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Conclusion: Is there Any Hope for an American Rule of Law?

A DECADE AGO, Stephen Holmes predicted that no high Bush Administration officials would ever be prosecuted for committing the crime of torture, despite presiding over the following conduct:

Detainees in U.S. custody were stripped naked, exposed to hypothermia, hung by their arms till their shoulders became dislocated, threatened with ferocious dogs, and placed in the cramped confinement of boxes for hours. Their heads were smashed against walls, and they were threatened with guns to the neck and with the revving of an electrical drill. Some were told that their children would be killed and their mothers raped.¹

Holmes confidently – and accurately, at least thus far – predicted that those at the highest levels of our government would enjoy impunity for such events (although some low-level soldiers did get convicted) for the simple reason that legal rules tend to be enforced against the powerless rather than the powerful. Holmes also gave an account of the government’s special ability to deploy impunity. For example, it could manipulate good faith immunity doctrines by writing memos (as lawyers say, ‘papering the file’) filled with frivolous legal arguments for the permissibility of torture – memos on which executive branch officials could thereafter ‘reasonably’ rely. This contingency of the enforceability as well as interpretation of law on relations of hierarchy and power is, of course, well known, but when it goes to an extreme we end up with a state in which legal order itself is nothing more than a cynical pretence. Is the United States at that extremity?

To conclude this volume, I raise that critical question and explore its implications externally and then internally.

THE WASHINGTON CONSENSUS: HERE COMES PROPERTY AGAIN

The deep connection between the American rule of law and the notion of property rights that existed at the founding reappears in its international development efforts. For many years, an ideology commonly known as

¹ S Holmes, ‘The Spider’s Web: How Government Lawbreakers Routinely Elude the Law’ in A Sarat and N Hussain (eds), *When Governments Break the Law: The Rule of Law and the Prosecution of the Bush Administration* (New York University Press, 2010) 127.

‘the Washington consensus’ – associated, as the name obviously suggests, primarily with the United States – dominated international development efforts. That ideology focused on capitalist market reforms, and once again joined the rule of law with extensive private property rights.² The idea, broadly speaking, is that the rule of law is particularly useful for the enforcement of property rights as well as contracts, which in turn are useful for economic development insofar as they create a safer environment for capital investment. In accordance with that idea, the United States has taken an active leadership role in promoting the development of the rule of law abroad through both government organisations such as USAID, and through NGOs supporting those efforts.

US rule of law (and democracy) promotion has been criticised for representing a form of neo-colonialism in which the export of US institutions and ideas serves as a cover for political and economic domination.³ Strikingly, however, America’s first foray into rule of law development was an instance of *actual* colonialism, and was carried out internally: I refer to the Indian Reorganization Act of 1934, based at least in part on a ‘vacuum’ theory according to which at least some of the Native American nations lacked effective self-government (although the details are contested) and hence were pressured to adopt constitutions under the tutelage of the Bureau of Indian Affairs.⁴ At least one contemporary participant interviewed for an edited volume on Native American constitutional reform believed that Native nations are engaging in constitutional reform for the same reason that countries submit to Washington Consensus-style development efforts: to provide reassurances to external investors.⁵ So American rule of law

²For general discussion, see I Glinavos, ‘Neoliberal Law: Unintended Consequences of Market-Friendly Law Reforms’ (2008) 29 *Third World Quarterly* 1087. According to a World Bank report, the Washington Consensus, while originating at a meeting in Washington in 1990, was actually led by Latin-American and Caribbean policymakers. S Javed Burki and G Perry, *Beyond the Washington Consensus: Institutions Matter* (World Bank, 1998) 1, however, when the term was coined in J Williamson, ‘What Washington Means by Policy Reform’ in J Williamson (ed), *Latin American Adjustment: How Much Has Happened?* (Institute for International Economics, 1990), it was specifically associated with Washington qua the United States as well. It’s also worth noting that the boundaries of the ‘Washington consensus’ are a bit fuzzy, and certainly not bounded by Williamson’s original article – I shall use it to also incorporate the institution-based reforms described by Burki and Perry (above), even though they themselves distinguish those reforms from the Washington consensus proper. The term ‘neoliberal’ is also frequently used in this context, but I shall avoid it here, for it has lately seemed to serve as a kind of general derogatory description of capitalism among left-wing scholars and commentators; it’s not clear what the specific content of ‘neoliberalism’ as such might be. For a helpful discussion of all of this terminological muddle, see B Fine and A Saad-Filho, ‘Politics of Neoliberal Development: Washington Consensus and the Post-Washington Consensus’ in H Weber (ed), *The Politics of Development: A Survey*, 1st edn (Routledge, 2014).

