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Security and Discretion: The Problem of Executive Power

THE CONTROL OF executive power is probably the quintessential rule of law problem. The executive in any government is, by definition, the branch with the most immediate control over the state's monopoly over violence; as all conceptions of the rule of law at a minimum require that this violence be used against members of a political community only pursuant to law, the subjection of the executive to law is the first goal of every rule of law state. Moreover, executive power is typically the site for the application of that perennial *bête noire* of the rule of law, discretion. And the executive is the traditional governmental site for the state's interaction with the outsider, the Schmittian enemy – to exclude someone from the political and legal community is often to turn them over to the tender mercies of the executive to be addressed with pure force. Thus, it shouldn't be surprising that major controversies over the rule of law have often centred around bringing under control entities that directly wield executive power, such as monarchs, and, of course, the American President.

The problem of controlling executive power in the American context has a kind of disjointed character. On the one hand, libertarian scholars such as Richard Epstein and Philip Hamburger have articulated a prominent rule of law critique of American administrative law and the way that it seems to confer arbitrary power on executive branch officials.¹ While that critique is important, it is also almost entirely an elite phenomenon: its participants are academics at US law schools and senior judges; its object of concern is heavily focused on companies and commercial activity – on the idea that administrative processes such as Securities and Exchange Commission enforcement actions and Environmental Protection Agency rulemakings are subject to bias and to lack of fair notice

¹ eg RA Epstein, 'The Perilous Position of the Rule of Law and the Administrative State' (2013) 36 *Harvard Journal of Law & Public Policy* 5; P Hamburger, *Is Administrative Law Unlawful?* (University of Chicago Press, 2014). I have discussed the warped character of the rule of law debate over American administrative law at length in P Gowder, '(Untitled) Review of Cass Sunstein and Adrian Vermeule, *Law and Leviathan: Redeeming the Administrative State*' (2021) 31 *Law and Politics Book Review* 12, available at www.lpbr.net/2021/01/law-and-leviathan-redeeming.html.

in ways that undermine the economic activities and perhaps even the property interests of firms. From the normative standpoint, one might fairly consider the problem identified by this literature to be somewhat low priority: regulated industries also tend to have substantial resources with which to defend themselves in administrative processes, to the point that there is an entire alternative literature on the phenomenon known as ‘regulatory capture’. Those who are supposedly subject to arbitrary power may on the whole benefit from or even control the administrative processes that apply to them. This is not to deny that this literature raises a real problem – in particular, it may suggest secondary rule of law concerns with respect to the capacity of dominant regulated entities to deploy government power in an arbitrary fashion to deter potential market entrants or to abuse consumers. But the force of the critique seems to me to be overstated by the scholars who focus on it.

However, there is a second critique of executive power which draws from but is not limited to the critique of administration – a critique which is centred on, and often advanced by, the most vulnerable. For the awesome power of the US President is not limited to, or even primarily about, industrial regulation – rather, the US President commands the most powerful military and law enforcement apparatus in the world, and those forces of violence are routinely turned on vulnerable individuals without full legal process. Most infamous in this respect is the conduct of the post-9/11/2001 ‘War on Terror’, featuring uses of executive power including torture, the holding of individuals without trial in offshore military bases, and the extrajudicial assassination of US citizens with missiles from the sky. Equally important, however, is the combination of the logics of national security and of administration in US immigration law – delved into at depth in the next chapter – in which administrative agencies apply executive power not with licence revocations and fines to multibillion dollar corporations but with guns and cages to some of the most vulnerable people in the world – like stateless refugees from war and oppression – and in which even ordinary administrative law protections, such as the existence of Administrative Law Judges with some degree of independence from the agencies whose cases they adjudicate, are absent.

Moreover, the President is not the only person who wields executive power in the United States. Rule of law worries surrounding executive power have also been applied to subordinate executive officials and to state-level officials. However, the conversation about those officials is typically – and, I contend, inappropriately – separated from the conversation about executive power more broadly. One example is the welfare rights movement discussed in chapter three: the victory represented by treating welfare as a property right rather than a mere boon to be granted or withheld at the government’s discretion was substantially a victory for the control of executive power – to protect individuals from having intrusive discretionary control over their lives exercised by the bureaucrat who

could decide at will whether they would receive the cheque necessary to meet their basic needs that week.²

Yet executive discretion at levels beneath the President continues today and frames the extent to which vulnerable individuals in their real lives experience the United States as a government of laws or as one of the arbitrary power of individuals. Consider prosecution. American criminal laws notoriously tend to come attached to vastly stiffer penalties than other liberal democracies and tend to be used more aggressively.³ Those penalties give prosecutors with charging discretion an immense bargaining chip with which to coerce plea bargains: a criminal defendant can take a prosecutor's deal and accept a sentence after which it might be possible to rebuild a life – or they can take the risk of a trial, and the risk of receiving a sentence, almost regardless of how minor the crime is, of years or decades of imprisonment.⁴ With that kind of a negotiating position, many defendants lack the genuine option of a jury trial even if they are innocent of the crime with which they are charged. Some scholars have suggested that America's extreme over-incarceration – and the extreme racial injustice embedded in that incarceration – is largely due to the power and incentives of prosecutors.⁵

According to a 2011 Department of Justice report, an estimated 90–95 per cent of criminal cases in the United States are resolved by plea bargaining.⁶ In addition to the lawless harms this prosecutorial strategy inflicts on individual defendants, it sets up a kind of conflict of interest between individual defendants and the community at large: if we suppose, with scholars like Appleman, that part of the function of the jury is to preserve the power of the People at large to both directly monitor and directly control the criminal process, then plea bargaining

² For an example and further discussion, see P Gowder, 'Equal Law in an Unequal World' (2014) 99 *Iowa Law Review* 1021, 1074–76.

³ J Travis, B Western and S Redburn (eds), *The Growth of Incarceration in the United States: Exploring Causes and Consequences* (The National Academies Press, 2014) 36–37; JQ Whitman, *Harsh Justice: Criminal Punishment and the Widening Divide Between America and Europe* (1 issued as paperback, Oxford University Press, 2005).

⁴ Human Rights Watch, 'An Offer You Can't Refuse: How US Federal Prosecutors Force Drug Defendants to Plead Guilty' (5 December 2013) www.hrw.org/report/2013/12/05/offer-you-cant-refuse/how-us-federal-prosecutors-force-drug-defendants-plead; DA Dripps, 'Guilt, Innocence, and Due Process of Plea Bargaining' (2016) 57 *William & Mary Law Review* 1343; GM Gilchrist, 'Plea Bargains, Convictions and Legitimacy' (2011) 48 *American Criminal Law Review* 143; WJ Stuntz, 'Plea Bargaining and Criminal Law's Disappearing Shadow' (2004) 117 *Harvard Law Review* 2548; A Manuel Crespo, 'The Hidden Law of Plea Bargaining' (2018) 118 *Columbia Law Review* 1303; M Langer, 'Rethinking Plea Bargaining: The Practice and Reform of Prosecutorial Adjudication in American Criminal Procedure' (2006) 33 *American Journal of Criminal Law* 223; TL Meares, 'Rewards for Good Behavior: Influencing Prosecutorial Discretion and Conduct with Financial Incentives' (1995) 64 *Fordham Law Review* 851.

⁵ J Pfaff, *Locked In: The True Causes of Mass Incarceration and How to Achieve Real Reform* (Basic Books, 2017).

⁶ L Devers, 'Plea and Charge Bargaining Research Summary', Department of Justice, Bureau of Justice Assistance 24 January 2011, p 1, bja.ojp.gov/sites/g/files/xyckuh186/files/media/document/PleaBargainingResearchSummary.pdf.

offers to individual defendants a way to escape the risks of trial but only at the expense of sacrificing a major tool for the public at large to rein in overbearing prosecutors.⁷ And yet so many of the American scholars who write about the rule of law and wring their hands about securities and environmental regulation have little or nothing to say about the proliferation of executive officials who have the *de facto* power to lock up the potentially innocent at will.

The United States also contains vast armies of executive officials who exercise the most consequential discretion of all – the too-often unchecked power to shoot and kill their fellow citizens. The Movement for Black Lives has in recent years brought into vivid relief that the complaints of the Black Panthers continue today. While, according to racial justice advocates, the criminal justice system in its entirety falls hardest on Black and Brown Americans in numerous respects, from the initial encounters with law enforcement, mired in racial profiling, all the way through sentencing, it all begins – and too often ends in the most permanent sense – with an encounter between a police officer and an individual on the street.⁸ Much like Jim Crow, the hyper-policing of Black communities is traced back to the fall of Reconstruction, and, with it, the

⁷ LI Appleman, 'The Plea Jury' (2010) 85 *Indiana Law Journal* 731, 756–59.

