue for the contrary. A culture of trust promotes the rule of law, and a culture of distrust undermines it.

While the debate between those who view institutions as a substitute for trust and those who view them as complements has taken place within social science, its outcome has significant normative implications. On the supposition that the

law is a substitute for trust, a legal order would be self-sustaining. Howsoever established, once the rule of law exists, it would generate the social conditions which are required for its own rule, yielding the good of a stable social order and enabling cooperation. If so, then a legal order could afford in its directives to be blind to the patterns of trust prevailing among the citizens who are subject to it. This would include not needing to consider influences on those patterns of trust which are either endogenous, being effects of the operation of the law, or exogenous, having their source external to the law. In contrast, if they are complements, and a culture of trust is required to sustain the rule of law with a culture of distrust undermining it, then a legal order cannot afford to be blind in that way. Rather, those responsible for administering and developing the law must weigh up the influence on trust that the legal order itself has, as well as that which is had by exogenous factors. It must weigh this influence alongside its influence on the other goals it should seek, the most notable of which is justice. The result is that the two goals may trade off against each other.

The structure of the chapter is as follows. Section 2 starts by developing in some detail an account of cultures of trust. This is distinct from a situation in which trust can be placed frequently or easily. Section 3 then considers the influence of the rule of law on trust, and Section 4 the influence of cultures of trust on the rule of law. Section 5 concludes by discussing some normative implications.

## 2. Cultures of Trust

A culture of trust is different from a social environment in which trust can be reliably placed well. Intuitively, trust can be evaluated according to whether the person trusted turns out to be trustworthy (Hardin, 2002; O'Neill, 2002a; 2002b, pp. 121–2). While this is not uncontroversial (for discussion and extended defence, see Simpson, 2017a; 2023), in the context pertinent here, namely, general interaction outside the context of family and immediate friends, trust is plausibly an attitude that is properly directed towards trustworthiness. Suppose that trusting only the trustworthy is the usual goal of trust in these wider contexts. It is possible that a social environment could facilitate well-placed trust, but not be recognizably a culture of trust. All that is required for the former is that trustors should be able reliably to discriminate the trustworthy from the untrustworthy. This is possible if there are social practices and structures available which serve this function. The central challenge for such social practices is that trustworthiness is a character disposition made evident principally over time. Towards showing this, let us start with the question of what makes someone trustworthy.

As a disposition of character, trustworthiness requires more than just that I do what I am trusted to. It imposes some specific demands on one's practical

reasoning. Suppose I am unable to resist the allure of cinnamon buns; if I go past the Bun Emporium, whatever else I was trying to do is dropped for the sake of immediate gratification. I may go on to fulfil my commitment to another person, but if it was mere happenstance that my route to doing so did not involve going past the Bun Emporium, which would have stopped me fulfilling that commitment, it is in a thin sense only, if any at all, that I was trustworthy. In trusting another, the trustor takes it that she, the trusted, would fulfil her commitment across a relevant range of circumstances which could occur. As a character disposition, trustworthiness requires that one does not fulfil one's commitments accidentally. If the counterfactual proposition that the trusted would fulfil her commitments across a relevant range of possible circumstances is true, then she robustly fulfils her commitment. (On trust as an attitude towards commitments, see Hawley, 2014; 2019; on the robust demands of trustworthiness, see Pettit, 2015, p. 60). That trustworthiness be a disposition robustly to fulfil one's commitments thus requires that a person must internalize the principle, 'I must fulfil my commitments'. The paradigmatic way that this happens, though not exclusively so, is through that principle being endorsed as a moral principle. By internalizing the principle, someone in their practical reasoning adopts as a premise and accords priority as a constraint to the principle that she must fulfil her commitments. If there are other practical goals which may be prioritized over the obligation to fulfil their commitments, then whether the trusted person does so is contingent on how the world goes. For, if fulfilling one's commitments turns out not to be instrumentally useful for achieving the other practical goal, or the other goal conflicts, then she will renege on her commitment. But the point of making a commitment is to give the person who accepts the commitment the assurance that, regardless of how the world goes, he can rely on her to pull through. He has this assurance only if she has a robust disposition to fulfil her commitments. Call the requirement that, in her practical reasoning, the trustworthy person accords priority to the principle that she must fulfil her commitments, its 'trumping' demand. That principle is trumping because it must take precedence over rival, non-moral considerations, such as self-interest, honour, loyalty, or partiality, and over quotidian moral concerns.

