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## BUREAUCRACY AS VIOLENCE

Jonathan Weinberg\*

THE UTOPIA OF RULES: ON TECHNOLOGY, STUPIDITY, AND THE SECRET JOYS OF BUREAUCRACY. By *David Graeber*. Brooklyn and London: Melville House. 2015. P. 227. Cloth, \$26.95; paper, \$16.95.

### INTRODUCTION

David Graeber's book *The Utopia of Rules: On Technology, Stupidity, and the Secret Joys of Bureaucracy*<sup>1</sup> addresses bureaucracy in modern society: how "bureaucratic principles [have been] extended to every aspect of our existence" (p. 27), and how nearly all of us have come to spend most of our time filling out forms. In the first chapter of the book, the author tells a story of his attempts to file paperwork to gain power of attorney over the bank account of his elderly mother, who was in a nursing home following a series of strokes. The experience was frustrating and seemingly never ending. It involved repeated errors—some made by him, some made by the bureaucratic functionaries with whom he was interacting—and every error sent the process back to square one (pp. 45–48). Nor, he concluded, was this experience isolated: we've set up the institutions of everyday life so that we all spend much of our time traversing bureaucratic mazes (pp. 48–52).

A little later in the book, Graeber addresses a seemingly different matter: the role of police in society (pp. 72–75, 80–81). Graeber suggests, though, that the two matters are not so different: policing is public law. Police are line personnel, engaging with the general public, who apply and enforce legal or organizational rules (p. 73). In other words, they are "bureaucrats with weapons."<sup>2</sup> And it would be hard to say that they have wielded those weapons well. In these days of tragedy in Minneapolis and Baton Rouge, in Cleveland and Ferguson, in New York and Chicago—when thirty-eight unarmed black people were killed by police in 2015<sup>3</sup>—we need to ask why those we have armed with day-to-day, street-level power over us have been wielding it so scarily, heartbreakingly, badly.

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\* Professor of Law, Wayne State University. As always, Jessica Litman's incisive comments hugely improved this manuscript.

1. David Graeber is a Professor of Anthropology, London School of Economics and Political Science.

2. P. 73; cf. Christopher Slobogin, *Policing as Administration*, 165 U. PA. L. REV. 91, 91 (2016) ("Police agencies should be governed by the same administrative principles that govern other agencies.").

3. *People Shot Dead by Police in 2015*, WASHINGTON POST, <https://www.washingtonpost.com/graphics/national/police-shootings/> [<https://perma.cc/D38B-TV5Q>].

Part of Graeber's argument in this book is that police shootings and bank bureaucratic runarounds have the same roots. The fundamental structure of our society, he contends, ensures that the exertion of power over the general public by police officers and bank functionaries alike is doomed to be arbitrary and uninformed.<sup>4</sup> The reason, in brief, is that members of both groups exert power over the public that derives not from deliberation, mutual understanding, and consent, but from simple legal coercion.<sup>5</sup> This means that they need not see things from others' point of view (pp. 66–72). And that means that their interactions with the public are likely to be obtuse and ignorant.<sup>6</sup> As Graeber puts it, social structures in which inequality is backed by power—what he terms “structural violence”—have the luxury of being stupid (p. 57).

*The Utopia of Rules* isn't an obvious choice for a survey of law-related books. For starters, the author isn't a lawyer. Graeber, a leading figure in the Occupy movement<sup>7</sup> and the author of the influential *Debt: The First 5,000 Years*,<sup>8</sup> is a professor of anthropology at the London School of Economics and Political Science.<sup>9</sup> He doesn't reference legal literature, and he doesn't actually approve of law as a framework for social organization.

The book, though, has a good deal to say about public law and its origins, strengths, and limitations, and lawyers can learn by engaging with its arguments. Even where the law-trained reader disagrees with Graeber's book (and there will be many such places),<sup>10</sup> *The Utopia of Rules* is fun and fascinating, the product of a fertile, sharp-witted, and broadly educated mind spinning out a wide range of ideas. In this Review I will question a variety of the author's arguments, but his point about the stupidity of power, I argue, is both well-founded and deep. We must address it if we are to face the challenges before us.

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4. See p. 57.

5. See, e.g., pp. 58–61.

6. See, e.g., pp. 65–66.

7. See, e.g., Drake Bennett, *David Graeber, the Anti-Leader of Occupy Wall Street*, BLOOMBERG BUSINESSWEEK (Oct. 26, 2011, 11:42 PM), <http://www.bloomberg.com/news/articles/2011-10-26/david-graeber-the-anti-leader-of-occupy-wall-street> [https://perma.cc/DP5X-SFRC].

8. DAVID GRAEBER, *DEBT: THE FIRST 5,000 YEARS* (updated and expanded ed., 2014).

9. See *supra* note 1. The author, though currently based in England, was born and trained in the United States and lived here until his mid-40s. See Bennett, *supra* note 7. The book, accordingly, reads as U.S.-centric.

10. Not all of Graeber's ideas stand up to scrutiny; for an example of one that does not, consider his assertion that an increasingly large number of U.S. college graduates in the 1950s and 60s came to work for a global, U.S.-led administrative apparatus incorporating international organizations and military and intelligence efforts, and that that helps explain the popularity of Weber's theory of bureaucracy among U.S. academics during that period (wait, what?). Pp. 54–56. I'll focus in this Review on the parts of Graeber's book that, to my mind, work best for the intrepid law-trained reader.

## I. BUREAUCRACY AND STRUCTURAL VIOLENCE

The book begins with Graeber's claim that ours is the age of "total bureaucratization" (p. 18). We are constantly filling out forms, struggling with phone trees, jumping through arbitrary, time-consuming, pointless, paperwork-related hoops. It is not merely that we are enmeshed in a web of government regulation, nor that we are stuck in corporate voicemail hell; rather, we find ourselves subject to a bureaucratic blob combining public and private power (pp. 11–28).

The techniques of corporate middle management and government administration grew up in parallel in this country, Graeber explains, so that for more than a century the United States has been a "profoundly bureaucratic society" (p. 13). Corporate rules and paperwork requirements are shaped by government regulation and the surrounding legal environment, but those rules are themselves the product of industry lobbying and campaign contributions; the end result is "the gradual fusion of public and private power into a single entity" (p. 17).

Moreover, Graeber stresses what he sees as the increasing role of the financial sector in the culture of corporate America. "Increasingly, corporate profits in America are not derived from commerce or industry at all, but from finance—which means, ultimately, from other people's debts" (p. 24). Much of that is student debt, itself the product of a bureaucratic culture requiring formal educational credentials for an ever-broadening range of jobs (pp. 21–24). And because debt repayment is enforced by law, the legal apparatus has become "the main mechanism for the extraction of corporate profits" (p. 24).