⁸ The literature on racial disparities in criminal justice is immense, but some examples that seem worth noting to me (either because of their importance in the literature or simply because I think they summarise matters well) include M Alexander, *The New Jim Crow: Mass Incarceration in the Age of Colorblindness* (The New Press, 2012); J Forman, *Locking Up Our Own: Crime and Punishment in Black America*, 1st edn (Farrar, Straus and Giroux, 2017); D Cole, *No Equal Justice: Race and Class in the American Criminal Justice System* (New Press 1999); R Kennedy, *Race, Crime, and the Law*, 1st Vintage Books edn (Vintage Books, 1998); IF Haney López, 'Post-Racial Racism: Racial Stratification and Mass Incarceration in the Age of Obama' (2010) 98 *California Law Review* 1023; KR Johnson, 'How Racial Profiling in America Became the Law of the Land: United States v. Brignoni-Ponce and Whren v. United States and the Need for Truly Rebellious Lawyering' (2010) 98 *Georgetown Law Journal* 1005; DE Roberts, 'The Social and Moral Cost of Mass Incarceration in African American Communities' (2004) 56 *Stanford Law Review* 1271; B Pettit and B Western, 'Mass Imprisonment and the Life Course: Race and Class Inequality in U.S. Incarceration' (2004) 69 *American Sociological Review* 151; L Wacquant, 'From Slavery to Mass Incarceration' (2002) 13 *New Left Review* 41; AJ Davis, 'Racial Fairness in the Criminal Justice System: The Role of the Prosecutor' (2007) 39 *Columbia Human Rights Law Review* 202; J Soss and V Weaver, 'Police Are Our Government: Politics, Political Science, and the Policing of Race–Class Subjugated Communities' (2017) 20 *Annual Review of Political Science* 565; G Prowse, VM Weaver and TL Meares, 'The State from Below: Distorted Responsiveness in Policed Communities' (2019) 56 *Urban Affairs Review* 1423; MC Bell, 'Police Reform and the Dismantling of Legal Estrangement' (2017) 126 *Yale Law Journal* 2054; MD Holmes and BW Smith, 'Intergroup Dynamics of Extra-Legal Police Aggression: An Integrated Theory of Race and Place' (2012) 17 *Aggression and Violent Behavior* 344. There is also currently a heated debate within the empirical literature about the measurement of street-level police bias, which is a notably difficult task due to: (1) the numerous potential confounding variables associated with race and police contact, and (2) the fact that available data is itself derived from police contact, and hence reflects a substantial selection bias. D Knox, W Lowe and J Mummolo, 'Administrative Records Mask Racially Biased Policing' (2020) 114 *American Political Science Review* 619; D Knox and J Mummolo, 'Toward a General Causal Framework for the Study of Racial Bias in Policing' (2020) 1 *Journal of Political Institutions and Political Economy* 341; SB Starr, 'Testing Racial Profiling: Empirical Assessment of Disparate Treatment by Police' (2016) 2016 *University of Chicago Legal Forum* 485.

enactment of the Black Codes that set the precedent for the representation of Black populations as inconvenient people to be managed by law enforcement, as well as the use of convict leasing to achieve effective reenslavement under the guise of criminal law.⁹ Yet it goes through executive power in the purest sense: the discretionary decision of an individual with a gun and a badge to stop a private citizen, to interrogate them, to commit acts of violence against them, and to arrest them. As such, it poses a core rule of law question. And while some earlier American scholars of administrative law and discretion – most prominently Kenneth Culp Davis – recognised the relationship between policing and administrative discretion, and thereby the rule of law; today the administrative law conversations and the policing conversations are largely distinct from one another.¹⁰

Policing also bears a complex relationship to the rule of law in its face as the protection of property rights. Black scholars since Du Bois have long identified that white identity itself can have, or substitute for, economic value. Contemporary critical race scholars have often followed Cheryl Harris in conceptualising whiteness itself as a form of property.¹¹ And that property interest can be projected onto both social relations and on space – thus, the private violence of both lynch mobs and of modern racial bias killings like George Zimmerman’s killing of Trayvon Martin can be interpreted as defences of both white-property-as-status as well as white-property as white space, that is, as the defence of spaces that gain economic and social value from being identified as white and occupied primarily by whites and by those who claim white identity.¹² Policing too has been conceptualised as the defence of white space, as police enforce ‘de facto’ spatial segregation by, among other prominent examples, treating non-white Americans as suspicious when they are found ‘out of place’ and perpetuating relative stigma of non-white spaces; in that way facilitating both the economic advantage (‘property values’) and the status advantage of white spaces.¹³

For those reasons, this chapter starts with a closer examination of policing – the area that seems to me to be the most consequential site of unconstrained executive power, both in virtue of the sheer number of people who find their freedom even to occupy public space undermined by out-of-control policing and in virtue of the connection between contemporary policing and the ongoing Black liberation quest for the benefits of the rule of law. I then turn to

⁹ K-Y Taylor, *From #BlackLivesMatter to Black Liberation* (Haymarket Books, 2016) 108–12.

¹⁰ For a discussion of Davis’s transition from administrative law to police discretion and the failure of the rest of the legal academy to listen, see RM Levin, ‘The Administrative Law Legacy of Kenneth Culp Davis’ (2005) 42 *San Diego Law Review* 315, 331–35.

¹¹ CI Harris, ‘Whiteness as Property’ (1993) 106 *Harvard Law Review* 1707.

¹² A Onwuachi-Willig, ‘Policing the Boundaries of Whiteness: The Tragedy of Being out of Place from Emmett Till to Trayvon Martin’ (2017) 102 *Iowa Law Review* 1113.

¹³ For a general discussion, see MC Bell, ‘Anti-Segregation Policing’ (2020) 95 *New York University Law Review* 650.

presidential power in national security (and in doing so, briefly leave behind the property-oriented themes of this book), but with an emphasis on the connections between security, race, and discretion. Those concepts then lead to the discussion in the next chapter of immigration; an area of American law(lessness) that brings together national security, law enforcement, administration, and the heritage of settler ideology and racialised property through a kind of Schmittian site of sovereignty at the literal as well as figurative boundaries of American law.

POLICE AS EXECUTIVES: THE PROBLEM OF
DISCRETION IN STREET-LEVEL CRIMINAL JUSTICE

The Movement for Black Lives and #BlackLivesMatter began, approximately, between the 2012 killing of Trayvon Martin by private citizen George Zimmerman and the summer of 2014, which saw the police killings in short succession of Michael Brown in Ferguson, MO, and Eric Garner in New York City, although the complaints of racist police violence and the epidemic of killings of Black Americans by police, frequently when those who are killed are unarmed and even children, has been salient and been the object of Black activism for much longer. Some of the most egregious of the many cases in which police have killed Black Americans since the summer of 2014 include Tamir Rice, a 12-year old boy who was killed for his toy gun; Freddie Gray, who died from neck injuries after police placed him in the back of a police van shackled but without a seatbelt – alleged to be a deliberate ‘rough ride’ meant to punish him for his conduct during the arrest; Breonna Taylor, who was killed in her own home in the course of a surprise midnight raid in which the police attempted to execute a search warrant to find drugs allegedly dealt by an ex-boyfriend; Botham Jean, who was killed inside his own apartment by an off-duty police officer who entered it, believing that it was her own unit, and shot him as a burglar; Atatiana Jefferson, whom police shot through the window of her own house following a ‘welfare check’ police call from the neighbour; and George Floyd, who suffocated after being held face-down, while handcuffed, on the ground, with a police officer’s knee on his neck, for more than seven minutes – after repeatedly telling the police that he was struggling to breathe (the police officers who killed Mr Jean and Mr Floyd were eventually convicted of murder).

The bare fact of repeated police killings of Black Americans, especially when the victims are innocent of any crime and/or the police receive no consequences for the killing, is itself a challenge to the US’s self-conception as a rule of law state, and we can interpret the Movement for Black Lives’ challenges to the racial disparity in such killings and the lack of accountability for them as core rule of law demands on their own strength. However, we can also go a little bit deeper: exploring some of the causal factors plausibly contributing to police killings of Black Americans can draw out some underlying tensions and weaknesses in the American conception of the rule of law.

In particular, among the contributors to the police killing crisis that scholars have identified include: (a) widespread underlying police enforcement discretion, (b) legal doctrines which shield police from consequences from illegal acts, hence conferring a kind of *ex post* discretion on police, and (c) the effects of physical segregation on policing, which in turn are attributable in part to a number of underlying conditions in how the United States has managed and partly continues to manage property rights.¹⁴

I will take up each in turn.

Ex Ante Police Discretion: Street-Level Arbitrary Power

The statute books are replete with a set of background offences and authorisations which allow police a substantial amount of day-to-day enforcement discretion by licensing some kind of coercive official law enforcement response against most or potentially even all persons whom the police might encounter on the street. For example, loitering, vagrancy, and disorderly conduct laws, traffic and public transit infractions that authorise arrest rather than merely citation, laws against obstructing public rights of way (ie, being on them and being perceived to be in the way), and laws against disobeying the commands of police in the abstract may confer on police the authorisation to arrest individuals in a vast array of situations.¹⁵ Moreover, current doctrines in constitutional criminal procedure permit the police to bring themselves in contact with a vast

¹⁴ See especially DW Carbadó, 'Blue-on-Black Violence: A Provisional Model of Some of the Causes' (2016) 104 *Georgetown Law Journal* 1479; DW Carbadó, 'From Stopping Black People to Killing Black People: The Fourth Amendment Pathways to Police Violence' (2017) 105 *California Law Review* 125; D Roithmayr, 'The Dynamics of Excessive Force' (2016) 2016 *University of Chicago Legal Forum* 407.