³eg U Mattei and L Nader, *Plunder: When the Rule of Law Is Illegal* (Blackwell Publishing, 2008).

⁴E Rusco, ‘The Indian Reorganization Act and Indian Self-Government’ in ED Lemont (ed), *American Indian Constitutional Reform and the Rebuilding of Native Nations*, 1st edn (University of Texas Press, 2006) 50.

⁵J Peters Jr, ‘Firsthand Account’ in ED Lemont (ed), *American Indian Constitutional Reform and the Rebuilding of Native Nations*, 1st edn (University of Texas Press, 2006).

export, and the challenge to that effort as a form of colonialism, is some decades older than most of us think.

The ‘vacuum’ theory resembles Teemu Ruskola’s concept of ‘legal orientalism’, according to which western observers engaging in motivated reasoning falsely come to the belief that China lacks law.⁶ The US also conducted a weird form of quasi-export of the rule of law in China. Because the United States didn’t believe that China had real law, it negotiated the 1844 Treaty of Wanghia, under which US citizens in China were only subject to trial by US officials.⁷ From 1906, there was even a US District Court located in China for the sole purpose of adjudicating cases involving Americans. The same sort of colonial distrust characterises current US legal attitudes with respect to Native American governments, who are not allowed to exercise criminal jurisdiction over non-Native Americans on the reservation.⁸

Not all of America’s rule of law development efforts are shamelessly colonial. Some might genuinely facilitate the self-governance of those who might otherwise be subjected to violence or oppression. I have previously cited, as admirable examples, programmes in Liberia and Afghanistan that appear to genuinely treat local leaders and the so-called ‘informal’ norms under which they operate with respect and aim to empower those leaders to protect the legal interests of community members.⁹

But even well-intentioned and otherwise-effective efforts may be undermined by lawlessness at home. If America fails to present itself to outsiders as a genuine rule of law state, the credibility of its external rule of law promotion efforts may be undermined. This is a familiar worry about American credibility with some historical importance: the international imperatives of the Cold War were an important element in the US’s efforts to remedy the vestiges of Jim Crow, in part because its efforts to promote its ideology abroad were undermined by the visibly hypocritical implementation of that ideology at home.¹⁰ The US could not seriously be seen as a credible promoter of freedom and democracy when it denied freedom and democracy to Black Americans; its racial injustice provided propaganda victories for the Soviets, and Black Americans appealed to the international community in order to pressure the US to deliver some simulacrum of justice.

The credibility challenge the US faces today is exacerbated by the fact that the most outward-facing aspect of its legal system is also its most lawless – I refer, of course, to the immigration system described in the previous chapter,

⁶ T Ruskola, *Legal Orientalism: China, the United States, and Modern Law* (Harvard University Press, 2013).

⁷ T Ruskola, ‘Colonialism Without Colonies: On the Extraterritorial Jurisprudence of the U.S. Court for China’ (2008) 71 *Law and Contemporary Problems* 217, 220.

⁸ *Oliphant v Suquamish Indian Tribe* 435 US 191 (1978).

⁹ P Gowder, *The Rule of Law in the Real World* (Cambridge University Press, 2016) 174–75.

¹⁰ ML Dudziak, *Cold War Civil Rights: Race and the Image of American Democracy* (Princeton University Press, 2011).

which makes a mockery of America's claims to embody the rule of law. Can the United States truly be a credible promoter of the rule of law in war-torn and impoverished countries when refugees from those countries, presenting themselves at our shores, are subject to lengthy detention in harsh conditions culminating in a kangaroo-court process and then promptly flown back to those countries with that negative experience fresh in their minds? Ryo argues that 'immigrant detainees [and immigrants in general], as individuals embedded in domestic and transnational networks, have the potentially to widely disseminate deference and trust, or alternatively cynicism and delegitimizing beliefs, about the US legal system and authorities – not only within the United States but around the world'.¹¹ And, as Ryo describes, the current message that America's immigration system is communicating to the world is decidedly negative.