That trustworthiness be trumping does not rule out the possibility of exceptional cases, in which moral demands may conflict. If my child has been hit in a car accident, I should break my promise to take the neighbour's dog for a walk and get to the hospital fast. But the principle does take precedence over some considerations that otherwise have moral weight. I am not justified in renegeing on my commitment just because doing so would lead to greater utility. Other than in such exceptional cases, however, the obligation to fulfil one's commitments must trump other concerns.

Given the foregoing, we can note some initial 'ideational conditions' for trustworthiness. The 'ideational conditions' of some social outcome are the normative

beliefs which, in their content and force, are required to generate or sustain that outcome. Included in the ideational conditions of trustworthiness are that the trusted must internalize the principle that she must fulfil her commitments, paradigmatically taking this to be a principle of morality, and this principle is trumping in her practical reasoning.

The requirement that trustworthiness be a disposition robustly to fulfil one's commitments has a further implication. The disposition is revealed only in those situations in which betraying someone's trust is in one's own interests, and one does not do so. In a significant proportion of cases, that someone has fulfilled their commitments does not yet show that they are trustworthy, for the negative effects of a reputation for untrustworthiness ensure that it is frequently in my interest to honour my commitments. There are unusual instances in which it comes to be known that someone has honoured another's trust, even when it is directly against their interests to do so and in circumstances where they reasonably believed this would not become publicly known. Without such unusual instances being known, however, it is only with a track record of non-betrayal that someone's trustworthiness can be inferred, inductively. By providing reliable evidence of someone's track record, social practices and structures may enable this inductive inference. These practices and structures include testimony from those who possess this knowledge first-hand, from being a member of a network which possesses this knowledge collectively, and from being a member of a trustworthy group, or by being supported by testimony from other of its members.

Social practices and structures which enable one successfully to discriminate the trustworthy from the untrustworthy, however, are not themselves constitutive of a culture of trust. The potential trustor asks herself: given a population made up of the trustworthy and the untrustworthy, how do I know whether this person is trustworthy? Testimony, networks, and groups help her to answer that question. By themselves, though, an answer to that question helps to solve only a 'match-making' problem, that of connecting a trustor with the trustworthy. It does not address how frequently one can place trust. That one is able successfully to discriminate the trustworthy from the untrustworthy is compatible with most people being untrustworthy, hardly a situation which is aptly described as a culture of trust. A social environment which is recognizably one marked by a culture of trust is one in which, at minimum, trust can be placed frequently and easily. 'You don't need to lock your door in this neighbourhood when you go out; you can trust people round here.' Numerous people have been drawn to the idea that trust is, in some sense, properly a default attitude towards others. The 'anti-reductionist' defends this in relation to belief in others' testimony (e.g. Burge, 1993; Coady, 1992; Reid, 1997/1764), and the position may be defended more generally in relation to trust (Reid, 2010/1788; Stern, 2017; Goldberg, 2019; Løgstrup, 2020/1956). I argue elsewhere that the correct way to understand the latter idea is in the claim that, in accepting someone's commitment to  $\phi$ , so belief

that she will  $\varphi$  normally follows. It is rational for belief that someone will  $\varphi$  to follow from her commitment to  $\varphi$  when the practice of commitment-making is functioning properly (Simpson, 2018; 2023). How well the practice of commitment-making functions varies across social context, however. A culture of trust may be usefully identified as a situation in which, for a suitably wide set of contexts in which interaction may take place, the practice of commitment-making is functioning properly; when so, trust is a rational, default attitude. (I draw here on Rose, 2019, p. 80.) The question is, then, what can ensure that this practice is functioning properly?

Social norms ensure that the practice of commitment-making functions properly, and thus that trust can be a rational, default attitude. Social norms prescribe a rule or regularity of behaviour within a population, which people are (normatively) expected to comply with. Norms are dynamic, sometimes growing in strength and sometimes weakening. When there is widespread compliance with the regularity of behaviour prescribed by a norm, and there is an equilibrium between the social pressures leading to compliance with the norm and those which would erode compliance (or the former predominate), we may say that the norm is 'embedded'. Why is it social norms that perform this function of ensuring that the practice of commitment-making functions properly? An alternative explanation for why trust could be placed frequently and easily in a given social context might appeal simply to a greater distribution of virtue in this situation, as opposed to that in a comparator. More people here love the good and do the right thing than they do over there. While this is conceivable, it is an unsatisfactory explanation. Whatever non-cultural individual propensities towards virtue there may be, if any, it is implausible that the distribution of these across groups should vary to such a degree that they can explain the differences between high-trust and low-trust societies. The explanation must appeal to factors which are variable across social or cultural contexts. Although not the only cultural factor which can explain this—I consider coercion as an alternative in Section 4—social norms provide this. More specifically, in a culture of trust, it is norms of trustworthiness which ensure that trust can be a default, rational attitude towards others' commitments.