¹⁵ Disorderly conduct laws, for example, permit the police to enforce conceptions of appropriate public behaviour even though those conceptions are not only open-ended, but replete with background assumptions about class, race, and disability, among others: J Morgan, 'Rethinking Disorderly Conduct' [Forthcoming] *California Law Review*. Unsurprisingly, vagrancy laws and the like were a prominent feature of the post-civil-war Black Code system in the South, which was an effort to force freed people back onto the plantations. WEB Du Bois, *Black Reconstruction: An Essay Toward a History of the Part Which Black Folk Played in the Attempt to Reconstruct Democracy in America, 1860-1880* (Harcourt, Brace & Co, 1935) 166-79; E Foner, *Reconstruction: America's Unfinished Revolution, 1863-1877*, updated edn (Harper Perennial, 2014) 198-205. While some of these broad types of laws are occasionally struck down on Due Process vagueness grounds, eg, *Chicago v Morales*, 527 US 41 (1999); *Papachristou v Jacksonville*, 405 US 156 (1972); *Kolender v Lawson* 461 US 352 (1983), they still appear to be in sufficiently common use that we, alas, cannot safely characterise them all as unconstitutional on the basis of the discretion they confer. For an important history of the fight against vagrancy laws in particular, which recognises that the fall of those laws was at least in part replaced by other discretion-conferring police strategies, see RL Goluboff, *Vagrant Nation: Police Power, Constitutional Change, and the Making of the 1960s* (Oxford University Press, 2016). For analytic purposes, it may be helpful to subdivide discretion-conferring laws into three rough categories: 'vague' laws, such as the laws struck down by the Supreme Court cases just noted, which fail to give people notice of the conduct that constitutes an offence, see generally TJ Boutros Jr and BH Evanson, 'The Enduring and Universal

array of people, either by ‘stopping and frisking’ them in the absence of any strong reason to believe they’re engaged in crime or ‘pretextual’ stops in which they stop citizens for things like broken taillights, but with the real purpose of engaging in a dragnet for more serious crimes.¹⁶

The rule of law case against such laws is that they effectively subject individuals to the arbitrary authority of the police. If everyone is committing a crime all the time, then the police may inflict state violence on whomever they want. And such power translates into the capacity to deliver commands that organise the environment in legally unauthorised ways: the police may, for example, order a person hanging out on the corner with their friends to leave the street, even though they have the perfect legal right to be there, in view of the fact that the police may come up with some charge that can stick on them to punish them for disobedience or for ‘contempt of cop’.¹⁷ And, of course, such authorisations are more likely to be deployed against persons and communities that lack the political power to control the police, and in favour of those who hold the political power to use the police to control stigmatised and stereotyped communities – that is, along the lines of race and class. Finally, because police contact is risky, and especially risky for the stigmatised, when the police have the power to impose their interactions on private persons at will, they inherently have the power to impose the risk of an escalation to violence on those private persons.

Consider, as an example, the laws that led up to the killing of Michael Brown. My best guess for the ordinance that originally justified the police in stopping him for walking down the road was the following:

Manner of walking along roadway.

- (a) Where sidewalks are provided, it shall be unlawful for any pedestrian to walk along and upon an adjacent roadway.

Principal of Fair Notice’ (2013) 86 *Southern California Law Review* 193; ‘broad’ laws as to which the conduct that violates it is perfectly clear, but so much conduct is covered that merely existing in public tends to constitute an offence, see generally K Brennan-Marquez, ‘Extremely Broad Laws’ (2019) 61 *Arizona Law Review* 641; and ‘trivial’ laws that punish behaviour so minor that even though the offence is narrow and clear, the collection of trivial laws *taken together* are likely to give police substantial discretion to arrest, and individual trivial laws are likely to be frequently violated just because nobody other than a police officer would seriously imagine that such a thing constitutes a crime. For an example of the last category, consider the fact that, in 2011, the New York police arrested some 1,600 people for violating laws regulating the manner of sitting on a subway seat, such as putting their feet up or taking up multiple seats, see J Goldstein and C Haughney, ‘Relax, If You Want, but Don’t Put Your Feet Up’ (*The New York Times*, 6 January 2012) www.nytimes.com/2012/01/07/nyregion/minor-offense-on-ny-subway-can-bring-ticket-or-handcuffs.html. More generally, on the proliferation of criminal laws, see SH Kadish, ‘The Crisis of Overcriminalization’ (1967) 374 *The ANNALS of the American Academy of Political and Social Science* 157; DN Husak, *Overcriminalization: The Limits of the Criminal Law* (Oxford University Press, 2008); E Luna, ‘The Overcriminalization Phenomenon’ (2005) 54 *American University Law Review* 703.

¹⁶ *Terry v Ohio* 392 US 1 (1968); *Whren v United States* 517 US 806 (1996). Both *Terry* and *Whren* have been widely criticised for facilitating racial profiling, eg RL Jones, ‘Terry v. Ohio: Its Failure, Immoral Progeny, and Racial Profiling’ (2018) 54 *Idaho Law Review* 511; Johnson (n 8).

¹⁷ CE Lopez, ‘Disorderly (Mis)Conduct: The Problem with Contempt of Cop Arrests’ (2010) 4 *Advance* 71.

- (b) Where sidewalks are not provided, any pedestrian walking along and upon a highway shall, when practicable, walk only on the left side of the roadway or its shoulder facing traffic which may approach from the opposite direction.¹⁸

That ordinance was repealed in 2016 – perhaps due to the scandal over Mr Brown’s death. But Ferguson’s municipal code still contains another ordinance sufficiently broad to justify exactly the same interaction:

A person commits the offense of loitering if he obstructs or encumbers the passage of persons or vehicles upon, through or into any street, street corner, depot, building entrance or other public place and then refuses to move on when requested to do so by any police officer of the city.¹⁹

Observe that such a statute contains no standard for what constitutes an encumbrance or an obstruction. By its terms it would apply to sidewalks, city plazas, and just about anywhere outside a person’s private home or office. Further observe the scope of probable cause for a permissible arrest (and hence the capacity to inflict the collateral consequences of an arrest, such as time in jail and possibly lost jobs, evictions, and other serious harms)²⁰ is broader than the scope of conviction, such that even if a court ultimately concludes that a person arrested under this ordinance was not encumbering the passage of others, it’s quite unlikely that a police officer who arrests someone for violating this ordinance will be punished for the arrest.

Hence, a Darren Wilson today could stop, and potentially lose control of the situation or his own emotions and shoot, another Michael Brown today, in Ferguson, in essentially any public place where they might happen to meet, on the basis of the ordinance quoted above.²¹ Such absolute police discretion is the anthesis of the rule of law.

¹⁸ Former Ferguson Municipal Code Sec 44-344. This section was repealed in 2016. For the aid of future researchers: Ferguson distributes its municipal code, and historical versions thereof, via the third-party provider ‘municode.com’. See City of Ferguson, www.fergusoncity.com/56/Government (linking to ‘www.municode.com/library/MO/Ferguson’ to provide the code of ordinances for the city). This ordinance can be viewed in a historical view of the city ordinances, at Municipal Code Sec 44-344, at library.municode.com/mo/ferguson/codes/code_of_ordinances/239430?nodeId=PTIICOOR_CH44TRMOVE_ARTVIIPE_S44-344MAWAALRO which I have archived at perma.cc/W8EN-NA57. The current municipal code notes that this section was repealed on 26 April 2016, by ordinance number 2016-3617. See library.municode.com/mo/ferguson/codes/code_of_ordinances?nodeId=PTIICOOR_CH44TRMOVE_ARTVIIPE_S44-344RE&showChanges which I have archived at perma.cc/55QQ-PNLJ.

¹⁹ Ferguson, Mo Municipal Code Sec 29-89. According to the Department of Justice report of the investigation into Mr Brown’s death, the police officer who killed Brown claimed that ‘cars [were] trying to pass’ Mr Brown and his friend. Department of Justice Report Regarding the Criminal Investigation into the Shooting Death of Michael Brown by Ferguson, Missouri Police Officer Darren Wilson, (4 March 2015) www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/doj_report_on_shooting_of_michael_brown_1.pdf, pp 12–13.

²⁰ R Harmon, ‘Why Arrest?’ (2016) 115 *Michigan Law Review* 307, 313–20.

²¹ Bell (n 8) 2101–02, n 172, describes the commonality between Ferguson and Baltimore in the use of walking-in-the-street and similar ordinances to punish Black Americans for occupying public space.