America has long held out in its legal system as a model for the world. In the early stages of the writing of this manuscript, I returned to Ronald Cass's almost-two-decades ago treatment of the American rule of law.¹² Toward the beginning of that book, the reader is treated to a story of Ronald Reagan's meeting with Mikhail Gorbachev and proudly boasting of America's tradition of free criticism of our leaders. In Cass's retelling of the story, 'Reagan observed that anyone in the United States could stand directly in front of the White House, the very seat of government power, and criticise the American president and his policies, in the harshest terms imaginable, without fear of punishment'.¹³ For Cass, it was clear both that Reagan's pride in American political freedom was justified, and that it arose from the rule of law and its function of establishing a well-defined and predictable set of individual liberties:

In fact, protestors outside the White House can know well before they get to Lafayette Park the general contours of (very substantial) constitutional constraints on the president's power to punish critics. Freedom to criticize the president is not a function of judges' and law enforcers' hostility to the president or their sympathy for the critics but of accepted free speech doctrine. All of the following were safe bets: police officers who idolized Ronald Reagan would not arrest critics condemning him in the vilest terms; if arrests were made, prosecutors whose sympathies were strongly with Reagan would not take such cases to court; and if the cases got to court, judges, including those who owed their appointment to Reagan, would not allow his critics to be punished.¹⁴

Stories about Russians gazing at our legal system with childlike admiration seem to have been a staple of the period. A few years later, Chief Justice John Roberts began his 2007 year-end report on the judiciary with a story about a Russian Supreme Court Justice who went to Arlington National Cemetery to lay

¹¹ E Ryo, 'Fostering Legal Cynicism through Immigration Detention' (2017] *Southern California Law Review* 999, 1002.

¹² RA Cass, *The Rule of Law in America* (Johns Hopkins University Press, 2003).

¹³ *ibid* 27.

¹⁴ *ibid* 28.

a wreath on Chief Justice Rehnquist's grave.¹⁵ Roberts recounts how Rehnquist had inspired that Russian jurist to drive reforms in his home country, and went on to trumpet the idea that the American judiciary is a model for the world:

Few could have imagined these episodes a mere 25 years ago. Justice Sidorenko's words are poignant, but his actions in seeking to reform the Russian judiciary reflect a more fundamental truth that should resonate with all Americans: When foreign nations discard despotism and undertake to reform their judicial systems, they look to the United States Judiciary as the model for securing the rule of law.

In recent years, even mature democracies with established traditions have modified their judicial systems to incorporate American principles and practices. For example, Great Britain, which exported its common law system to the American colonies some 400 years ago, has recently imported the distinctly American concept of separation of powers. It has transferred the House of Lords' judicial review functions to an independent Supreme Court. Japan has adopted trial procedures inspired by American jury practice, while South Korea is increasingly employing American-style oral advocacy in its judicial review proceedings. But perhaps most important, our federal courts provide the benchmark for emerging democracies that seek to structure their judicial systems to protect basic rights that Americans have long enjoyed as the norm.

I re-read Cass's words on 13 June 2020. Two weeks previously, President Donald Trump had shut Lafayette Park down in order to spare himself the sight of people condemning his response to the protestors who had for weeks been convulsing America's cities in response to the police murder of George Floyd.¹⁶

On 1 June, Trump decided he wanted to take a photo opportunity at a church which had been damaged in the unrest. But there were protestors in Lafayette Square who would have inconvenienced his photo op. So Attorney General William Barr ordered them attacked.¹⁷

In the words of the *New York Times*:

What ensued was a burst of violence unlike any seen in the shadow of the White House in generations. As he prepared for his surprise march to the church, Mr. Trump first went before cameras in the Rose Garden to declare himself 'your president of law and order' but also 'an ally of all peaceful protesters,' even as peaceful protesters just a block away and clergy members on the church patio were routed by smoke and flash

¹⁵ The year end report is available at www.supremecourt.gov/publicinfo/year-end/2007year-endreport.pdf.

¹⁶ M Lefrak, 'The White House And Lafayette Park Went From "Public Square" To "Veritable Fortress"' (NPR, 5 June 2020) www.npr.org/local/305/2020/06/05/870877297/the-white-house-and-lafayette-park-went-from-public-square-to-veritable-fortress.