It is characteristic of social norms that they owe their stability, in part, to the fact that a sufficiently high proportion of those who comply with a norm are willing to enforce it against those who break it (Bicchieri, 2006, pp. 11, 189; also 2017, p. 28). How is a norm enforced? At minimum, it may be enforced through social disapprobation (Brennan and Pettit, 2005, pp. 274–9). Others' disapproval is sufficient to sustain norms which make relatively slight demands, such as not picking one's nose in public. Other norms are more demanding, however, and mandate more costly forms of behaviour, whether in gains foregone or costs incurred. For these, sanctions are required which are stronger than mere disapprobation, involving material penalties (Simpson, 2017b, pp. 46–7).

That a social norm must be enforced through penalties imposed on norm-breakers by norm-upholders indicates that norms standardly have some ideational conditions. It is sometimes proposed that, for a norm to exist, not only must the regularity of behaviour mandated by a norm be generally complied with, but that regularity of behaviour must also be generally approved of (e.g. Axelrod, 1986, p. 1097; Sugden, 1986, p. 166; Pettit, 2002, p. 311). But, for many norms, the normative attitude of approval is too weak. For those norms which, to be embedded, must be supported by material penalties, the associated normative attitudes should, from a norm-upholder's perspective, justify her in seeking to punish a norm-breaker. So, the normative attitude must have a certain force. It must be not just a good thing to comply with the norm, or even praiseworthy, but must be something that one may appropriately expect others to do. Geoffrey Brennan, Lina Eriksson, Robert Goodin, and Nicholas Southwood offer a range of possible attitudes that could correspond to this, including normative expectations, reactive attitudes, dispositions to have such attitudes, or attitudes that entail any of these (Brennan et al., 2013, p. 29). Further, the norm must also apply generally. The behaviour enjoined by the norm is not just expected of a given individual; rather, an individual is expected to behave in the specified way because this is expected of all those within the relevant social context. In being taken to apply generally, a norm is an imposition. Norm-upholders impose the norm on those who would otherwise not acknowledge it, and who may resist its imposition.

The combined effect of these social and normative facts is that, when a norm is embedded, a significant proportion of people within the relevant population internalize the principle it mandates, thus being disposed to comply with that principle in their behaviour, and agree with the principle if it is articulated. Those who uphold the norm, imposing social sanctions on non-compliers, paradigmatically do so because they regard the principle as being morally mandated. Those who comply with the norm may do so for the same reason, or simply because it is a useful heuristic for the purposes of practical reasoning. The effect of norms is to increase the proportion of the population who comply with the rule robustly, and to increase the cost of flouting the norm to those who would otherwise be willing not to comply.

The norm of trustworthiness shares these features which characterize norms generally. The regularity of behaviour which it prescribes is, 'Fulfil your commitments!'. The demand to fulfil one's commitments is trumping, taking precedence over other concerns, and being excepted only in unusual circumstances. Further, it has the force required to justify norm-upholders in punishing norm-breakers. It is collectively beneficial for the norm of trustworthiness to be embedded; when so, commitments are normally kept, and trust can be a rational, default attitude. But the untrustworthy can exploit this fact, and renege on commitments to their own gain. So, the norm of trustworthiness shares the classic structure of a collective action problem, in which some may unfairly free-ride on others' compliance.

(Not all norms have this structure; norms of politeness are mere conventions, for instance.) Norms of trustworthiness, therefore, are enforced on the basis of a concern for fairness—which is a paradigmatic basis for such reactive attitudes and disposition to punish. The expectation that one should be trustworthy thus applies generally, to all, and not just to individuals. This contrasts with the requirements for an individual to be trustworthy. Whereas, in her practical reasoning, the trustworthy individual needs to endorse only the principle, ‘I must fulfil my commitments’, for a norm of trustworthiness to be appropriately supported, the norm-upholders must reason according to the principle, ‘One must fulfil one’s commitments.’ When the norm of trustworthiness is embedded, the demand to fulfil one’s commitments is enforced against those who break their commitments. Depending on the context, the penalties may be expressive, material, or both. The proportion of the population who fulfil their commitments robustly is increased. When all this is so, trust is a rational, default attitude.