The unbounded authority conferred by the numerous ordinances like Ferguson's across the United States effectively authorise a police officer to order anyone whom they want out of public space. And they are used that way. In Los Angeles, for example, researchers have observed these kinds of laws being used to target the homeless or to identify ostensible drug users for profiling. People who were unable to get through intersections at skid row at a normal walking speed – for example, because of a physical disability – were subject to police harassment on the basis of jaywalking laws.²² Such harassment has concrete consequences on the lives of those whom police choose to supervise. Stuart gives as an example the experience of 'Tex', a homeless individual who was cited for 'obstructing the sidewalk' for momentarily setting his bags down on the street – an offence that spiralled into hundreds of dollars of fines and threats from a judge who apparently perceived Tex as a recidivist merely for existing.²³

Sociologists and criminologists have gone so far as to equate the very function of policing with arbitrary discretion. For example, a famous definition of policing by Allan Silver in 1967 is that:

A policed society is unique in that central power exercises potentially violent supervision over the population by bureaucratic means widely diffused throughout civil society in small and discretionary operations that are capable of rapid concentration.²⁴

Nor is this view just the province of left-wing academics. Part of the intellectual foundation for the 'broken windows' or 'order-maintenance' policing movement that took over many US cities, most famously Rudy Giuliani's New York, in the 1990s was an *Atlantic Monthly* article by George Kelling and James Wilson.²⁵ That article, which the New York police commissioner cited as a key influence on his policing strategy, openly applauded the lawless use of boundless police discretion.²⁶ Here's how Kelling and Wilson describe the conduct of a police officer in Newark whom they offer as a model to be admired:

The people on the street were primarily black; the officer who walked the street was white. The people were made up of 'regulars' and 'strangers.' Regulars included both 'decent folk' and some drunks and derelicts who were always there but who 'knew their place.' Strangers were, well, strangers, and viewed suspiciously, sometimes

²² F Stuart, 'Becoming "Copwise": Policing, Culture, and the Collateral Consequences of Street-Level Criminalization' (2016) 50 *Law & Society Review* 279, 289–90.

²³ *ibid* 290–91.

²⁴ A Silver, 'The Demand for Order in Civil Society: A Review of Some Themes in the History of Urban Crime, Police, and Riot' in DJ Bourda (ed), *The Police: Six Sociological Essays* (Wiley, 1967) 8.

²⁵ GL Kelling and JQ Wilson, 'Broken Windows: The Police and Neighborhood Safety' (*The Atlantic*, March 1982) www.theatlantic.com/magazine/archive/1982/03/broken-windows/304465/.

²⁶ WJ Bratton, 'The New York City Police Department's Civil Enforcement of Quality-of-Life Crimes' (1995) 3 *Journal of Law and Policy* 447, 448.

apprehensively. The officer—call him Kelly—knew who the regulars were, and they knew him. As he saw his job, he was to keep an eye on strangers, and make certain that the disreputable regulars observed some informal but widely understood rules. Drunks and addicts could sit on the stoops, but could not lie down. People could drink on side streets, but not at the main intersection. Bottles had to be in paper bags. Talking to, bothering, or begging from people waiting at the bus stop was strictly forbidden. If a dispute erupted between a businessman and a customer, the businessman was assumed to be right, especially if the customer was a stranger. If a stranger loitered, Kelly would ask him if he had any means of support and what his business was; if he gave unsatisfactory answers, he was sent on his way. Persons who broke the informal rules, especially those who bothered people waiting at bus stops, were arrested for vagrancy. Noisy teenagers were told to keep quiet.

These rules were defined and enforced in collaboration with the ‘regulars’ on the street. Another neighborhood might have different rules, but these, everybody understood, were the rules for this neighborhood. If someone violated them, the regulars not only turned to Kelly for help but also ridiculed the violator. Sometimes what Kelly did could be described as ‘enforcing the law,’ but just as often it involved taking informal or extralegal steps to help protect what the neighborhood had decided was the appropriate level of public order. Some of the things he did probably would not withstand a legal challenge.²⁷

Whatever else this model of policing might be, it isn’t the rule of law – not when police take it as their responsibility to enforce ‘informal’ rules that bear no relationship to the law as enacted by some legislature or applied by some court; maintain a running list of ‘regulars’ and ‘strangers’ who have different rights; order people to leave public spaces on the basis of their ‘unsatisfactory’ answers to intrusive questions about their wealth and their plans; and single-handedly adjudicate disputes between businesspeople and consumers not on the basis of the facts of their conduct and the correspondence of that conduct to law but on the basis of the hierarchical identity of the parties. And it should surprise nobody that those who were regulated were ‘primarily black’ while the one doing the regulating was white. Of course, perceptions of disorder themselves are often racialised.²⁸

It might be imagined that police could carry out such an ‘order-maintenance’ role simply by using persuasion, rather than by directly deploying state violence. But they cannot, and Kelling and Wilson openly admit as much too:

Though the police can obviously make arrests whenever a gang member breaks the law, a gang can form, recruit, and congregate without breaking the law. And only a tiny fraction of gang-related crimes can be solved by an arrest; thus, if an arrest is the only recourse for the police, the residents’ fears will go unassuaged. The police will soon feel helpless, and the residents will again believe that the police ‘do nothing.’

²⁷ Kelling and Wilson (n 25).

²⁸ DE Roberts, ‘Race, Vagueness, and the Social Meaning of Order-Maintenance Policing’ (1999) 89 *Journal of Criminal Law and Criminology* 775.

What the police in fact do is to chase known gang members out of the project. In the words of one officer, 'We kick ass.'²⁹

Needless to say, using the state's monopoly over violence to 'kick the asses' of those who have admittedly violated no law is consistent with no conception of the rule of law whatsoever. Elsewhere in the Kelling and Wilson article, they observe that '[n]one of this is easily reconciled with any conception of due process or fair treatment'. That's something of an understatement. But for present purposes, what we should notice is that the capacity of the police to engage in such behaviour is contingent on the underlying legal tools with which they may operate – only if they can avoid sanction for 'kicking ass' and have a sufficient set of tools – like those vagrancy, disorderly conduct, loitering, and disturbing the peace laws – to actually enforce their wills over any person whom they meet may they rule a community on a day-to-day basis with arbitrary commands in the way that Kelling and Wilson advocate and that New York and other American cities implemented.³⁰

Ex Post Police Discretion: The Qualified Immunity Doctrine

One of the reasons that Kelling and Wilson's Officer Kelly could engage in the lawless behaviour that they describe is that the American legal system lacks the

²⁹ Kelling and Wilson (n 25).

³⁰ There are many other ways in which the American police run afoul of the basic idea of the rule of law. My emphasis on discretion is not meant to suggest that we disregard, for example, the evidence of widespread 'dropsy' (planting of evidence and 'testilying' (perjured police testimony), S Zeidman, 'From Dropsy to Testilying: Prosecutorial Apathy, Ennui, or Complicity?' (2019) 16 *Ohio State Journal of Criminal Law* 423; the militarisation of police personnel, who now routinely parade around the streets with tanks and machine guns intimidating citizens and destroying their property; R Balko, *Rise of the Warrior Cop: The Militarization of America's Police Forces*, pbk edn (Public Affairs, 2014); and even police departments that maintain off the books 'black sites' where victims are secretly tortured, as in Chicago's infamous Homan Square facility; S Ackerman, 'Homan Square Detainee: I Was Sexually Abused by Police at Chicago "Black Site"' (*The Guardian*, 14 May 2015) www.theguardian.com/us-news/2015/may/14/homan-square-detainee-police-abuse; S Ackerman, 'Chicago's Homan Square "Black Site": Surveillance, Military-Style Vehicles and a Metal Cage' (*The Guardian*, 24 February 2015) www.theguardian.com/us-news/2015/feb/24/chicago-homan-square-black-site; BE Patterson, 'Chicago's "Black Site" Police Scandal Is About to Explode Again' (*Mother Jones*, 8 December 2015) www.motherjones.com/politics/2015/12/rahm-emanuel-chicago-police-homan-square-scandal/. Indeed, a torturer at the Guantanamo Bay military black hole apparently built up his resume torturing prisoners in Chicago first. S Ackerman, 'Bad Lieutenant: American Police Brutality, Exported from Chicago to Guantánamo' (*The Guardian*, 18 February 2015) www.theguardian.com/us-news/2015/feb/18/american-police-brutality-chicago-guantanamo; S Ackerman, 'How Chicago Police Condemned the Innocent: A Trail of Coerced Confessions' (*The Guardian*, 19 February 2015) www.theguardian.com/us-news/2015/feb/19/chicago-police-richard-zuley-abuse-innocent-man; S Ackerman, 'Guantánamo Torturer Led Brutal Chicago Police Regime of Shackling and Confession' (*The Guardian*, 18 February 2015) www.theguardian.com/us-news/2015/feb/18/guantanamo-torture-chicago-police-brutality; L Ralph, 'The Making of Richard Zuley: The Ignored Linkages Between the US Criminal In/Justice System and the International Security State' (2020) 122 *American Anthropologist* 133.

means to effectively sanction officers who ride roughshod over individual legal rights. Bureaucratic discipline within police departments is likely a nonstarter because of the internal solidarity of police departments which tend to view the world in an us-vs-them kind of way, plus the pernicious effects of powerful police unions which insulate their officers from discipline.³¹

An aggrieved citizen might look for a remedy in the courts. Such a remedy would be well within the Anglo-American tradition. AV Dicey's classic English conception of the rule of law revolved around the proposition that government officials were subject to ordinary law in ordinary courts – if a police officer beat one up, one would simply sue them for battery and receive a remedy, just as against an ordinary person.³² At least in some contexts, the same principle held in the early United States – there is reason to believe that an early use of the warrant requirement for police searches was as a defence to an ordinary common law trespass action.³³

But today in the US these classic torts have largely been supplanted by the 'constitutional torts', primarily the federal civil rights remedy of 42 USC 1983 brought back to life in *Monroe v Pape*.³⁴ Unfortunately, the Supreme Court has read a 'good faith' immunity into that statute as the qualified immunity doctrine.³⁵ This doctrine shields police and other officials from lawsuits for money damages for civil rights violations – such as unlawful stops, searches, arrests, and uses of force – unless the officer's violation of law was 'clearly established' at the time of the action. Worse, 'clearly established' is interpreted so narrowly that it effectively amounts to conferring on police impunity for violations of individual legal rights.³⁶

³¹ C Fisk and S Richardson, 'Police Unions' (2017) 85 *George Washington Law Review* 712; WG Skogan, 'Why Reforms Fail' (2008) 18 *Policing and Society* 23; JR Silver and others, 'Traditional Police Culture, Use of Force, and Procedural Justice: Investigating Individual, Organizational, and Contextual Factors' (2017) 34 *Justice Quarterly* 1272, 1274–75; J Van Maanen, 'Observations on the Making of Policemen' (1973) 32 *Human Organization* 407, 414–16.