Finally, the "bureaucratization of everyday life" is intimately bound up with violence (p. 32). Professional police forces, Graeber notes, are a relatively modern invention, a product of the nineteenth century; before then, he tells us, there were "no impersonal bureaucratic [authorities] who were, like the modern police, empowered to impose arbitrary resolutions backed by the threat of force" (p. 32). And that violence, he continues, is crucial to our modern lives. As society provides more elaborate infrastructure to support the market, it employs more bureaucrats and enacts rules subjecting a broader range of social relations to more extensive regulation. That change in the state's role increases the extent to which we are all in our everyday lives subject to the threat of violence—since, after all, "impersonal rules and regulations . . . can only operate if they are backed up by the threat of force" (p. 32).

This claim about violence turns out to be central to Graeber's argument. Government rules are enforced via the threat of force: while "in ordinary life, police rarely come in swinging billy clubs to enforce building code regulations, . . . if one simply pretends the state and its regulations don't exist, this will, eventually, happen" (p. 86). So are the rules of corporate bureaucracy, to the extent they mediate claims about such matters as consumer debt or rights of exclusion from the corporation's property. Any such claim

is part of “a system of property rights regulated and guaranteed by governments in a system that ultimately rests on . . . the ability to call up people dressed in uniforms, willing to threaten” physical violence—and that sort of threat is exactly what will happen if one chooses to ignore, say, a university’s right to demand duly stamped and validated ID as a condition of entering its library stacks (p. 58).

Our government, thus, has to be understood as managing structures of pervasive inequality ultimately created and maintained by the threat of physical violence (even if actual violence is rare). But that fact, Graeber continues, dooms bureaucracy as a form of intelligent social organization. The behavior of actors empowered by this sort of structural violence is inevitably “stupid,” and bureaucracies formed to manage those situations cannot help but produce willful blindness and absurdity (p. 57).

Why should that be? In the everyday business of social life, Graeber urges, we need to do the work of understanding other people’s perceptions and motivations, of figuring out “who you think they are, who they think you are, what they might want out of the situation” (p. 68). Human relations are “complicated, dense with history and meaning. Maintaining them requires a constant and often subtle work of imagination, of endlessly trying to see the world from others’ points of view” (p. 68). Graeber calls that work “interpretive labor,” and describes it as part of the ordinary human condition (p. 68).

Bureaucrats backed by the threat of violence, on the other hand, can simply issue dictates and threaten physical force against those who fail to comply. In so doing, they need not empathize with or understand their counterparts. Rather than immersing themselves in thick social relationships, they can engage in much simpler relations, such as “cross this line and I will shoot you” (p. 68).

For this reason, Graeber explains, “situations of structural violence invariably produce extreme lopsided structures of imaginative identification” (p. 69). Ordinary people need to understand those with power over them, but bureaucrats bolstered by the threat of force need not know much about the people they regulate (pp. 66–72). “[T]hose relying on the fear of force are not obliged to engage in a lot of interpretive labor, and thus, generally speaking, they do not” (p. 67). The greater the inequality between regulators and regulated, the easier it is for regulators not to bother trying to understand their public or the effects of their rules (pp. 65–66).

That’s not the end of it. There’s a second crucial reason, Graeber continues, why bureaucracy in the modern state offers a way to bypass interpretive labor. “Bureaucratic knowledge is all about schematization”—it means “ignoring all the subtleties of real social existence and reducing everything to preconceived . . . formulae” (p. 75). Bureaucrats apply “very simple pre-existing templates to complex and often ambiguous situations”; they close their eyes to rich social reality, and confine their attention to a tiny, arbitrarily selected subset of the relevant facts (p. 75). For Graeber, that schematization follows in large part from the freedom granted by power to ignore

context, and the resulting “blinker perspectives typical of the powerful” (p. 82).

Nor is this all the damage that bureaucracy does. Perhaps most fundamental for Graeber is the sense that bureaucracy represents “a kind of war against the human imagination” (p. 82). We’ve encountered one sense in which this might be true: those exercising power via bureaucracy don’t need to exercise imagination to understand those to whom they dictate. But Graeber has in mind a deeper meaning as well. Leftist thought, he argues, is founded on the principle that the world is socially conceived: that human beings “first envision things, and only then bring them into being” (p. 88). The job of constructing the world, thus, begins with thinking of ways in which it could be different—preferably not as “some sort of prefab utopian vision” (p. 92), but as part of a practical grappling with the complex reality of the world as it is, making use of the same sort of interpretive labor and imaginative identification earlier described.

Government and corporate bureaucracy rule out that sort of imaginative work by encouraging overseers to be oblivious to their surroundings and social context; by relegating workers to mindless, mechanical jobs without autonomy; and by trapping bureaucratic subjects in boxes and artificially defined categories, both assuming conformity to social models and pushing those characterized to fit inside their boxes. Moreover, the “bureaucratic spirit” is fundamentally timid and conservative, well designed “to squelch anything likely to have revolutionary implications of any kind.”<sup>11</sup>

And yet, Graeber continues, we nonetheless find bureaucracy appealing on a deep level. Some of those reasons are straightforward: sometimes schematized bureaucratic relationships are preferable to thick, situationally sensitive ones, so that “you can . . . pull out your validated photo ID card without having to explain to the librarian why you are so keen to read about homoerotic themes in eighteenth century British verse” (p. 152). There are advantages, at least sometimes, to avoiding “complex and exhausting . . . interpretive labor” (p. 152). It is alienating to use an impersonal waiting list or lottery to allocate a limited number of organs for transplant, but any less impersonal method would be “immeasurably worse” (p. 152). Moreover, bureaucratic organization can provide a platform for others’ creativity; Graeber suggests as an example the poetry and manifestos made possible by

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11. Pp. 137, 139. Graeber devotes a significant chunk of the book to asking why (in his view) American technological progress has stalled since the Second World War. The argument is a little muddled; one statement that corporate-research spending declined because of tax law changes, p. 127, is followed, without sense of apparent contradiction, by a statement that such spending has actually increased, p. 132. His central argument points to researchers’ increased burden today dealing with paperwork and bureaucracy. Pp. 133–35. This suggestion is exemplary of the book’s limitations: it would be notable if backed up by serious history-of-science research, but it is not. On initial encounter, Graeber’s thesis appears to be grounded in little more than the author’s annoyance about the modern research university’s reliance on paperwork and encouragement of self-promotion. See pp. 133–35. More fundamentally, though, the argument resonates with Graeber’s position that our society’s creative urge has been snuffed out with the rise of a bureaucratic mindset that is fundamentally antithetical to creativity. See pp. 137–39.

the establishment of the (highly bureaucratic) postal system in nineteenth-century Germany (pp. 153–58).