Given this account of cultures of trust, I turn to consider why the rule of law should promote cultures of trust.

### 3. How the Rule of Law Supports Cultures of Trust

As observed earlier, it is not surprising that the rule of law should promote cultures of trust. As the law provides a social framework within which patterns of cooperation become established, so habits of trust may similarly develop. A general reason as to why this should be so is that both the criminal law and the civil law make trust less risky. In deciding whether to interact with someone whom one has limited knowledge of, one may compare the possible costs of interaction with the possible gains. The possible gains include those which come from the mutual benefit arising if the other person proves trustworthy. The rule of law is significant because it decisively affects the possible costs. In a context without the rule of law, one is vulnerable to others’ aggression and predation. Unconstrained by anything other than one’s capacity for self-defence, the results of misplaced trust could be catastrophic: in the state of nature, keep your distance. When the rule of law exists, however, legally defined and enforced sanctions limit how badly and how often interactions go wrong. So, in expectation, the costs one may incur from a trusting interaction are much reduced, and the outcome of the risk/reward calculation accordingly changes. As Samuel Bowles comments, in most of human history, ‘strangers represent dangers, not opportunities for mutual benefit’. But, by insuring against worst-case outcomes, the rule of law could ‘promote the spread of trusting expectations and hence of trusting behaviour through the population’ (Bowles, 2011, pp. 72, 74). Under the rule of law, trust is likely to be frequent and easy.

There is a more specific way in which the rule of law promotes cultures of trust, however. That trust is frequent and easy, perhaps because the risks are low,

is distinct from there being a culture of trust. The latter requires, in addition, that norms of trustworthiness should be embedded, being reinforced by a set of normative attitudes which internalize and uphold the obligation to fulfil one's commitments. It is conceivable that trust could be frequent without such norms being embedded. However, the law supports a culture of trust because it replicates, in its structure, the ideational conditions required for norms of trustworthiness to be embedded.

In common with norms, a legal order prescribes rules of behaviour which are trumping, generally applied, imposed on non-compliers, and, paradigmatically, are internalized. In requiring one to  $\phi$ , the law demands that  $\phi$ -ing should take priority over other goals which may conflict: not only the temptations of self-interest but also morally valuable goals which may not be jointly achievable. When the law requires one to  $\phi$ ,  $\phi$ -ing is a requirement that applies generally, across a law's jurisdiction, not just applying to specific individuals only. Plainly, the law is imposed on non-compliers, through the institutional apparatus of police, prosecution services, courts, and prisons. Most fundamentally, legal rules paradigmatically work by being internalized by individuals—if not by all, then at least by a significant proportion of those to whom they apply. H. L. A. Hart's comprehensive rebuttal of the behaviouristic understanding of law promoted by Wendell Holmes and Austin proceeded by contrasting social habits with rules, with the latter being taken as general standards for a community, which entitle one to criticize and punish those who deviate from it. It is the 'internal aspect' of rules that distinguishes them from (mere) social habits (Hart, 2012/1961, pp. 56, 89; also Schapiro, 2006).

It is not accidental that social norms and the law have a shared ideational structure. In his discussion of the internal aspect of rules, Hart assumes a fundamental continuity between the modes of operation of rules of etiquette, of social morality, and of law. All of these rely for their existence on the social pressures which arise because of the internal point of view, as a result of which they are held up as general standards. The continuity is such that Hart identifies those rules of social morality for which 'physical sanctions are prominent or usual among the forms of pressure, even though these are neither closely defined nor administered by officials but are left to the community at large', as 'a primitive or rudimentary form of law' (Hart, 2012/1961, p. 86). On his formal account, what distinguishes law from rules of politeness or social morality is the presence of 'secondary' rules in the former, which confer powers to change and administer the law, in addition to the 'primary' rules which state the regularity of behaviour to be followed. The sentence quoted above implies a further contrast, which is distinct from the presence or absence of secondary rules. While the law is centrally administered and enforced by a set of institutions, which are presumed or authorized by the secondary rules, rules of social morality are enforced by agents who act in ways that are both distributed and coordinated. Their action is distributed, because there is no single individual or decision-making body which directs people to act,

but it is coordinated, because each acts on the basis of the same rule or family of rules. Similarly, the content of these rules changes not through a central decision, but through a distributed, evolutionary process. On Hart's account, the point of secondary rules is to overcome the problems sometimes posed by rules that rely only on such distributed processes, with the latter being inefficient, static, and enforced in an uncertain way (*ibid.*, pp. 92–4). While secondary rules enable law to avoid certain pathologies that social norms are subject to, and there is a formal structure for enforcement, its primary rules structure human action in the same way as those of customary morality. In this sense, law is fundamentally continuous with customary morality.