³² AV Dicey, *Introduction to the Study of the Law of the Constitution* (Liberty Fund, 1982) 114–15, 120–21.

³³ See discussion in D Dripps, 'Akhil Amar on Criminal Procedure and Constitutional Law: Here I Go Down That Wrong Road Again' (1996) 74 *North Carolina Law Review* 1559, 1600–03.

³⁴ The common law claims remain available, but may not be effective to bring practical relief to individuals subject to police abuses. One practical reason for the relative predominance of 1983 claims: lawyers who bring civil rights cases need to eat too, and federal civil rights cases come with statutory attorney's fees under 42 USC § 1988. Of course, access to federal rather than state courts is another motivation. Finally, state law immunity doctrines may immunise police misconduct from state common law tort claims, leaving the federal civil rights claim as the only remedy. See, eg, *Phillips v Hanse* 281 Ga 133 (2006) (under Georgia law, a police officer was immune from negligence liability for conducting a high-speed chase that killed the plaintiff in the absence of malice); *Brown v Town of Chapel Hill* 233 NC App. 257 (2014) (under North Carolina law, police officer was immune for false imprisonment liability for arresting plaintiff without reason then detaining him for an hour on the basis of mistaken identity).

³⁵ W Baude, 'Is Qualified Immunity Unlawful' (2018) 106 *California Law Review* 45, 52–61, argues that the supposed origins of this immunity in the common law are apocryphal.

³⁶ Carbado, 'Blue-on-Black Violence' (n 14) 1519–22; LC Feldman, 'Police Violence and the Legal Temporalities of Immunity' (2017) 20 *Theory & Event* 329.

Qualified immunity is subject to severe criticism from the standpoint of the rule of law to the extent it encourages the arbitrary use of government coercion. I characterise qualified immunity as *ex post* police discretion in virtue of the fact that, in practical effect, it expands the array of behavioural choices of police in interacting with citizens: even in situations where a use of force or an arrest is not legally justifiable, the qualified immunity doctrine adds it to the police menu by making it dramatically less likely that they will face sanctions for doing so.³⁷

Segregation and Policing: How Property Rights and Local Quasi-Federalism Can Undermine the Rule of Law

The attentive reader will notice that the features of policing just described are, at least superficially, race-neutral, although they can be applied by racially motivated or unconsciously biased officers in a racialised way. Critical race scholars, however, have identified that there are not merely two ways that racial injustice can appear in a legal system (ie, conscious and unconscious bias), but also a third, which often goes under the name ‘structural racism’ or ‘institutional racism’. To my mind, the relationship between segregation and policing stands both as a quintessential example of structural racism and as an important complication in this book’s exploration of the relationship between property rights, especially in land, and the rule of law.

Note at the beginning that I speak of what is typically called *de facto* segregation, that is, segregation that is not caused by recent intentional government action – although past government action may be a contributing factor – with the quintessential example being suburban ‘white flight’. Note also that it is well established that segregation is strongly associated with concentrated poverty.³⁸ With respect to such segregation, I make the following three observations about policing and residential segregation, which will be lightly sketched (rather than fully defended) below:

- (1) Residential racial segregation facilitates the delivery of policing in a way that is racially biased in the aggregate (ie, falling with unjust harshness on subordinated racial groups, on average).
- (2) Policing that is racially biased in the aggregate reinforces residential racial segregation.

³⁷ Even if the officer does something egregious enough for a court to refuse to apply qualified immunity, chances are that their government will indemnify them for the judgment, further insulating them from individual consequences for lawless uses of power. Carbado, ‘Blue-on-Black Violence’ (n 14) 1522–24.

³⁸ L. Quillian, ‘Segregation and Poverty Concentration: The Role of Three Segregations’ (2012) 77 *American Sociological Review* 354.

- (3) Residential racial segregation and racially biased policing are also driven by the economic interests of white landholders in preserving property values, and those interests are sometimes translated into crime-control interests that invoke order-oriented conceptions of the rule of law.

A defence of claims (1) and (2) can be derived from the important recent work of Monica Bell, who has carefully elucidated the bidirectional relationship between policing and segregation, and Daria Roithmayr, who has given important network theory accounts of both police violence and segregation.³⁹

Key ways in which policing reinforces already-existing segregation include *boundary-enforcement* by which Black and Brown Americans are subjected to police attention when they are found ‘out of place’, ie, in predominantly white neighbourhoods; and *capital destruction*, by which the consequences of hyper-policing in segregated and subordinated communities reduce the economic resources available to community members, thus making those communities both worse places to live and harder places to escape. Mechanisms of capital destruction include, for example, the incarceration of parents, thus reducing the resources available to their children; the infliction of criminal records and consequent job market consequences of same on community members; and the disruption of social networks and civic life through official behaviour such as anti-gang injunctions and the aggressive enforcement of quality-of-life laws like those described above to drive people out of public spaces.

On the other side of the vicious cycle, segregation contributes to aggregate racial bias in policing by mechanisms that include *neighbourhood stigma*, in which segregated and subordinated areas are perceived (either inaccurately, or accurately because of economic disadvantage) as high-crime and hence in need of more aggressive policing; and *organisational divergence*, in which police organisations adopt different strategies in subordinated and superordinated

³⁹ Bell (n 13); D Roithmayr, ‘Locked in Segregation’ (2004) 12 *Virginia Journal of Social Policy & the Law* 197; Roithmayr (n 14); see also S Bass, ‘Policing Space, Policing Race: Social Control Imperatives and Police Discretionary Decisions’ (2001) 28 *Social Justice* 156; RJ Sampson and SW Raudenbush, ‘Neighborhood Stigma and the Perception of Disorder’ (2005) 24 *Focus* 7; N Jones, ‘“The Regular Routine”: Proactive Policing and Adolescent Development Among Young, Poor Black Men’ (2014) 2014 *New Directions for Child and Adolescent Development* 33; D Pager, *Marked: Race, Crime, and Finding Work in an Era of Mass Incarceration*, pbk edn (University of Chicago Press, 2009); AJ Meehan and MC Ponder, ‘Race and Place: The Ecology of Racial Profiling African American Motorists’ (2002) 19 *Justice Quarterly* 399; B Capers, ‘Policing, Place, and Race’ (2009) 44 *Harvard Civil Rights – Civil Liberties Law Review* 43; LJ Krivo, RD Peterson and DC Kuhl, ‘Segregation, Racial Structure, and Neighborhood Violent Crime’ (2009) 114 *American Journal of Sociology* 1765; N Lacey and D Soskice, ‘Crime, Punishment and Segregation in the United States: The Paradox of Local Democracy’ (2015) 17 *Punishment & Society* 454; EA Stewart and others, ‘Neighborhood Racial Context and Perceptions of Police-Based Racial Discrimination Among Black Youth’ (2009) 47 *Criminology* 847; S Gaston and RK Brunson, ‘Reasonable Suspicion in the Eye of the Beholder: Routine Policing in Racially Different Disadvantaged Neighborhoods’ (2020) 56 *Urban Affairs Review* 188.

territories.⁴⁰ Organisational divergence is also a consequence of a number of factors, such as differences in political power and hence the capacity to control police misconduct; differences in municipal finance and hence in the capacity to support public services that provide an alternative to police contact as well as in the use of policing as a revenue source; organisational learning in which police pick up harsher strategies from one another in departments ‘serving’ segregated communities; and the vicious cycle destruction of police-community relationships in which harsh policing leads to non-cooperation and oppositional behaviour from community members, which in turn leads to more harsh policing, and so forth.⁴¹

Unsurprisingly, we see police compromising legal fidelity in other nations with segregated and disadvantaged communities. Of particular importance is the French *brigade anti-criminalité*, the special ‘anti-crime’ unit that patrols segregated immigrant *banlieues*. Didier Fassin’s ethnographic study of the *brigade* revealed a pattern of behaviour that is barely distinguishable from the complaints about American police in Black neighbourhoods, including pervasive stop-and-frisk harassment, evident police endorsement of racial stereotypes about the criminal character of those whom they were policing, and swift violent escalation paired with a reputation for violence.⁴² These are the sort of consequences that follow from the enterprise of policing a subordinated and segregated community.