¹⁷ D Gregorian, C Kube and CE Lee, 'Trump Says He Will Deploy Military If State Officials Can't Contain Protest Violence' (NBC News, 1 June 2020) www.nbcnews.com/politics/white-house/trump-considering-move-invoke-insurrection-act-n1221326; T Gjeltén, 'Peaceful Protesters Tear-Gassed To Clear Way For Trump Church Photo-Op' (NPR, 1 June 2020) www.npr.org/2020/06/01/867532070/trumps-unannounced-church-visit-angers-church-officials; L King, 'Secret Service Admits It Used Pepper Spray to Clear Protesters Prior to Trump Photo Op at St. John's Church' (USA Today, 13 June 2020) www.usatoday.com/story/news/politics/2020/06/13/floyd-protests-secret-service-used-pepper-spray-trump-photo-op/3184223001.

grenades and some form of chemical spray deployed by shield-bearing riot officers and mounted police.¹⁸

Alas for Cass's happy confidence in the refusal of officials to illegally suppress the individual rights protected by the Constitution, there's no evidence that anyone in the legions of police agencies who gassed protesters refused to obey orders. Let's hope the Russians aren't still taking notes.

THE CRISIS OF THE AMERICAN RULE OF LAW:
REFLECTIONS ON DONALD TRUMP

The problems with America's existing rule of law run deep. Institutionally, we seem to lack the tools necessarily to effectively control the abuse of power; culturally, a combination of polarisation and mutual distrust rooted in inequality may make it impossible for the American people to use the tools they have.

On the institutional side, one easy claim to make is that executive officials just have too much power. Prosecutors can essentially dictate convictions via plea bargain without the benefit of jury due to the threat of life-ruining sentences if a defendant dares roll the dice on a trial; the Attorney General can command the outcomes of immigration cases; the President can declare a bogus state of emergency and build a wall without congressional appropriation. These are concrete institutional powers written into law; we can write them back out again.

Yet at the same time, American government is also too weak. The President can do malicious harm to individuals or hated groups within the polity but cannot convince Congress and the states to make policy. As Howell and Moe cogently argue, people turn to populist demagogues when their governments are ineffective at responding to their (real or perceived) problems.¹⁹ But American government is notoriously ineffective. The federal government is unable – in contrast to the rest of the world's liberal democracies – to finance health care without bankrupting citizens when they get sick. The states and localities are perennially broke – and that governmental penury provokes more rule of law catastrophes, as they abuse their tax and criminal justice systems to expropriate their citizens.²⁰ Moreover, this penury is radically unevenly distributed, leading to human rights catastrophes like the poisoning of the water supply in Flint, Michigan. Our transit infrastructure is crumbling. Anyone with the money to get their children out of our public schools does so at the earliest opportunity. No surprise that the people have started looking for someone to make the trains run on time.

¹⁸ P Baker, M Haberman, K Rogers, Z Kanno-Youngs and K Benner, 'How Trump's Idea for a Photo Op Led to Havoc in a Park' (*New York Times*, 2 June 2020) (updated 17 September 2020) www.nytimes.com/2020/06/02/us/politics/trump-walk-lafayette-square.html.

¹⁹ WG Howell and TM Moe, *Presidents, Populism, and the Crisis of Democracy* (University of Chicago Press, 2020).

²⁰ B Atuahene, 'Predatory Cities' (2020) 108 *California Law Review* 107.

Culturally, one of the consequences of this weakness has been shocking inequality, both economic and legal. I say that this inequality is a consequence as well as a cause of the underlying governmental weakness because the United States, unlike most other developed countries, has been incapable of creating a sufficient social safety net to prevent its worst-off from experiencing extreme suffering – as the unique phenomenon of widespread medical bankruptcies again dramatically illustrates.²¹ Another important example is the inability even of progressive politicians such as numerous centre-left mayors of major cities to break the power of police unions and control racially disparate police violence. As I have argued elsewhere, this inequality is likely, especially in conjunction with the elite polarisation that we see in America's current political environment, to make it impossible for ordinary citizens to act collectively to backstop their institutions and hold their officials to compliance with the law.²² At the same time, inequality also undermines institutional reform and exacerbates the problem of misgovernance. Racial inequality and white resentment about enacting policies from which non-whites might benefit is doubtless part of the reason the US has not been able to build a functioning social safety net.

Such inequality is also at the heart of the rule of law crisis in America, for its cruellest manifestations – racially disparate criminal justice and immigration law – rest on a system of racial and economic caste. Only in a caste system are poor Black and Brown Americans geographically segregated from richer Americans of more privileged races and vulnerable to the development of distinctive strategies of policing bound to stigmatised neighbourhoods. And only as the continuing global side of such a system (originating, as it did, in colonialism and empire) are entire countries of Black and Brown human beings subject to a kind of economic segregation in which capital, pursuant to the Washington Consensus, is entitled to freely cross borders to seek out the cheapest labour at will, while labour is locked in place, and when the actual human beings try to cross borders to go to the rich country, they are subjected to an immigration regime that is barely a parody of a legal process.