It matters that law has the same ideational structure as social norms because, when it is enforced effectively, it reinforces the latter. There are at least two ways in which it does so. One reinforcing dynamic derives from the law's power to habituate people to reason practically in ways that are conducive to being trustworthy. Although it is not necessarily so, where the rule of law exists, it is likely that the law's sanctions would be more effectively enforced, and of greater severity, than the penalties enforced against those who break social norms. If so, for the proportion of the population who would be willing to break a legal or a social norm if the benefits of doing so in expectation outweighed the costs, there will be a sub-set for whom the effective enforcement of the law makes it practically rational for them simply to internalize the principle, 'comply with social rules'. Without the law, the costs of cognition may be outweighed by the prospective gain; with the law, they are not. While 'comply with social rules' would be internalized merely as a useful heuristic which aids practical reasoning, rather than as a moral principle, its significance would be the same: that person would follow social rules robustly, regardless of whether they were social norms only or were also supported by law. If norms of trustworthiness were internalized by some in this way, so a culture of trust would be thereby promoted. Further, it is the rule of law that may promote cultures of trust in this way, not merely the law as such. For, if the law is not effectively enforced, it does not habituate people into rule-following in their practical reasoning. More generally, law-abiding citizens—both those who comply with the law out of habit, or out of duty—reason practically in ways that are conducive to being trustworthy.

Another reinforcing dynamic, and I think the more significant one, arises from the power of the law to expand the context in which social rules can be relied upon. While rules provide general standards of behaviour, they do so only within a given social context. In pre-legal social environments, habits of cooperation are tightly bound to the tribal group, within which kin selection and reciprocal altruism form the socio-biological basis for trust (Bowles and Gintis, 2011; Fukuyama, 2011). However, the material gains from specialized labour and exchange are possible only if cooperation is established on a wider basis than the tribe (Hayek, 1988; Rose, 2011). The challenge, then, is to find ways by which social rules which

may be embedded within an extended kinship group can come to be relied upon when interacting with those outside that group. There are countervailing social pressures that make trust difficult in this situation. At the limit, the groups may be hostile to each other. Less dramatically, it may simply be that patterns of reciprocal behaviour do not yet exist, so I lack assurance that members of other groups are likely to enforce the social rules governing how to cooperate. When the rule of law is established across kinship or tribal groups, however, I have that assurance, for the legal rules are complied with across those boundaries. Under the pressure of the law, that two people may belong to different groups increasingly becomes less significant an obstacle to cooperation, so long as both fall within the law's jurisdiction.

The normative pressure that the law places on group membership, dissolving its significance as a basis for cooperation—and the lack of which is an obstacle against cooperation—has a 'spill-over' effect on cooperation which is not directly subject to law. The obstacle to cooperation, again, is the lack of assurance that the relevant social rules are embedded across groups. Because the law is effectively enforced, patterns of reciprocal behaviour already bind individuals who are similarly subject to the law, but belong otherwise to distinct groups. So, these patterns of behaviour provide an existing basis for assurance. With this, norms of trustworthiness come to be extended beyond the tribal or kinship group, to encompass those who are otherwise strangers, but are likewise subject to the same legal order. The point is not that norms cannot be restricted to social contexts which are smaller than that ruled by a given legal order. That is plainly false; norms in the seminar room are very different to those on the football terrace. The point is that, given that there are existing patterns of reciprocal behaviour on fundamental matters of cooperation, namely, complying with the law, so this provides an assurance that the social context within which these patterns occur also applies to those norms, which provides a similarly fundamental basis for cooperation, as those of trustworthiness do. Patterns of reciprocal law-following support patterns of reciprocal norm-following. The rule of law supports cultures of trust.

I turn now to consider the reverse direction of the relationship, namely the ways in which cultures of trust support the rule of law.