As for my point (3) above: there is an obvious connection between the protection of property interests (and property values) in the advantaged and white flight and: (a) the creation of new municipalities, (b) entry restrictions in existing municipalities (such as zoning rules restricting multiple-occupancy units and the manipulation of transit networks), (c) the demand for boundary-enforcement policing, and (d) the demand for harsher policing strategies against groups of people and neighbourhoods stereotyped as dangerous and sources of crime. Charles Tilly has characterised many of these broader dynamics as ‘opportunity hoarding’.⁴³ Wealthier people who also enjoy racial

⁴⁰ There’s a grim cruelty to neighbourhood stigma: many Black leaders originally sought additional police presence in their neighbourhoods to combat the criminogenic consequences of poverty – but that only made matters worse. Forman (n 8).

⁴¹ The fatal consequences of Ferguson’s revenue-oriented policing are well known and worth particular note. Generally, on revenue-depleted cities resorting to lawless enforcement tactics and other challenges to legal order, see B Atuahene, ‘Predatory Cities’ (2020) 108 *California Law Review* 107; DW Carbado, ‘Predatory Policing’ (2017) 85 *UMKC Law Review* 545; Taylor (n 9) 126–29; Jy Fagan and E Ash, ‘New Policing, New Segregation: From Ferguson to New York’ (2017) 106 *Georgetown Law Journal Online* 33; MW Sances and H Young You, ‘Who Pays for Government? Descriptive Representation and Exploitative Revenue Sources’ (2017) 79 *The Journal of Politics* 1090.

⁴² D Fassin, *Enforcing Order: An Ethnography of Urban Policing* (Wiley, 2013).

⁴³ C Tilly, *Durable Inequality* (University of California Press, 1999); see also E Anderson, *The Imperative of Integration* (Princeton University Press, 2010).

privilege have strong financial incentives, even if they do not personally have racially biased beliefs or preferences, to self-isolate, for example, to avoid having to financially subsidise their poorer neighbours, and hence to achieve benefits like more well-resourced schools with lower taxes.⁴⁴ Similarly, our public discourse is replete with demands for aggressive policing in response to threats to property; for vivid recent examples, there were demands for aggressive police responses to the summer 2020 Black Lives Matter protests in response to property damage that some people claiming affiliation with such protests committed. Then-President Donald Trump even took to Twitter to threaten military action in response to property damage, declaring ‘when the looting starts, the shooting starts’.⁴⁵

This seems to me to represent our recurrent paradox of property rights: while property rights are the core of the American rule of law, they also motivate lawless behaviour in their defence (recall the Fugitive Slave Acts). Financial motivations drive those who experience racial privilege and economic advantage to protect their wealth by physical isolation – and by supporting harsh and capital-destroying police practices which they will not personally experience. By excluding those residents in segregated communities from the benefits of regional wealth – wealth which also permits a dominance of political life – the advantaged have the capacity both to structure the delivery of policing (and other public services) in ways that differ across geographic and municipal lines, and to generate the demand for harsh policing in places where they, themselves, are not directly affected. Hence, some have the capacity to make rules that apply to others but not to themselves – with the predictable oppressive consequences. Thanks to inequality, the argument of Federalist 57 failed in 1788, and it fails today.

From Policing to National Security

The supposedly domestic problem of policing is also not separate from the regime of national security to which I will turn in a moment. Scholars and journalists have traced the connections between the militarisation of the police and the tactics and tools deployed in international theatres of conflict, including, inter alia, via the movement of personnel between domestic policing and foreign military action; the transfer of equipment from military forces to police

⁴⁴ See generally N Burns, *The Formation of American Local Governments: Private Values in Public Institutions* (Oxford University Press, 1994); Atuahene (n 41). For a revealing case study of wealth and race segregation in Los Angeles, see L Redford, ‘The Intertwined History of Class and Race Segregation in Los Angeles’ (2017) 16 *Journal of Planning History* 305.

⁴⁵ DJ Trump, (Twitter, 28 May 2020) twitter.com/realDonaldTrump/status/1266231100780744704. This is no longer available on Twitter due to its suspension of Trump’s account, but is visible on the Internet Archive at web.archive.org/web/20210108042810/https://twitter.com/realDonaldTrump/status/1266231100780744704.

departments (such as the infamous 1033 program); and the development of technologies for international conflict that are then deployed domestically.⁴⁶

Thus, in considering the killing of Breonna Taylor for example, we must ask: how did it come about that it seemed normal or acceptable to some police officers to assault a private residence after midnight with a battering ram in order to execute a surprise search warrant for some drugs allegedly associated with a person that didn't even live there?⁴⁷ Such a shock-and-awe midnight raid for a minor crime sounds like the antics of a secret police in a dictatorship, the KGB or the Gestapo, not a liberal democracy.

There's a kind of grim irony to the killing of Ms Taylor in particular, for the already-violent police assault may have escalated into deadly gunplay because her boyfriend took America's claims to the rule of law too seriously. As far as can be determined as of this writing, when the midnight banging on the door began, her boyfriend appears to have assumed that the people trying to break in were criminals, and that he was entitled to defend her home by firing a shot at the burglars.⁴⁸ It was this shot which led the police to respond with the hail of bullets that killed Taylor.

Ms Taylor's boyfriend's assumptions weren't unreasonable in the context of a political and legal culture that purports to control executives and respect private property. Such assumptions could never have been made in the Soviet Union, where the right of the police to kick down doors and snatch people in the middle of the night was clearly established. But in the United States, that alleged paragon of the rule of law, a person's home is supposedly their castle and they're supposedly entitled to defend it; more to the point, they're also supposedly entitled to assume that the police do not carry out home invasions, and hence that they need not make their decisions about what to do – in response to the sudden sounds of an attacker while they are sleeping – in the shadow of the possibility that their own state may be treating their home like an urban combat zone. Unfortunately, due to the infiltration of the logic of international military action and national security into domestic policing, these classical rule of law assumptions appear to no longer be sustainable. And with that, we move to an examination of the rule of law in the national security context.

PRESIDENTIAL POWER IN THE NATIONAL SECURITY STATE

In 1861, the army arrested John Merryman of Maryland for attempting to impede the passage of federal troops. When served with a writ of *habeas*

⁴⁶ CJ Coyne and AR Hall, *Tyranny Comes Home: The Domestic Fate of U.S. Militarism* (Stanford University Press, 2018); Balko (n 30).

⁴⁷ 'Breonna Taylor: What Happened on the Night of Her Death?' (BBC News, 8 October 2020) www.bbc.com/news/world-us-canada-54210448.

⁴⁸ *ibid.*

corpus, the military refused to produce Merryman before the court. Instead, the general commanding the fortress in which Merryman was held declared that Lincoln had authorised him to suspend the writ.⁴⁹ Chief Justice Taney held Cadwalader in contempt and sent a marshal to enforce his order. The marshal was not admitted to the fortress.⁵⁰

Taney's outraged response wields the language of the rule of law in the severest tones:

The constitution provides, as I have before said, that 'no person shall be deprived of life, liberty or property, without due process of law.' It declares that 'the right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated; and no warrant shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.' It provides that the party accused shall be entitled to a speedy trial in a court of justice.

These great and fundamental laws, which congress itself could not suspend, have been disregarded and suspended, like the writ of habeas corpus, by a military order, supported by force of arms. Such is the case now before me, and I can only say that if the authority which the constitution has confided to the judiciary department and judicial officers, may thus, upon any pretext or under any circumstances, be usurped by the military power, at its discretion, the people of the United States are no longer living under a government of laws, but every citizen holds life, liberty and property at the will and pleasure of the army officer in whose military district he may happen to be found.⁵¹

A second controversy arose around Lincoln's use of military tribunals to try Confederate sympathisers. In 1863, Congress passed the Habeas Corpus Act, which lent its authority to the withdrawal of *habeas corpus*, but provided for indictment by grand jury or release for those arrested under its authority.⁵² In *Ex Parte Vallandigham*, the Court refused, on grounds of lack of jurisdiction, to hear the petition for release of a former Ohio Congressman who had advocated resistance against the Union.⁵³ After the crisis of immediate warfare had passed, however, the Court was evidently more comfortable handing the President – and the Reconstruction Congress – a defeat in this domain. In *Ex Parte Milligan*, the Court considered the case of an Indiana Democrat ordered arrested in 1864 by

⁴⁹ J Yoo, 'Merryman and Milligan (and McCardle)' (2009) 34 *Journal of Supreme Court History* 243, 247.

⁵⁰ There is some disagreement about the extent to which Cadwalader outright defied any binding court orders, as well as the extent to which any such defiance was directly authorised by Lincoln. S Barrett Tillman, 'Ex Parte Merryman: Myth, History and Scholarship' (2016) 224 *Military Law Review* 481; nonetheless, Taney certainly perceived it as defiance.

⁵¹ *Ex parte Merryman* 17 F Cas 144, 152 (1861).

⁵² JG Gambone, 'Ex Parte Milligan: The Restoration of Judicial Prestige?' (1970) 16 *Civil War History* 246, 251; Yoo (n 49).