Even property itself, qua core of the American rule of law, turns against the poor as public and private power combine in arbitrary regulation-by-landlord. Consider what are known as 'nuisance property' or 'chronic nuisance' ordinances. Under those ordinances, landlords are obliged on pain of penalty to 'abate' the nuisances caused by properties that generate, for example, too many police calls. Advocates for victims of domestic violence have been particularly vocal about the harms these laws can inflict by punishing crime victims for the misconduct of their victimisers, and have highlighted scandals, such as the infamous case of Lakisha Briggs, who was evicted by her landlord under pressure

²¹ DU Himmelstein et al, 'Illness and Injury as Contributors to Bankruptcy' (2005) 24 *Health Affairs* W5.

²² P Gowder, 'The Dangers to the American Rule of Law Will Outlast the Next Election' (2020) 2020 *Cardozo Law Review de novo* 126.

from the police when a neighbour called 911 to report that she had been stabbed by her abusive boyfriend.²³ Public housing tenants have also been evicted for the crimes of their relatives.²⁴ These cases represent an analytically striking inversion of the traditional role of property in the American rule of law – rather than being a basis for the protection of a person's legal rights, property law becomes the back door through which criminal sanctions are inflicted on individuals whom the state could not lawfully punish via ordinary law. Not only is the jury evaded – so is the judge and even the prosecutor, as police authorities go through landlords to achieve ends unfathomable to ordinary criminal law.

The Danger of Legal Alienation

On every side, the promises of the American rule of law seem to be illusory. In segregated communities, the police act like an occupying military force. For the most vulnerable in the United States, interactions with government bureaucracies are filled with Kafkaesque menace. Public and private power merge as the state uses landlords as a law enforcement tool, while companies may freely rewrite the law and deprive individuals of their ordinary legal entitlements through legal doctrines that permit, for example, the use of putative contracts entered without any real assent to strip away individuals' rights to a judicial remedy for civil wrongs, or the use of captured federal agencies to preempt individuals' ordinary common-law remedies in tort and contract.²⁵

Yet, at the same time, it is unquestionably true that the United States, driven in large part though not exclusively by Black liberation movements, has made substantial strides over its history toward a genuine achievement of its rule of law ideals. Lynching is not an ordinary part of Southern racialised criminal justice any more. The Supreme Court has, since 1963, forced the states to fund lawyers for criminal defendants who cannot pay for their own, although the effective delivery of that promise of access to law has been undermined both by the plea-bargaining power of prosecutors and the egregious underfunding of many public defence systems.²⁶ And while the insecurity of property rights through mechanisms like civil asset forfeiture is a serious problem, it's nothing

²³ K Moran-McCabe, A Gutman and S Burris, 'Public Health Implications of Housing Laws: Nuisance Evictions' (2018) 133 *Public Health Reports* 606; G Arnold and M Slusser, 'Silencing Women's Voices: Nuisance Property Laws and Battered Women' (2015) 40 *Law & Social Inquiry* 908; M Desmond and N Valdez, 'Unpolicing the Urban Poor: Consequences of Third-Party Policing for Inner-City Women' (2013) 78 *American Sociological Review* 117.

²⁴ R Austin, 'Step on a Crack, Break Your Mother's Back: Poor Moms, Myths of Authority, and Drug-Related Evictions from Public Housing' (2002) 14 *Yale Journal of Law and Feminism* 273.

²⁵ See generally, MJ Radin, *Boilerplate* (Princeton University Press, 2012)); *AT&T Mobility v Concepcion* 563 US 333 (2011); *Northwest Inc v Ginsberg* 572 US 273 (2014).

²⁶ *Gideon v Wainwright* 372 US 335 (1963); B Mock, 'New Orleans to Poor Criminal Defendants: We Can't Defend You' (*The Atlantic*, January 2016) www.theatlantic.com/politics/archive/2016/01/new-orleans-to-poor-criminal-defendants-we-cant-defend-you/458856/.

like Jim Crow. Criminal defence lawyers do manage to win their trials and have their clients set free (and public defenders tend to be among the most skilled, notwithstanding their egregious overwork). The infliction of quasi-peonage on undocumented migrant labourers is a crime, and when employers are caught doing it, they are at least sometimes punished. Men are no longer entitled to inflict private ‘discipline’ on their wives, and although efforts to use the criminal justice system to remedy gender-based private domination have backfired, at least the state is trying.²⁷ As I have detailed at length in this book, the United States has a long way to go. But it has also come a long way.