#### 4. How Cultures of Trust Support the Rule of Law

There is an uncomplicated sense in which the rule of law depends on trust. Hobbes's thesis, recall, starts from the suspicion that others are not playing their part in complying with shared rules, with the result that I am tempted not to either. As people yield to this temptation, so general compliance breaks down. Compliance with the law, in general, depends on trust that others are complying with the law. The temptation not to comply when others are not complying is not

an arbitrary fact of human psychology. Rather, it is based on some plausible normative reasoning. Why should I comply if others do not? That would be to accept the sucker's pay-off, given others' free-riding. So, while the law presents itself as an unconditional obligation, it is taken by many to be a conditional obligation. Indeed, Rawls took the principle of reciprocity to be a 'deep psychological fact', which a conception of justice must take account of if it is to be stable (Rawls, 1999, p. 433; see also Ci, 2006; Lister, 2011; 2017). It should be noted that Hobbes' actual views are, of course, more complex than the Rawlsian summary. In particular, Hobbes' emphasis on the power of education, both from the pulpit and in universities alike, reflects his emphasis on the power of ideational factors in sustaining a social order; for discussion, see Bejan (2010). The conditional obligation—that I am obliged to comply with the law only if sufficiently many others are complying—is grounded by, again, a concern for fairness. It is unfair for me to be expected to pay into a scheme which others only take out from.

I take no view here on whether the obligation to comply with the law is, in fact, conditional on general compliance. It is sufficient that many people take this to be the case, which there is evidence for. Experimental studies in behavioural science allow subjects to be divided into a basic tripartite schema: (1) those who cooperate unconditionally, displaying 'pure altruistic' preferences; (2) those who cooperate conditionally; and (3) those who maximize their self-interest, regardless of the implications for others. (A small proportion of subjects do not fit this schema.) Surveying results from a number of such studies, Samuel Bowles finds that conditional cooperators form the largest proportion, varying from a third to two-thirds of subjects. The proportion of 'knives', in David Hume's term, who maximize their self-interest, ranges from less than a third to a fifth (Hume, 1975/1748, p. 278, Bowles, 2016, pp. 41–5, 74).

This uncomplicated sense in which the rule of law depends on trust does not address the thesis to be defended, that the rule of law depends on cultures of trust. Law may be a substitute for trust—it may enable widespread cooperation, precisely in the absence of cultures of trust—so long as it is generally complied with, and its sanctions are imposed on law-breakers. When so, and other things are equal, conditional cooperators are by their own lights obliged to comply with the law. So, this sense in which the rule of law depends on trust requires no more than that there is general compliance. It does not yet show that the law is susceptible to external influence in doing so.

That the rule of law depends on a culture of trust derives from their shared ideational structure. Start with the conditions of the rule of law. In identifying the law as characterized by its 'internal aspect', Hart sought to distinguish it and other social rules from habits. The distinction rested, in part, on the role that the internal aspect plays in justifying criticism and punishment of those who break the relevant rules, as contrasted with habits, where such criticism and punishment are inappropriate. The internal aspect of the law plays a deeper explanatory role

than this, however. Only given this internal aspect is a legal system possible which is both widely complied with, and proportionate.

To show this, consider the counterfactual scenario in which the population governed by a legal order are egoists, acting only in pursuit of their own self-interest. As a relaxing assumption, suppose that officials act in conscientious fulfilment of their public duties. Could such a population of egoists be governed by law? By hypothesis, they would not internalize the law: that the law requires them to  $\phi$  by itself provides no reason to  $\phi$ . For the egoist, the law provides reason to  $\phi$  only in virtue of the likelihood and severity of its sanctions and associated legal costs of not complying (time spent during trial, etc.), as well as the indirect social consequences of legal entanglements. But, under the supposition, the indirect social consequences of law-breaking or being suspected of law-breaking are dramatically diminished. For the wider population of egoists, that a member of theirs had been suspected or convicted of law-breaking would reveal some information about that person's willingness to break the law, but it would provide no reason to take any other action. Other egoists would have no disapprobatory attitudes against law-breakers, so there would be no social exclusion, nor would they withdraw from cooperating at present or in the future. Even the direct victims of law-breaking would be willing to cooperate in future with those who broke the law at their expense. No normatively laden social rituals such as apology and forgiveness would be required. So long as there were mechanisms available—such as contracts—which would adequately align the parties' otherwise divergent interests, cooperation would be rational. So, the costs of law-breaking would be restricted to those sanctions directly imposed by the law, and would not include the indirect, social sanctions which, in the actual world, follow from breaking the law.