But, Graeber continues, there are deeper reasons. He begins his explanation by contrasting the medieval vision of a “celestial bureaucracy” of angels with the sharply different imagined societies of heroic Homeric epics and modern high fantasy (pp. 174–81). Heroic and fantasy worlds, he urges, are fundamentally antibureaucratic (p. 175). Heroic societies value potlatch and the ephemeral (p. 178); their leadership derives from charisma (p. 177). In such a world, “[t]he whole point of life [is] to do things that other people might wish to sing about” (p. 179). In fantasy worlds similarly, “every aspect of bureaucratic existence has been carefully stripped away” in favor of charismatic actors taking unpredictable steps in a novelistically gripping fight against absolute evil (pp. 180–81). All of this stands in contrast to the value-free, mechanical, predictable world of bureaucratic organization.

Fairy tales, though, illustrate the downside of (some) nonbureaucratic societies: exciting as such a fantasy world might be, Graeber notes, few of us would want to live in one (p. 186). He draws a parallel distinction between play and games. Games are “pure rule-governed action,” and that’s why they’re fun: they eliminate the ambiguity and interpretive burden of everyday life (p. 191). Play, by contrast, is improvisational and open-ended—“a pure expression of creative energy” for its own sake (pp. 191–92). Play, though, is also “potentially terrifying” (p. 192), since it can be “randomly destructive. Cats play with mice. Pulling the wings off flies is also a form of play” (p. 192). A thinking person would do his best to avoid a playful god (p. 193). And by the same token, we fear play by a governmental sovereign, above and unconstrained by law (pp. 193–94).

The appeal of bureaucracy, Graeber concludes, lies in the fear of play. We have come to embrace bureaucracy in order to embrace rules: because of “a tacit cosmology in which the play principle (and by extension, creativity) is itself seen as frightening, while game-like behavior is celebrated as transparent and predictable, and where as a result, the advance of all these rules and regulations is itself experienced as a kind of freedom” (p. 196).

At this point, though, the administrative-lawyer reader has reason to take a step back. Has Graeber spun out a dazzling run of polymathic erudition—deploying an analysis of fantasy literature, Pythagorean philosophy, Ficino’s taxonomy of angels, heroic societies in the ancient Middle East, and Huizinga’s theory of games and play—only to conclude that the appeal of rule-bound bureaucracy lies in the desire to constrain arbitrary and destructive sovereign power? Of course it does, a lawyer might answer. *Of course* the point of a body of law binding administrative actors to follow rules and procedural norms is to constrain arbitrary government power. Why is this even a question?

U.S. courts have long stressed that “the law is the definition and limitation of power,”<sup>12</sup> and government is not allowed the exercise of unbounded,

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12. *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886).

arbitrary power.<sup>13</sup> “Arbitrary power . . . is not law, whether manifested as the decree of a personal monarch or of an impersonal multitude.”<sup>14</sup> That is why the Administrative Procedure Act invalidates “arbitrary” or “capricious” agency action.<sup>15</sup> Administrative and corporate law in this country since the Second World War have been driven by the desire to say, “Don’t worry, bureaucratic organizations are under control.”<sup>16</sup> And that is why administrative law seeks to bind government actors by rule: as Justice Scalia put it, in order to have the “rule of law,” we must have “a law of rules.”<sup>17</sup>

So why is that not straightforward? For Graeber, the answer is first that “the pursuit of freedom from arbitrary power simply ends up producing more arbitrary power” (p. 205). Attempts to use bureaucracy to avoid arbitrary government action will inevitably fail. Bureaucracy does not constrain power; it may look rational or efficient from the top, but it is inevitably arbitrary, obfuscating, and stupid from the perspective of the citizen-subject.<sup>18</sup> Purportedly neutral rules, in any event, can be deployed unequally, making them a vehicle for arbitrary personal power (p. 27).

Second, Graeber sees our hope of constraining the arbitrary exercise of power as illusive, because our real problem is not arbitrariness—it’s power.<sup>19</sup> Even if we could eliminate arbitrariness, the nature of power in our society, one in which relationships of command are backed up by the ultimate threat of violence, guarantees that its directives are stupid and soul-deadening (p. 57).

Finally, part of the question Graeber is trying to answer is why everyday life in modern society is constrained, as he sees it, by so many rules: building codes, auto licensing and insurance rules, open container laws, rules limiting who can “buy or sell or smoke or build or eat or drink what where” (p. 61). His answer is that those rules are part of the pervasive bureaucratization of everyday life, and that we can understand our tolerance for them if we can understand what makes rule-boundedness and bureaucracy appealing (p. 149). So the answer Graeber seeks is not merely why bureaucrats are constrained by rules, but why we all are: why we collude in tying ourselves down, like Gulliver, by the cords of petty regulation. His answer is that we have come to be so afraid of creativity—of its destructiveness, its instability,

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13. See *id.* at 369–70; see also *Downes v. Bidwell*, 182 U.S. 244, 380–81 (1901) (Harlan, J., dissenting) (“The glory of our American system of government is that it was created by a written constitution which protects the people against the exercise of arbitrary, unlimited power . . .”).

14. *Hurtado v. California*, 110 U.S. 516, 536 (1884).

15. 5 U.S.C. § 706(2)(A) (2012).

16. Gerald E. Frug, *The Ideology of Bureaucracy in American Law*, 97 HARV. L. REV. 1276, 1284 (1984). Frug’s trenchant paper anticipated a number of the arguments discussed here. See *id.*

17. Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175 (1989).

18. See p. 41.

19. See pp. 201–05.



its arbitrariness—that instead we embrace rules and bureaucracy as a hoped-for zone of safety.<sup>20</sup>

## II. ON RULES

The connection Graeber draws between bureaucracy and rules says something important, I think, about his understanding of the uses of power. Here's Graeber: "bureaucratic procedure invariably means ignoring all of the subtleties of real social existence and reducing everything to . . . forms, rules, statistics, or questionnaires" (p. 75). As a result, people who interact with bureaucratic administration are left with the impression that "they are dealing with people who have for some arbitrary reason decided to put on a set of glasses that only allows them to see only 2 percent of what's in front of them" (p. 75). The author doesn't call it that, but this is the familiar (to lawyers, anyway) problem of rules and standards.<sup>21</sup>

A rule, in this lingo, is simple and hard-edged, and consequently easily administrable; it causes results to turn mechanically on a limited number of fairly easily ascertainable facts. There are a lot of those in the law. For example, the provision that you can vote beginning on your eighteenth birthday is a rule. It's in the nature of rules, though, that they exclude from consideration facts that would otherwise be relevant, facts that a sensitive decisionmaker would otherwise consider.<sup>22</sup> That means that sometimes they will generate results contrary to the policies underlying them.<sup>23</sup> The point of the eighteen-year-old franchise, for example, is to screen out voters who are unwise and immature, while allowing those who are mature and capable; in practice, though, some folks below eighteen may be mature and capable, while some above it might not be.

For that reason, there can be advantages to making a legal consequence turn not on application of a rule, but on an ad hoc evaluation of how a general policy directive (in other words, a "standard") applies to the overall facts of a situation. That's what juries do when they decide whether somebody drove at a "reasonable" speed—given visibility, road conditions, and so on. The problem, though, is that the situationally sensitive application of a standard is expensive and unpredictable;<sup>24</sup> moreover, standards can lend

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20. See pp. 192–93.