⁵³ *Ex Parte Vallandigham* 68 US 243 (1863). For discussion, see Gambone (n 52) 251–52.

the governor of that state.⁵⁴ The Court ruled that military tribunals could not exercise jurisdiction over a noncombatant in a northern state.⁵⁵

The precedents set during the Civil War have continued to impact the powers of presidents in other military conflicts. In *Ex Parte Quirin*, the Supreme Court ruled that President Roosevelt had the power to try eight Nazi saboteurs, two of whom were American citizens, by military commission on the basis of a claim that such a procedure was authorised by Congress – and distinguished *Milligan* on the grounds that *Milligan* was a non-belligerent charged with an ordinary crime, which was not triable except by a jury.⁵⁶ *Quirin*, in turn, served as an important precedent in the series of cases surrounding the Bush Administration's use of military detention and military commissions in the 'War on Terror'.

Today, presidential power to directly use force on private persons without the trappings of law remains a highly contested domain for the rule of law. The most alarming contemporary example of unconstrained executive power in the national security and emergency domain is the practice of targeted killing. In recent years, the executive branch has claimed – and exercised – the authority to assassinate US citizens found abroad, on the basis of their alleged connections to terrorism, on the basis of a unilateral presidential command and without any process or scrutiny outside the executive branch whatsoever. On this basis, US citizens Anwar al-Awlaki, Samir Khan, and sixteen-year-old Abdulrahman al-Awlaki were killed by US drone strikes in Yemen.

The purported legal justification for these actions – as stated in an executive branch internal memorandum attached (in redacted form) to the Second Circuit's opinion in Freedom of Information Act litigation compelling its disclosure – supposes that when, in the unilateral judgment of high-ranking intelligence officials and/or the President, a person abroad 'pose[s] a 'continued and imminent threat of violence' or death to US persons ... and a capture operation would be infeasible', and if 'the CIA and DoD "continue to monitor whether changed circumstances would permit such an alternative"', then the President is not obliged to offer a person any legal process whatsoever or seek the imprimatur of any other branch of government before ordering an assassination.⁵⁷ Arguably, the reasoning in the memorandum also depends on the victim's being in a combat zone – but while it is hard to deny that the US military might shoot back at a US citizen firing on its forces on a battlefield, the memorandum, to the extent its reasoning can be discerned through the redactions, seems to focus more on the role of citizens like al-Awlaki's in planning

⁵⁴ *Ex Parte Milligan* 71 US 2 (1866). See Yoo (n 49) 252.

⁵⁵ For an extended discussion of military tribunals of the period, including the trial of Lincoln's assassin, see MS Lederman, 'The Law (?) Of the Lincoln Assassination' (2018) 118 *Columbia Law Review* 323.

⁵⁶ *Ex Parte Quirin* 317 US 1 (1942). For helpful background, see J Goldsmith and CR Sunstein, 'Military Tribunals and Legal Culture: What a Difference Sixty Years Makes' (2002) 19 *Constitutional Commentary* 261.

⁵⁷ *New York Times v Department of Justice* 756 F3d 100 (2nd Cir 2014).

attacks against the United States – not their presence in live firefights (and who gets to say what counts as a ‘combat zone’ or how large that zone is?).

Consider also the irregular imprisonment and military pseudo-trial of accused terrorists in sites outside the ordinary territory of the United States, such as the Guantanamo Bay military base in Cuba. The practice of using military commissions in the cases of accused terrorists has come before the courts numerous times, but an abbreviated version goes along the following lines.⁵⁸ In 2004, the Supreme Court held, in a split opinion in *Hamdi v Rumsfeld*, that an American citizen alleged to be part of the Taliban and held by the military in a naval brig in Charleston, South Carolina, was entitled to some opportunity to contest his imprisonment.⁵⁹ In 2006, the Court decided *Hamdan v Rumsfeld*, which ruled that trying a Yemeni citizen held at Guantanamo Bay by military commission was beyond the executive power.⁶⁰ The Court distinguished *Quirin* on the ground that *Quirin* considered a crime (violation of the laws of war) for which Congress and the Constitution authorised the use of military commissions.

In response, Congress enacted the Military Commissions Act, which stripped the courts of *habeas corpus* jurisdiction and specifically provided for trial of noncitizens accused of terrorism by military commissions with weak procedural protections, although it permitted them to appeal to the District of Columbia Circuit. The Supreme Court, in *Boumediene v Bush*, struck down the Military Commissions Act, in part, on the grounds that Congress had not ‘formally’ suspended the writ, but merely limited it, and when Congress limits the writ of *habeas corpus* it must provide some ‘adequate’ alternative procedures to permit a detainee to challenge his or her confinement. In particular, the Court objected to the facts that:

[T]he detainee has limited means to find or present evidence to challenge the Government’s case against him. He does not have the assistance of counsel and may not be aware of the most critical allegations that the Government relied upon to order his detention. The detainee can confront witnesses that testify during the CSRT proceedings. But given that there are in effect no limits on the admission of hearsay evidence – the only requirement is that the tribunal deem the evidence ‘relevant and helpful,’ the detainee’s opportunity to question witnesses is likely to be more theoretical than real.⁶¹

⁵⁸ For a fuller picture, see R Alford, *Permanent State of Emergency: Unchecked Executive Power and the Demise of the Rule of Law* (McGill University Press, 2017); CA Bradley and JL Goldsmith, ‘Obama’s AUMF Legacy’ (2016) 110 *American Journal of International Law* 628; P Blenz, ‘Hamad v. Gates and the Continuing Interpretation of Boumediene: A Note on 732 F.3d 990 (9th Cir. 2013)’ (2015) 35 *Journal of the National Association of Administrative Law Judiciary* 443.

⁵⁹ *Hamdi v Rumsfeld* 542 US 507 (2004).

⁶⁰ *Hamdan v Rumsfeld* 548 US 557 (2006).

⁶¹ *Boumediene v Bush* 553 US 723, 783–84 (2008) (internal citations omitted). This decision should be of particular interest to rule of law scholars, as its interpretation of the Military Commissions Act to not fully suspend the writ of *habeas corpus* is reminiscent of the classic common-law strategy of narrowly interpreting legislative enactments that threaten the rule of law, even when those

Yet despite this decision, irregular detention and trial by military commission has continued. And the lower courts do not appear to have taken *Boumediene* seriously; nor has the Supreme Court forced them to do so. Thus, the District of Columbia Circuit Court of Appeals held, in *Latif v Obama*, that district courts are required to presume that intelligence reports accurately recount the information provided to the government.⁶² The same court upheld a military commission conviction for conspiracy against the argument that conspiracy was a common law crime, not a crime under the laws of war triable by military commission.⁶³ In general, the DC Circuit has shown a distinct hostility to *habeas* petitions from detainees.⁶⁴ Accordingly, it is unclear how much real-world impact the Supreme Court's holding that there must be adequate procedures to permit detainees to challenge their incarceration has had.⁶⁵

To be sure, the military commissions aren't exactly producing a flood of convictions.⁶⁶ Yet there are still prisoners incarcerated at Guantanamo, for whom there are no options but military commission trial; it seems that the commissions are ineffective both to secure convictions and to secure releases – arguably, their primary real-world function is to provide a procedural gloss on the continuing lawless detention of prisoners at Guantanamo.

Efforts to subject the executive to legal control in the area of national security have also been stymied by self-inflicted limitations on the power of the courts. Most troubling is the existence of national-security-related limitations on private litigation even when egregious executive criminality is alleged. The federal courts have created a 'state secrets privilege' to bar litigation by the victims of truly extreme executive branch misconduct when that litigation would require the executive branch to reveal secret national security information, even *in camera* to a court. This privilege has been used, for example, to procure the dismissal of litigation by plaintiffs who allege that they were kidnapped by US intelligence agents and subjected to torture as part of the 'war on terror'.

Consider the Khaled El-Masri case.⁶⁷ El-Masri, a German citizen, alleged that he was kidnapped in Macedonia at the behest of the CIA, tortured, carried

enactments are concededly within the power of the legislature, in order to require that if the legislature seriously means to strip persons of fundamental rights, it must say so with absolute clarity. eg, D Dyzenhaus, *The Constitution of Law: Legality in a Time of Emergency* (Cambridge University Press, 2012) 102–17.

⁶² *Latif v Obama* 677 F3d 1175 (2012).

⁶³ *Al Bahlul v United States* 840 F3d 757 (2016).

⁶⁴ SI Vladeck, 'The D.C. Circuit After *Boumediene*' (2011) 41 *Seton Hall Law Review* 1451.

⁶⁵ J Hafetz, 'Calling the Government to Account: Habeas Corpus in the Aftermath of *Boumediene*' (2011) 57 *Wayne Law Review* 99.

⁶⁶ As of 2019, '[i]n 13 years under the Military Commissions Act regime, and 17 years total, the commissions have produced a grand total of eight convictions [and] [s]ix of those eight convictions were obtained via plea bargain'. SI Vladeck, 'It's Time to Admit That the Military Commissions Have Failed' (*Lawfare*, 16 April 2019) www.lawfareblog.com/its-time-admit-military-commissions-have-failed.