Nor would a population of egoists act in the ways that the operation of law informally requires. If there could be personal risk in intervening at the moment of law-breaking, or costs of time and effort in reporting a crime, acting as a witness, or otherwise giving evidence, the egoist would leave the operation of law to the public officials. So, in a population of egoists, the potential law-breaker would not need to be concerned with the low-level vigilance against crime provided by a law-abiding population, but would need to be concerned only with the risk that their law-breaking would be detected by public officials, or those who would be direct victims. This would again reduce the costs, in expectation, of law-breaking. The 'internal aspect' of the law thus explains a much wider range of the behaviour required for law to operate effectively, beyond simply acting in accordance with law and so reducing the proportion of potential law-breakers in the population who must be successfully deterred. Those who regard it as a duty to uphold the law also assist public officials in its operation, and reinforce its sanctions in a distributed way across society. For the rule of law to be possible in a population of egoists, where this distributed support is lacking, the likelihood and severity

of the law's sanctions must be correspondingly increased. A legal order in a community of egoists would be sustained only by intensive surveillance and severe punishment. And all this assumes that public officials act in conscientious fulfilment of their duties. If that assumption is withheld, the possibility that law may independently sustain a culture of trust becomes more remote still. As Virginia Held remarked, 'Any mechanism for enforcement constitutes just another area of joint activity where all the problems that led to its creation recur concerning it' (1984, p. 63).

The rule of law, then, is upheld by the assurance that sufficiently many others have the required normative attitudes. These normative attitudes derive, centrally, from a concern for fairness. By enjoying the social benefits of others' compliance with the law, while not incurring the costs of doing so themselves, law-breakers free-ride on those who comply. The concern for fairness ensures that sufficiently many not only comply with the law in how they themselves act but also actively uphold it—they view law-breaking with disapprobation, may withdraw cooperation on that basis, and support the operation of law through the informal mechanisms as required. These same responses are required to sustain norms of trustworthiness. Norms of trustworthiness must be not only complied with but also upheld. Crucially, the willingness to do so derives from the concern for fairness. Those who break norms of trustworthiness free-ride on those who comply, by enjoying the social benefits of others' compliance while not incurring the costs themselves. Both the rule of law and cultures of trust depend on the concern for fairness being widespread.

Does this show that a culture of trust is an independent source of influence on the rule of law? It may be objected that it does not. That cultures of trust and the rule of law both depend on the concern for fairness does not rule out the possibility that it is the rule of law which is more significant in sustaining that concern, which in turn sustains a culture of trust. If so, then, while the rule of law would sustain and promote a culture of trust, it need not be the case that the latter is a source of independent influence on the former. This would do no more than further illustrate the point already made in Section 3, namely that the rule of law promotes cultures of trust.

The objection is unsuccessful, however. A possible reason for rejecting it may be an appeal to the greater salience of norms of trustworthiness, as opposed to the law. The utility of law is, in large part, that it governs interactions between people who are otherwise strangers. The law is a system of impersonal rules. In contrast, cultures of trust rely on norms of trustworthiness which are, in significant part, relevant in the context of some sort of interpersonal relationship. While norms of trustworthiness may be as general in application as the law is, personal relationships seem likely to make them salient in an ongoing, day-to-day fashion, whereas the constraints of law are more usually a background assumption to everyday

conduct. If norms of trustworthiness are more salient than the law, then it is likely that one's instinct to fairness is reinforced more by the former than the latter. Erosion of those norms would lead to the instinct to fairness enjoying only the weaker support provided by the law.

While I find this plausible, it is not decisive. The ongoing, everyday nature of interpersonal relationships, as opposed to the more usual condition of the law as a background assumption, supports a dynamic that would tend to make norms of trustworthiness more salient. Against this must be set a different dynamic, which has the contrary effect. Norms of trustworthiness are enforced in relatively quotidian ways: some difficult conversations; maybe broken relationships or social shaming; and withdrawn cooperation. By contrast, law is enforced in ways that have a terrible majesty, through public trial, conviction, and resulting punishment. By this description, this far exceeds in salience the means by which norms of trustworthiness are enforced. It is not clear which dynamic predominates, or, indeed, if there are other ways in which law may be more salient than norms of trustworthiness. So, this putative reply to the objection is at best inconclusive.