21. Duncan Kennedy first popularized this language. See Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685, 1685, 1687–89 (1976). By now its use has expanded far beyond its original roots. See, e.g., Kathleen M. Sullivan, *Foreword: The Justices of Rules and Standards*, 106 HARV. L. REV. 22, 58–59 (1992). It is a staple of the law-and-economics literature. See Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 DUKE L.J. 557 (1992); see also, e.g., David McGowan, *Two Ironies of UPL Laws 5–6* (San Diego Legal Studies, Paper No. 16-218, 2016), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2791116](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2791116) [<https://perma.cc/8WFN-EGS6>].

22. Frederick Schauer, *Formalism*, 97 YALE L.J. 509, 510, 536–37 (1988).

23. *Id.* at 534–35.

24. Jonathan Weinberg, *Broadcasting and Speech*, 81 CALIF. L. REV. 1101, 1169 (1993); see Kaplow, *supra* note 21, at 569.

themselves to arbitrary and biased administration.<sup>25</sup> Not many people would welcome the creation of a government office charged with examining every prospective voter, regardless of age, to determine that person's fitness to vote.<sup>26</sup> There would be no screening out of relevant facts in such an examination—decisionmakers would be able to take into account everything they learned about us—but the dangers of partiality and inconsistency would be overwhelming.<sup>27</sup>

The end result is that American law is chock-full of rules, standards, and decisionmaking criteria falling somewhere on the continuum stretching between them.<sup>28</sup> Bureaucrats' instructions sometimes incorporate standards (witness the Communications Act's direction to the FCC to grant a broadcast license when doing so is in the "public . . . interest"<sup>29</sup>). Much of the time, they incorporate rules—directions to look to a narrow band of facts, like chronological age, while ignoring the rest. The conventional understanding is that doing so is less expensive, generates more predictable results, and offers protection against certain forms of arbitrariness and bias.<sup>30</sup> Such an approach, it is true, sometimes generates results that are illogical because they ignore facts that are meaningful in a particular context—but hey, modern American law tells us, no decisionmaking process is perfect.<sup>31</sup>

Understanding Graeber's criticism of rules in terms of the rules–standards dichotomy raises two questions. The first is *do* bureaucrats disproportionately rely on rules, as Graeber suggests?

Certainly it can seem from the perspective of the regulated that bureaucrats are constantly relying on rules, citing rules, telling one to fill out forms that do not give room to explain the complete facts of a situation, telling one that without regard to the facts of one's situation, the rule says that one has to file a Form 11-M612-G before one's claim can be heard at all. Bureaucrats can cite rules as excuses for why they will not help you. Michel Crozier once wrote that people build bureaucracies because "they are trying to evade face-to-face relationships and situations of personal dependency whose authoritarian tone they cannot bear."<sup>32</sup> Thus, the excuse of rules can be part of an attempt to salvage human relationships within a structure built on hierarchy.

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25. See Weinberg, *supra* note 24, at 1169.

26. *Id.*

27. See *id.* at 1169–70.

28. Sullivan, *supra* note 21, at 61.

29. 47 U.S.C. § 307(a) (2012).

30. See, e.g., *Quill Corp. v. North Dakota*, 504 U.S. 298, 315–16 (1992) (explaining that although the challenged bright-line rule was "artificial at its edges" when compared to a more contextual balancing inquiry, that artificiality was "more than offset by the benefits of a clear rule"—predictability and ease of application that, in turn, fostered investment).

31. Frederick Schauer has suggested that legal training socializes lawyers to accept rules even when they lead to bad results in particular cases. See FREDERICK SCHAUER, *THINKING LIKE A LAWYER: A NEW INTRODUCTION TO LEGAL REASONING* 8–10 (2009).

32. MICHEL CROZIER, *THE BUREAUCRATIC PHENOMENON* 54 (1964).

And rules are important within bureaucracies for other reasons. One of the central challenges for any bureaucracy is how to ensure that line personnel at the bottom implement policy decisions made at the top. Discretion-denying rules are one way in which upper-level officials can seek to protect the policy they make from disagreement at lower levels.<sup>33</sup> They are also tools agencies can use to ensure that they can fill bureaucratic slots with less than ideally competent personnel (as will inevitably happen) without unacceptable levels of dysfunction.<sup>34</sup>

Yet administrative lawyers know well that agency personnel don't merely implement inflexible directions; they also exercise discretion. Indeed, as one scholar put it, "[d]iscretion is at the center of most accounts of bureaucracy."<sup>35</sup> The whole enterprise of American administrative law—responding to the fear that agencies are outside popular control—derives from the fact that bureaucrats do *not* merely mindlessly apply rules, but also make policy choices.<sup>36</sup>

Agencies exercise discretion at both policy-articulation and policy-implementation stages of their process. We can see the former in the failure of the delegation doctrine: administrators routinely make discretionary policy choices in figuring out how to carry out legislative commands.<sup>37</sup> Graeber, I suppose, might answer that policymaking discretion is irrelevant to his discussion, since he is primarily concerned with interaction between line bureaucrats and the general public (that is, policy implementation).<sup>38</sup>

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33. Witness, in this regard, the frustration of top policymakers at the Department of Homeland Security in getting their policies implemented by hostile line personnel in the agency's Immigration and Customs Enforcement and Customs and Border Protection units. See Hiroshi Motomura, *The President's Dilemma: Executive Authority, Enforcement, and the Rule of Law in Immigration Law*, 55 WASHBURN L.J. 1 (2015).

34. See JERRY L. MASHAW, *CREATING THE ADMINISTRATIVE CONSTITUTION: THE LOST ONE HUNDRED YEARS OF AMERICAN ADMINISTRATIVE LAW* 310 (2012); Elizabeth Magill, *Foreword: Agency Self-Regulation*, 77 GEO. WASH. L. REV. 859, 884–86 (2009).

35. Magill, *supra* note 34, at 859.

36. See Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1667, 1676–88 (1975).

37. Delegation-doctrine challenges initially reflected the view that agencies shouldn't be exercising discretion at all: they should simply be implementing policy choices made by the legislature. See, e.g., *Field v. Clark*, 143 U.S. 649, 699–700 (1892) (Lamar, J., concurring). The Supreme Court rejected that position. Because Congress wasn't itself equipped to set rates for every railroad route, for example, it had no choice but to direct bureaucrats to fix rates that were "just and reasonable considering the service given." *J.W. Hampton, Jr. & Co. v. United States*, 276 U.S. 394, 407–08 (1928). In making those choices, though, the bureaucrats faced questions: Should rates be designed to guarantee railroads a "fair return"? Return calculated with reference to what base? How high should that return be? Should some services cross-subsidize others? Should railroads be required to set aside excess profits into a contingent fund? See B.W. PATCH, *RAILROAD RATES AND FEDERAL REGULATION OF TRANSPORTATION* (1934), <http://library.cqpress.com/cqresearcher/document.php?id=cqresrre1934092700> [<https://perma.cc/68D2-54YS>]. All of those questions involved discretionary policymaking.