⁶⁷ Full disclosure: I was briefly a very minor member of the plaintiff's legal team in this case. R M Chesney, 'State Secrets and the Limits of National Security Litigation' (2007) 75 *George Washington Law Review* 1249, gives another description.

to Afghanistan and imprisoned for five months, and then dropped off on the side of the road in Albania, even though for a substantial part of the period of his imprisonment the CIA knew that he had no affiliation with any terrorist organisation. The District Court dismissed his lawsuit against his kidnappers on the strength of the government's assertion that litigating it would require the revelation of secret national security information. Upholding the dismissal, the Court of Appeals expressed a standard so generous to the executive that it poses the risk of completely shielding even bad-faith executive branch assertions of a state secrets privilege from any judicial scrutiny:

A court considering the Executive's assertion of the state secrets privilege, however, must take care not to force a disclosure of the very thing the privilege is designed to protect by demanding more information than is necessary. Frequently, the explanation of the department head who has lodged the formal privilege claim, provided in an affidavit or personal declaration, is sufficient to carry the Executive's burden. [...] Indeed, in certain circumstances a court may conclude that an explanation by the Executive of why a question cannot be answered would itself create an unacceptable danger of injurious disclosure. In such a situation, a court is obliged to accept the executive branch's claim of privilege without further demand.⁶⁸

The combination of the state secrets privilege and the broad authority claimed by the executive to use military force against American citizens arguably amounts to a kind of national security impunity for agencies such as the CIA and the Pentagon. It is difficult indeed to imagine any argument capable of reconciling such powers to a serious conception of the rule of law. Rather, it seems to be a direct instantiation of a Schmittian state of exception, in which the executive can put on the crown of the Sovereign and declare the law not to apply.

The Schmittian Dilemma

Running through the problem of executive power is what we might call the 'Schmittian dilemma' – executive authority is particularly well-suited to addressing exceptional, emergent situations unanticipated in detail by existing law; but the delegation of emergency powers in that law to address it is inherently impossible or at least highly difficult to control, and hence subject to immense potential abuses unless surrounded by extremely strong political rather than legal controls.⁶⁹

It should not be surprising that the domain of warfare and national security has been the source of some of the most shocking stories of American

⁶⁸ *El-Masri v United States* 479 F3d 296, 305-06 (4th Cir 2007) (internal quotes and citations omitted).

⁶⁹ EA Posner and A Vermeule, *The Executive Unbound: After the Madisonian Republic* (Oxford University Press, 2010).

lawlessness, for war has been the perennial source of emergencies and the scourge of efforts to control executives throughout political history. It has, alas, been universally accepted that military leadership by committee doesn't work; but it has also been universally recognised that handing over all the troops to one person poses dire risks of abuse. Sometimes this danger has manifested itself in the old-fashioned coup, as when Caesar crossed the Rubicon. Madison's famous fears of a standing army seem to have been directed at this end, as in his argument, in Federalist 46, about the capacity of the states and the public to fend off a hypothetical federal 'military force for the projects of ambition'.

Often the danger has been more subtle and complex. For example, the exigencies of military affairs have frequently led to a demand for money to support warfare which other elements in the government or society at large refuse; this was a particularly important aspect of the conflict between Crown and Parliament in the seventeenth century which precipitated lawless executive power grabs like ship money and forced loans as an alternative to receiving funds from Parliament – and which in turn contributed to the conflict that led to Charles I losing his head, and informed the American framers' conceptions of what limited government should look like. The framing generation also had some direct experience in the area (albeit associated with Parliament as well as Crown), insofar as the taxes imposed on the colonies which set the whole revolution off had been occasioned by the need to pay for the Seven Years War. Likewise, some of the more egregious acts of colonial lawlessness (in particular the use of the vice-admiralty court – see chapter two) were in turn occasioned by the need to collect the taxes.

The Schmittian dilemma in its fundraising aspect is also clearly visible in Donald Trump's claim of authority to build a southern border wall based on an emergency statute allowing the diversion of funds appropriated for other purposes. But presidential emergency powers are much broader. The Brennan Center for Justice attempted to collect a comprehensive list of presidential emergency powers, and found 123 distinct statutory powers that may be exercised on the basis of a unilateral presidential declaration of emergency.⁷⁰ And while some of those powers are modest, others are extensive or even terrifying. The most nightmare-inducing example the Brennan Center delicately describes as the power to 'suspend the operation of provisions regulating the storage, transportation, disposal, procurement, handling, and testing of chemical and biological weapons, including the prohibition on testing such weapons on human subjects'. Would even the most fevered conspiracy theorists imagine that there is a law allowing the President to test secret superbugs on people?

⁷⁰Brennan Center for Justice, 'A Guide to Emergency Powers and Their Use' (*Brennan Center for Justice*, 2019) www.brennancenter.org/sites/default/files/2019-10/2019_10_15_EmergencyPowersFULL.pdf.

Hafetz has plausibly suggested that national security law is functionally distinct from ordinary law in a way that undermines traditional rule of law values.⁷¹ It lacks the traditional concern with facilitating public obedience – for national security law doesn't directly command the public – and thus does not provide courts with the incentive, present in more traditional cases, to progressively develop and clarify the law through ongoing adjudication. Instead, the courts are motivated to preserve executive flexibility in dealing with complex and evolving situations – that Schmittian emergency. This naturally leads to the softening of controls on executive power by the development and expansion of vague standards governing executive authority.

Yet emergency powers are a feature of all states, and the numerous gubernatorial emergency public health orders in response to the COVID-19 catastrophe have most recently revealed why they are necessary. Ultimately, the Schmittian dilemma of the executive – how to make it possible to respond to genuine emergencies without creating a dictator – will be present in every country, and it is manifestly present in the United States.

But we must also consider that Schmitt was not merely a theorist of executive power and emergencies, but also a theorist of sovereignty and of the infamous boundary between friends and enemies. For Schmitt, emergency executive power (the 'state of exception') was the core characteristic of sovereignty, and the exercise of this power in turn presupposes the capacity of a sovereign actor to claim authority on the basis of a bounded people defined against some other people.⁷²

In the United States, these bounds have all too often been drawn on the basis of racialised ethno-national categories. Thus, we saw the ethno-racial legacy of the deprivation of Japanese immigrants of their property via alien land laws converted in World War II into the outright removal of Japanese-American US citizens from their homes as 'internment'. The notorious *Korematsu* case, which upheld the removal of Japanese-Americans from their homes, relied in turn on *Hirabayashi v United States*, upholding a curfew for Japanese-Americans, which explicitly appealed to a racialised allegation of existing ties between those citizens and Japan: 'There is support for the view that social, economic and political conditions which have prevailed since the close of the last century, when the Japanese began to come to this country in substantial numbers, have intensified their solidarity and have in large measure prevented their assimilation as an integral part of the white population.'⁷³

⁷¹ J Hafetz, 'A Problem of Standards? Another Perspective on Secret Law' (2016) 57 *William and Mary Law Review* 2141.

⁷² If you believe Agamben, the modern administrative state, that other great executive *bête noire* of rule of law advocates, was also a product of wartime states of emergency, at least in the European tradition of which US law also partakes. G Agamben, *State of Exception* (University of Chicago Press, 2005), 12–13, 20–22.

⁷³ *Hirabayashi v United States* 320 US 81, 96 (1943); see also *Korematsu v United States*, 323 US 214 (1944).

Ironically, the Court in the same breath noted that America's own legal discrimination against Japanese-Americans may have contributed to this perceived disloyalty as failure to assimilate:

As a result of all these conditions affecting the life of the Japanese, both aliens and citizens, in the Pacific Coast area, there has been relatively little social intercourse between them and the white population. The restrictions, both practical and legal, affecting the privileges and opportunities afforded to persons of Japanese extraction residing in the United States have been sources of irritation, and may well have tended to increase their isolation, and in many instances their attachments to Japan and its institutions.⁷⁴

In a footnote, the Court lists discrimination in immigration laws, in naturalisation laws, in 'the privilege of owning land', and in laws regulating marriage. In other words: the *Hirabayashi-Korematsu* line of cases again illustrates the point I first noted in chapter two with respect to the Fugitive Slave Acts: legal caste tends to metastasize. Having relegated them to a subordinate legal status, the whites who dominated the United States government decided that it could not trust the loyalty of its Japanese-American citizens because they would resent their treatment. Thus, under pressure of external threat, the United States saw itself as having no real choice but to chase them out of their homes.

From *Korematsu*, we naturally turn to immigration and citizenship law. For it is in that conjoined area of law that the Schmittian identity of the people becomes most salient, for it is there that who counts as a member is defined today – and the delineation between who counts and who does not count becomes one between who is subject to arbitrary power as a presumptive enemy and who is entitled to legal process, to being addressed with reasons before being subject to government coercion as opposed to being simply subject to the raw force of the sovereign. Immigration is where the literal and the figurative borders of the American rule of law meet, and where *Korematsu* meets Chinese Exclusion in contemporary arbitrary executive power.⁷⁵

⁷⁴ibid 98.

⁷⁵RS Chang, 'Whitewashing Precedent: From the Chinese Exclusion Case to *Korematsu* to the Muslim Travel Ban Cases' (2018) 68 *Case Western Reserve Law Review* 1183.