Nonetheless, the objection fails. Being viewed by many as conditional obligations, the law and norms of trustworthiness both depend on the assurance that sufficiently many others are concerned for fairness. Being concerned for fairness leads one to act in compliance with, and to uphold, both the rule of law and the norms of trustworthiness. But, when compliance with norms of trustworthiness erodes, that undermines my assurance that others are appropriately concerned for fairness. Their erosion is evidence that the concern for fairness is less widespread, and less strong, than I previously took it to be. If the erosion of norms of trustworthiness is evidence that fewer people are concerned for fairness, it is likewise evidence that the normative attitudes upholding the law are correspondingly weaker and less widespread. To the degree that my compliance with the law is affected by the assurance I enjoy that others are concerned for fairness, so the erosion of cultures of trust diminishes the reason to comply with the law for those who view it as a conditional obligation. Cultures of trust and the rule of law are reciprocally dependent. If one erodes, so does the other.

## 5. Social Trust as a Goal for Policy and Law

I have argued that the rule of law and cultures of trust are mutually reinforcing, and, conversely, that the absence or weakening of one undermines the other. Why does this conclusion matter?

If my argument is correct, it implies that promoting social trust is properly a goal of the law and of public policy. By any plausible standard, the rule of law is a core requirement for a flourishing society. The rule of law may be threatened

directly, such as through political leaders being elected or public officials appointed who are corrupt. In addition, the rule of law may be threatened indirectly because cultures of trust are disrupted or erode. This may be due to exogenous shocks or threats to cultures of trust, or the effect may be endogenous, with the law itself mandating behaviour that undermines trust. Because the rule of law requires healthy levels of social trust, it is a reason in favour of a law or public policy that it would promote trust or guard against threats to it. A social philosophy which takes this seriously will, accordingly, have a set of practical goals for policy and law that reflects the importance of the conditions and institutions which promote trust.

Identifying the sources of trust is, fundamentally, an empirical investigation—and no simple one at that. But, for present purposes, we may recognize three aspects of the sources of trust, comprising both institutions and some general social conditions. Some institutions, such as the family and school, are predominantly ‘formational’. They have a direct influence or shaping effect on character, most notably that of children and young people, through face-to-face activity. Other institutions have predominantly ideational effects, being constitutive of public culture. This includes news media, entertainment, and arts corporations; universities; and the political forum. Some institutions, such as those which are religious, are hybrid, being both formative and ideational. Trust is also affected by fundamental social conditions, including the distribution of income and wealth, and levels of geographic mobility. Formational institutions, ideational institutions and fundamental social conditions jointly constitute the sources of trust. They are susceptible in different ways to legal or policy interventions.

Promoting social trust may conflict with other practical goals that are properly aimed at by law and policy. The most notable of these is social justice. There are many instances where these goals will not conflict. For instance, measures to improve the material position of the worst-off in society are likely both to promote trust and to advance social justice. (Pickett and Wilkinson, 2009, e.g. show that income inequality correlates with lower levels of trust.) In other instances, however, these goals may conflict. The conflict may be indirect, due simply to the opportunity cost involved in how scarce resources of time and money are distributed. The conflict may also be direct. For instance, suppose that policies designed to enable labour mobility promote prosperity as well as individual freedom, and thus social justice, but that they also undermine trust. The price of metropolitan success is not just the economic stagnation of those regions and towns ‘left behind’, but also their social travails (Collier, 2018; in addition, communities displaced by gentrification may experience material gain but social loss). In such cases there is a trade-off between conflicting goals—between trust and justice.

How weighty a reason, for or against a policy or law, is its effect on social trust? Some cases may be clear-cut, in which a policy or law has an emphatic

importance for promoting trust or justice, and the cost to the other or to a third goal is not significant. But for many cases, the effects on different sides of the trade-off may be more equally weighted. It would be a mistake, I think, to propose that either trust or justice standardly takes priority in such situations. Rather, insofar as trust is a general enabling condition for more-or-less just societies, so the pertinent question is whether policy and law, taken as a whole, can protect the sources of trust adequately. It is the package of trust-promoting institutions and social conditions, jointly constituting its sources, which must be evaluated together for its effect on trust. Nonetheless, if this is correct, or something approximating it is, the need for social trust places fundamental constraints on the pursuit of justice. Protecting the sources of trust is an independent goal of policy and law.

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