38. In practice, though, there's no clear distinction between global policymaking and case-by-case policy implementation; the same substantive choices can present themselves in either context. See, e.g., *Heckler v. Campbell*, 461 U.S. 458 (1983) (approving the agency's resolution of individual cases by means of global rulemaking); *SEC v. Chenery Corp.*, 332 U.S.

Discretion in policy implementation too, though, is baked into the nature of law enforcement. Regulation in the United States incorporates informal elements.<sup>39</sup> Regulators often see it as too costly to hammer regulated parties into submission via brute-force compliance efforts, and so they engage instead on the basis of relative bargaining power, shared values, and personal relationships.<sup>40</sup> That process is one of “accommodations, threats, and tradeoffs between enforcement official and violator that result in compromises and modifications of the [effective] law.”<sup>41</sup> After all, regulators’ resources are limited. Any enforcement system must rely heavily on voluntary compliance; litigation and insistence on formal remedies can gum up the works. Regulators need cooperation from regulated parties to collect the information they seek. All of these factors push in the direction of a bargaining-oriented, rules-eschewing bureaucracy.<sup>42</sup>

Graeber might argue that bargaining-mediated enforcement too is irrelevant to his discussion. A bargaining-based approach will only lead bureaucrats to seek accommodation with folks who actually have bargaining power; bureaucrats might still be rigid and demanding with those who do not. Graeber might thus characterize bargaining-based approaches to regulation as a mere form of accommodation *within* the agglomerated corporate-government borg, rather than as a mode of bureaucratic interaction with ordinary members of the (noncorporate, nongovernment) public.

But it remains the case that American law often makes policy implementation a matter of bureaucratic discretion in contexts where regulators interact with relatively powerless individuals. That discretion is explicit in the statute in some cases, such as the discretion of an immigration judge to ignore an asylum recipient’s criminal background “for humanitarian purposes . . . or when it is otherwise in the public interest.”<sup>43</sup> Sometimes it is implicit in a particular statutory scheme, such as the Department of Homeland Security’s discretion whether to seek to deport an individual found present in this country without authorization.<sup>44</sup> Administrative law routinely empowers bureaucrats to use discretion and frees them from rules.

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194 (1947) (approving the agency’s proceeding case-by-case without promulgating a global rule).

39. See Jonathan Weinberg, *Broadcasting and the Administrative Process in Japan and the United States*, 39 *BUFF. L. REV.* 615, 623–33 (1991).

40. See *id.* at 625–26.

41. Weinberg, *supra* note 39, at 624 (alteration in original) (quoting Cento G. Veljanovski, *The Economics of Regulatory Enforcement*, in *ENFORCING REGULATION* 171, 172 (Keith Hawkins & John M. Thomas eds., 1984)); see also THEODORE J. LOWI, *THE END OF LIBERALISM: IDEOLOGY, POLICY, AND THE CRISIS OF PUBLIC AUTHORITY* 147–49 (1969).

42. For a longer discussion contrasting different models of administrative enforcement, see Weinberg, *supra* note 39, at 623–33.

43. 8 U.S.C. § 1159(c) (2012); see Elizabeth Keyes, *Beyond Saints and Sinners: Discretion and the Need for New Narratives in the U.S. Immigration System*, 26 *GEO. IMMIGR. L.J.* 207, 215–16 (2012).

44. See SHOBA SIVAPRASAD WADHIA, *BEYOND DEPORTATION: THE ROLE OF PROSECUTORIAL DISCRETION IN IMMIGRATION CASES* 146–50 (2015).

Graeber frames his argument in terms of members of the *public* being limited by rules (so that one's ability to claim a benefit, say, depends on providing all and only that information specified on a preprinted form<sup>45</sup>); I've focused here on whether *bureaucrats* are themselves bound by rules. It's important to understand, though, that the two things are the same. Line administrators in a bureaucracy, where bound by rules, are instruments of their superiors. They distribute forms directing members of the public to provide certain information because that is the information that the rules of the bureaucracy in which they toil make relevant to their decision. To the extent the system gives line administrators discretion, on the other hand, they can take into account such information as they choose.

The upshot is that bureaucratic agents interact with the public both in rule-bound and in discretion-driven ways; the obtuse exercises of bureaucratic power that Graeber criticizes can be seen in either context. Indeed, Graeber discusses one key setting in which bureaucratic agents wielding the threat of violence have tremendous discretion in their interactions with the public: policing.<sup>46</sup> Police are bureaucrats—government line personnel applying and enforcing legal requirements—who make discretionary judgments legally characterizing the facts before them, and back up those judgments with violence.

Police, Graeber says, are not effectively bound by rules. It is “extraordinary [sic] difficult . . . for a police officer to do *anything* to an American citizen that would lead to that officer being convicted of a crime” (p. 195). Nor is officers' behavior, as he sees it, predictable in the ways we seek from a bureaucrat applying rules. Their work, as he describes it, has little to do with rules.<sup>47</sup> And yet police officers illustrate Graeber's larger claim that the American bureaucrat need not understand or empathize with those subject to his authority.<sup>48</sup>

The bottom line is this: we can have bureaucratic stupidity—and we often do—even in the absence of rules. If there's something special about rules leading them to play a leading role in Graeber's critique, we haven't identified it yet.

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45. See, e.g., pp. 45–48.

46. See pp. 72–75, 80–81.

47. Graeber at one point seems to suggest that police authority is about rules in the following sense: because a police officer exercises judgment to characterize a situation with a particular “administrative rubric (an orderly or a disorderly crowd? A properly or improperly registered vehicle?)” and may respond with violence if a member of the public challenges that characterization, we can therefore see the “police truncheon [as] precisely the point where the state's bureaucratic imperative for imposing simple administrative schema and its monopoly on coercive force come together.” P. 80. But the administrative rubrics at play there are not mechanical, hard-edged rules like the rest of the “simple administrative schema” Graeber describes; on the contrary, his point is that their factual predicates leave the officer with the discretion to pick his rubric of choice. An officer so described, able to pick and choose from all the facts before him to support his characterization, lives in the world of standards rather than that of rules.

48. See pp. 80–81.

Next: Graeber's take on rules and standards, it should be clear, departs from the ordinary legal understanding. Graeber recognizes in passing some of the advantages of rules (or, at least, some of the disadvantages of standards) when he notes that reliance on simple rules can sometimes usefully avoid burdensome interpretive labor; it can help ensure that a decisionmaker does not rely on factors that are better treated as extraneous (such as her feelings about the library book I am trying to check out).<sup>49</sup> But the conventional legal understanding is that rules and standards each have their place. In some cases, the advantages of rules will carry the day; in others, the benefits of standards will win out.

For Graeber, by contrast, rules rarely have a place. He takes for granted that in any desirable system, decisionmakers should almost always look at thick factual context; decision by rule should be limited to exceptional situations.<sup>50</sup> How come, though? What's behind that view?

Forty years ago, some thinkers suggested that standards, rather than rules, were better attuned to left-wing political thinking. Legal doctrines, Duncan Kennedy argued, tend to reflect two antagonistic worldviews.<sup>51</sup> The first sees individuals (absent government intervention) as largely independent and autonomous, free to make their own choices; under this view, the role of law is to preserve order while minimizing restraints on each individual's freedom of action to pursue his own ends. The latter sees everyday interaction between private actors as ubiquitously characterized by (varying degrees of) unequal bargaining power and constraint; with our lives and circumstances importantly socially determined, law supports our looking out for one another as a community.<sup>52</sup>

Critical Legal Studies scholars suggested a link between the first worldview and rules, and between the second and standards.<sup>53</sup> Take contract law as an example: If we assume that private ordering in the marketplace is routinely free and autonomous, we might follow a rule-like approach enforcing all contracts supported by formal consideration, subject to bright-line rule-like exceptions for fraud, duress, and lack of capacity. But if "fraud" or "duress" is present to greater or lesser degree in every case, it makes less sense to have sharply bounded exceptions; it would make more sense to invalidate contracts, after taking all facts of the situation into account, if one party seems to have had undue bargaining power, or if the

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49. See *supra* text following note 11; see also p. 152.

50. See, e.g., p. 75.

51. See Kennedy, *supra* note 21, at 1766–74 (discussing the "fundamental premises" of individualism and altruism).

52. See *id.*; see also Weinberg, *supra* note 24, at 1167–74.

53. See Kennedy, *supra* note 21, at 1737–66; see also MARK KELMAN, A GUIDE TO CRITICAL LEGAL STUDIES 54–63 (1987).

contracts simply seem too unfair.<sup>54</sup> That inquiry is fact-specific—standard-like—requiring sensitivity and imaginative identification.<sup>55</sup>

Graeber is a man of the Left and an anarchist; Kennedy's thesis thus provides one perspective on Graeber's critique of rules. But there's a deeper answer than that. To get there, I'll need to take a moment to discuss Graeber's understanding of power.

### III. ON POWER

It's not wholly clear from the book whether Graeber opposes the use of collectively sanctioned force in *any* situation. If a former lover appears in your bedroom uninvited and refuses to leave, is it appropriate from Graeber's perspective for you to have the option of calling police to have him removed? What if a former lover appears in your bedroom and threatens to kill you? While some passages in Graeber's book suggest that society can never bring force to bear,<sup>56</sup> his larger discussion suggests a more nuanced answer.<sup>57</sup>

That answer emerges from a story he tells of his observations of rural Madagascar, part of his early anthropological fieldwork. The government

54. See KELMAN, *supra* note 53, at 18–25.

55. See *id.* at 60. This account is oversimplified and the premise controversial, as discussed in Weinberg, *supra* note 24, at 1167–81, but it's suggestive for our purposes.

56. Graeber urges at one point that, at least when it comes to noncriminal disputes, police are simply unnecessary: “[F]or the overwhelming majority of humans who have lived in human history, there has simply been nothing remotely like police to call . . . Yet they worked something out.” P. 32 n.31. That approach has only limited utility. When one private actor is much more powerful than another (say, because he is better positioned to resort to violence to get his way) and lacks a commitment to peaceful cooperation, then parties “work [ ] something out” in the shadow of that imbalance. P. 32 n.31. At various points in human history, when, say, men have asserted their power to rape and subordinate women or whites have asserted power to enslave blacks, we have “worked something out” by allowing the strong to dominate the weak. Dispensing with government threats of force, thus, seems to work only if we have also somehow eliminated concentrations of private power.

57. Graeber emphasizes at one point that most police activity relates to what he describes as “rules and regulations” rather than “criminal matters.” Pp. 72–73. His discussion is consistent with the notion that state-sponsored force is acceptable but only for true “criminal matters,” based on something like the *malum prohibitum* versus *malum in se* distinction. See *Pettibone v. United States*, 148 U.S. 197, 210 (1893) (Brewer, J., dissenting) (contrasting *malum in se*, “an undertaking unlawful in and of itself,” with *malum prohibitum*, “one simply forbidden by statute”). That line, though, is surprisingly hard to draw. Immigration law, for example, sometimes makes deportability turn on a similar inquiry: whether the criminal statute a noncitizen has violated involves conduct involving “moral turpitude.” See 8 U.S.C. § 1227(a)(2)(A)(i) (2012); see also *id.* § 1182(a)(2)(A)(i). Yet “[n]o one can really say what is meant by saying a crime involv[es] moral turpitude.” *Jordan v. De George*, 341 U.S. 223, 233–34 (1951) (Jackson, J., dissenting) (quoting *Restriction of Immigration: Hearing on H.R. 10384 Before the H. Comm. on Immigration & Naturalization*, 64th Cong. 8 (1916) (statement of Rep. Adolph Sabath)). Courts have found the phrase—and the case law—incoherent. See, e.g., *Arias v. Lynch*, 834 F.3d 823, 830–36 (7th Cir. 2016) (Posner, J., concurring in the judgment); *Nunez v. Holder*, 594 F.3d 1124, 1130–31 (9th Cir. 2010); see also Mary Holper, *Deportation for a Sin: Why Moral Turpitude Is Void for Vagueness*, 90 NEB. L. REV. 647 (2012).

bureaucracy in Madagascar was mainly interested in tax collection and operated through the threat of force (pp. 60–64). But that government was distant, largely absent, and “played almost no role in regulating the minutiae of daily life” (p. 61). At least as an effective matter, “there were no building codes, no open container laws, no mandatory licensing and insurance of vehicles, no rules about who could buy or sell or smoke or build or eat or drink what where, where people could play music or tend their animals” (p. 61). So did the community not see itself as bound by any law? Hardly. It had a legal system, but not a bureaucratic one—rather, it was “regulated by custom, deliberation by communal assemblies, or magical taboo” (p. 61). And unlike bureaucratic systems premised on the threat of force and wielding the language of peremptory command, Graeber suggests, that older Malagasy social structure was one characterized by “explanations, deliberation, and, ultimately, consent” (pp. 64–65); its social relations involved “debate, clarification, and renegotiation” (p. 66).

This story suggests that the ultimate problem, for Graeber, is neither rules nor power as such. Rather, the problem is power that is wielded impersonally—power that is not the product of discourse. I’ll take a moment to briefly define a term: Jürgen Habermas usefully adopted the word “discourse”<sup>58</sup> to describe a mode of speech in which every individual can “take part, freely and equally, in a cooperative search for truth, where nothing coerces anyone except the force of the better argument.”<sup>59</sup> The communicative exchange takes place without restriction and on an even playing field. Each person aims to persuade in good faith rather than seeking to threaten, trick, or bribe; each participant takes account of the others’ interests and needs, and modifies her own accordingly.<sup>60</sup>

Central to Habermas’s philosophy is the idea that society can legitimately formulate moral norms only through discourse.<sup>61</sup> Graeber, similarly,

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58. Well, strictly speaking, he adopted the word “diskurs,” but “discourse” is the standard English translation.

59. Jonathan Weinberg, *The Right to Be Taken Seriously*, 67 U. MIAMI L. REV. 149, 170 (2012) (quoting JÜRGEN HABERMAS, *MORAL CONSCIOUSNESS AND COMMUNICATIVE ACTION* 198 (Christian Lenhardt & Shierry Weber Nicholson trans., 1990)).

60. See JÜRGEN HABERMAS, *JUSTIFICATION AND APPLICATION: REMARKS ON DISCOURSE ETHICS* 49–50 (Ciaran Cronin trans., 1993); Weinberg, *supra* note 59, at 169–73, 176.

61. See JÜRGEN HABERMAS, *BETWEEN FACTS AND NORMS: CONTRIBUTIONS TO A DISCOURSE THEORY OF LAW AND DEMOCRACY* 107 (William Rehg trans., 1996) (articulating the discourse principle); Weinberg, *supra* note 59, at 170. That’s challenging because “the repressive and exclusionary effects of unequally distributed social power, structural violence, and systematically distorted communication” make discourse supremely difficult to achieve in the real world. Kenneth Baynes, *A Critical Theory Perspective on Civil Society and the State*, in *CIVIL SOCIETY AND GOVERNMENT* 123, 138 (Nancy L. Rosenblum & Robert C. Post eds., 2002) (quoting HABERMAS, *supra* at 307–08). For what the author concludes is a real-world example of Habermasian discourse, see A. Michael Froomkin, *Habermas@discourse.net: Toward a Critical Theory of Cyberspace*, 116 HARV. L. REV. 749 (2003) (analyzing the IETF Internet standards process).



appears to see power within the Malagasy social structure as legitimate precisely because he sees it as discursive.<sup>62</sup> It seems implausible, from this reader's perspective, that there was no exercise of power involved in Malagasy regulation "by custom, deliberation by communal assemblies, or magical taboo" (p. 61). But that exercise of power is acceptable for Graeber because, we are told, traditional Malagasy relationships relied on "deliberation, explanation, and consensus decision-making" rather than on "the language of command."<sup>63</sup> From that perspective, the problem with bureaucracy is that even if bureaucratic commands manage not to be arbitrary, it remains the case that they derive their force from the threat of violence rather than from discursive engagement and persuasion.

This explains, then, Graeber's condemnation of rules. Discourse, by definition, is unrestricted; no facts are off the table. The language of discourse is standards. Rules by their nature preclude discourse; their point is to avoid discussion. Rules allow quick, predictable, and inexpensive application, but they do so by short-circuiting the deliberation, clarification, renegotiation, and thus consent that Graeber sees as essential. I noted earlier that Graeber doesn't much worry about the costs of proceeding via standards. Those costs, though, are precisely the costs of discourse generally. Law likes rules because law rejects the idea that we can or should try to run the world through discourse.

There remains the question whether purely (or predominantly) discourse-based government, of the sort Graeber would approve, is even possible. One might start with the example of traditional Madagascar: How discursive can a system be when its law is based in custom and magical

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62. Cf. p. 61 (distinguishing between "bureaucracy" and "deliberation"). Others have drawn the connection between Habermas's and Graeber's work. See, e.g., Adam Fish, *The Public Sphere of Occupy Wall Street*, SAVAGE MINDS (Oct. 30, 2011), <http://savageminds.org/2011/10/30/the-public-sphere-of-occupy-wall-street/> [<https://perma.cc/K6Z9-29BF>]. The reader should bear in mind, though, that Graeber doesn't reference Habermas, and—as an anarchist—rejects a variety of Habermas's underlying premises. See Nancy Fraser, *Against Anarchism*, PUB. SEMINAR (Oct. 9, 2013), <http://www.publicseminar.org/2013/10/against-anarchism/> [<https://perma.cc/L7RQ-JBYQ>]. In particular, while Habermas and Graeber agree that commercial and state bureaucracy operate through the instrumental application of power rather than through communicative discourse, Habermas does not see that fact as rendering bureaucracy illegitimate. See JAMES GORDON FINLAYSON, HABERMAS: A VERY SHORT INTRODUCTION 53–56 (2005); Weinberg, *supra* note 59, at 176.

63. P. 64. Graeber's argument tends toward the unsubtle, away from shades of gray. Bureaucratic commands, we are told, ultimately rest on the threat of force, and thus are no more than systems of structural violence. Pp. 58–60. They are a world away from traditional Madagascar, which relied on "debate, clarification, and renegotiation." P. 66. And yet, so long as there are costs to relying on violence and compulsion in every instance, bureaucratic systems too will feature debate, clarification, and renegotiation. As I've noted, administrative agencies in the U.S. routinely rely on non-brute-force tools such as education, personal relationships, and appeals to shared values. See *supra* text accompanying notes 40–42. Even an imagined society whose values include a firm commitment to community-wide discussion and discourse will see instances where discourse is inadequate. In short, discourse, and structural violence, exist on a continuum. Graeber would likely respond, though, that my search for nuance only helps obscure the ruined lives and structural violence on which our current system rests.

taboo? Custom and taboo are facts, not judgments, and as such are relatively impervious to discussion. It may be that in such a society people would be less likely to imagine the possibility of challenging prevailing norms, but that's not a hallmark of democratic openness.

Graeber suggests at one point that premodern societies in general were able to avoid the structural violence he condemns. Most ancient or medieval governments, we are told, would never have thought to claim a territorial monopoly on the legitimate use of force—"this was the logic of conquering empires, not of any sort of civilized community" (pp. 175–76). It's challenging to generalize about ancient and medieval governments, and the nature of political relationships in the medieval period was sufficiently different from today's that even the word "government" can be misleading. It seems clear, though, that some holders of medieval political power did enforce legal obligations via the threat of force and did not see that as inconsistent with "civilized community."<sup>64</sup>

We should understand, moreover, that it's not enough that government shift away from command to bargaining and renegotiation. Bargaining without more doesn't constitute discourse; it is a form of instrumental behavior disconnected from "the force of the better argument."<sup>65</sup> Administrative techniques in Japan, for example, are famously reliant on bargaining rather than on the voice of command.<sup>66</sup> But bargaining and consultation in Japan, as in the United States, take place in the shadow of implied regulatory threat, and regulators choose the parties with whom they consult based on considerations of social, political, and economic power.<sup>67</sup> That's a model for rewarding the already influential; it's not a model for discourse.<sup>68</sup>

Rather, the sort of discourse Graeber seems to seek can only take place when the formulation and administration of the law goes beyond mere negotiation and instead is part of a cooperative enterprise marked by empathy and open-heartedness. Can we do that? In this book at least, Graeber is unhelpful: he writes only that the arrival of his preferred world—one without states, capitalism, or bureaucracy, operating through nonhierarchical democratic collectives—will require a "complex and multifaceted revolutionary process whose outlines could hardly, at this point, be fully anticipated" (p. 97). That admission leaves a fairly large Kumbaya-shaped hole in the book. To be sure, Occupy encampments of the self-selected and like-

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64. See, e.g., Alice Taylor, *Lex Scripta and the Problem of Enforcement: Anglo-Saxon, Welsh, and Scottish Law Compared*, in *LEGALISM: COMMUNITY AND JUSTICE* 47, 54–60 (Fernanda Pirie & Judith Scheele eds., 2014).

65. See HABERMAS, *supra* note 61, at 285; Baynes, *supra* note 61, at 126; Weinberg, *supra* note 59, at 170 (quoting JÜRGEN HABERMAS, *MORAL CONSCIOUSNESS AND COMMUNICATIVE ACTION* 198 (Christian Lenhardt & Shierry Weber Nicholson trans., 1990)).

66. See FRANK K. UPHAM, *LAW AND SOCIAL CHANGE IN POSTWAR JAPAN* 21–27 (1987); Weinberg, *supra* note 39, at 634–40.

67. See Weinberg, *supra* note 39, at 627, 634–36, 730–31.

68. See *id.* at 729.

mindful were able to make good use of nonhierarchical consensus techniques.<sup>69</sup> But that doesn't tell us whether it would be desirable for society at large to abandon hierarchical organization, or whether that could be made to happen.

#### IV. ON EMPATHY

For all that, as I stated at the start of this Review, Graeber's book makes a crucial point. We can all agree that law should encourage legislators and administrators to attend to the views and desires of members of the public. How is it to do that, though? Electoral democracy takes us only part of the way.<sup>70</sup> From time to time, American law has taken steps attempting to achieve that goal through discursive means. Those steps have been small, falling far short of anything Graeber (or Habermas) would consider meaningful, but they teach us something important nonetheless.

Let's start by going back a few hundred years to the early right to petition, which was said to be in "the very nature" of republican government.<sup>71</sup> The right to petition was understood in colonial times and in the early American republic to carry with it an affirmative right that government hear, fairly consider, *and respond* to the issues each petition raised.<sup>72</sup> It thus reflected a need deeply encoded in American DNA for government to listen to its citizens, to take them seriously and treat them with respect.<sup>73</sup> As late as 1836, that obligation was described in terms explicitly evoking discourse and dialogue: Congress's refusal to consider petitions on the merits and respond, it was said, would mean that "the people of the United States [were] not to be reasoned with."<sup>74</sup> For government to speak purely in the instrumental language of command, we believed, would deprive it of legitimacy; democratic citizens are owed persuasion and not mere pronouncement.<sup>75</sup>

The petition right lost its original meaning well over a century ago, though. It withered as part of this nation's shift from a preliberal political world of organic reciprocal obligation to a new politics of voting and rights-holding.<sup>76</sup> In more modern times, when legislatures decided that they did

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69. See Fish, *supra* note 62.

70. See Jonathan Weinberg, *On Commercial—and Corporate—Speech*, 99 MARQ. L. REV. 559, 599–601 (2016); Weinberg, *supra* note 59, at 165–66.

71. Weinberg, *supra* note 59, at 191 (quoting 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1887 (1833)).

72. See *id.* at 191–98.

73. *Id.* at 208–09.

74. Weinberg, *supra* note 59, at 205 (quoting 12 REG. DEB. 2331 (1836) (statement of Rep. Caleb Cushing)).

75. STEPHEN MACEDO, LIBERAL VIRTUES: CITIZENSHIP, VIRTUE, AND COMMUNITY IN LIBERAL CONSTITUTIONALISM 41 (1990); Weinberg, *supra* note 59, at 175.

76. Weinberg, *supra* note 59, at 205–08.

not want to engage with petitions on the merits, there was no way to force them to do so.<sup>77</sup>

Similarly, consider modern American administrative law, which requires government decisionmakers in a variety of contexts—most importantly, notice-and-comment rulemaking<sup>78</sup>—not only to seek input from the public on their proposed actions, but to take that input seriously, consider it on the merits, and respond.<sup>79</sup> That too can be seen as part of a commitment to discourse.<sup>80</sup>

But that doesn't really work either. Agencies tend to make their key regulatory choices outside of the notice-and-comment environment, at times when industry has unfettered access.<sup>81</sup> The vast majority of comments are filed by industry members, and agencies are more responsive to those than they are to comments filed by individuals.<sup>82</sup> Even in cases when individuals file large numbers of comments, agency members tend not to give them careful attention.<sup>83</sup> Judicial review only enforces engagement with a subset of legally sophisticated comments that are filed by parties with the resources and motivation to go to court.<sup>84</sup> More importantly, judicial review cannot require an agency to consider a commenter's arguments with an open heart and mind; at best it can require the agency to assign a staffer to recite some plausible reason for rejecting the commentator's position.<sup>85</sup>

#### CONCLUSION

The lesson? Law isn't a successful tool for promoting meaningful dialogic engagement between legislators and bureaucrats on the one hand and members of the public on the other. We want bureaucrats to openheartedly understand, and discursively respond to, members of the public. But law can't mandate empathy. That means that legal mechanisms for ensuring that bureaucrats take public perspectives to heart can't fully work.

Put another way, Graeber is right: bureaucracy *is* stupid. Imaginative identification is difficult. Understanding people whose situations are different from our own is difficult. For police to understand the communities they patrol is difficult. All this is all the more true when meaningful understanding means that a regulator—or a police officer—must look out through the eyes of someone whose race, or gender, or gender identification,

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77. *Id.* at 210. As currently understood, the petition right entitles us only to transmit our views to government; the government is not legally obliged to pay attention to what we say. *See Smith v. Ark. State Highway Emps., Local 1315*, 441 U.S. 463, 465 (1979) (per curiam).

78. *See* 5 U.S.C. § 553(c) (2012).

79. Failure by agencies to do so will lead to reversal on judicial review. *See Weinberg, supra* note 59, at 153–58.

80. *See id.* at 176–78.

81. *See id.* at 180–81.

82. *Id.* at 183–84.

83. *See id.* at 185–86.

84. *See id.*

85. *Id.* at 210.

or religion, is different from his own. Overcoming those difficulties takes tremendous effort. Law can't cause people to undertake that effort.

Graeber suggests no way out of this trap other than sweeping away states and capitalism to achieve a "genuinely non-bureaucratized social order" (pp. 100–01). For most of us, that answer will not satisfy. The problem Graeber identifies, though, is real and deadly serious. Since law can't solve it, we need to think harder about mechanisms outside the law that might.