A key problem, it seems to me, is that this progress doesn’t manifest itself in the ways that ordinary people interact with the law on a day-to-day basis. A lot of people, especially those people who happen to be not white, still have strong reason to fear the police when they encounter them on the street, reason that has nothing to do with whether they’ve committed any kind of crime. I experience this fear myself: when I pass a police officer walking down the streets of Chicago, I always find myself feeling a kind of mental compulsion to attempt to make eye contact with them and nod in a friendly fashion, to communicate (falsely) that I’m not afraid to see them, that I have nothing to hide – and hence that I am not a ‘suspicious’ person who should be stopped, harassed, and perhaps arrested. And this is so even though I’m a law professor at an elite university who lives in one of the richest neighbourhoods in the city – after all, my being a lawyer didn’t stop the New Orleans police officer who falsely arrested me in 2003 on a made-up marijuana charge after pulling me over for a broken taillight. I’m also more than a little bit afraid that the Border Patrol will retaliate against me for the contents of the previous chapter the next time I return to the US from abroad. But others – poorer, lacking law degrees or even citizenship – have much more reason to fear.

For the relatively well-off, the law’s intrusions in our lives also seem to come predominantly in a series of endless petty public and private oppressions. Everything we do on a day-to-day basis is structured by a contract imposed on us by some corporation without any real alternatives – you or I undoubtedly enter into hundreds of contracts per day, so pervasively that some scholars have worried that it might be training us out of the habit of autonomous decision-making.²⁸ When we have to deal with the government, it presents itself to us in the form of some hostile and arbitrary-seeming bureaucratic hassle: we have

²⁷ On the backfire, see A Gruber, ‘A Neo-Feminist Assessment of Rape and Domestic Violence Law Reform’ (2012) 15 *Journal of Gender, Race & Justice* 583; L Goodmark, ‘Reimagining VAWA: Why Criminalization Is a Failed Policy and What a Non-Carceral VAWA Could Look Like’ (2020) 27 *Violence Against Women* 84. On reasons to think that protecting the victims of gender-based private violence is an important rule of law goal, see R West, ‘Paul Gowder’s Rule of Law’ (2018) 62 *Saint Louis University Law Journal* 303, 309–11; P Gowder, ‘Resisting the Rule of Men’ (2018) 62 *Saint Louis University Law Journal* 333, 352–56).

²⁸ BM Frischmann and E Selinger, *Re-Engineering Humanity* (Cambridge University Press, 2018) ch 5.

to hire accountants to do our taxes, because Turbo Tax has hired lobbyists to make sure that the government doesn't dare simplify the process; we have to take a day off work to be glared at in a motor vehicle office to renew our drivers' licences. And when someone has wronged us – when, for example, the student loan servicer has screwed up our payments – we're forced to appear before yet another agonising and inaccessible bureaucracy as supplicants to have the wrong corrected, because our civil legal system is so expensive that there's no realistic path to calling upon the law to enforce even the rights of the wealthy in the absence of a truly dire injury.

For the poor, those same bureaucratic hassles are deadly traps: taking a day off work to go to the DMV could mean losing the job; the failure to pay a ridiculous 'occupancy permit' tax in Ferguson, Missouri, could mean going to jail, and then losing the driver's licence altogether because of the inability to pay the court fees on top of the occupancy permit, and then going to jail again for driving without a licence to get to work, and so on and so on, in an endless course of bureaucratically mediated criminal justice financial vampirism.²⁹ Because of the outrageous misallocation of law enforcement resources, while people with law professor incomes are the ones who can hire accountants to do their taxes, people with McDonald's incomes are vastly more likely to be the target of a tax audit that they lack the resources to defend.³⁰ The poor may also find themselves in things that call themselves courts, but which really operate assembly-line systems with little legal process used to punish or extract resources from them, like municipal criminal courts or eviction courts.³¹

For those reasons, it seems to me that a key source of the threat of degeneration rather than progress in American legality takes the form of what I will call 'legal alienation.' When the daily face of the law presents itself to ordinary, not-rich, people as nothing more than unilateral exercises of power – governments and companies shoving pieces of paper in their faces with magic incantations that take away whatever legal rights they happen to have – how do we expect ordinary people to maintain a minimum degree of respect for the legal system?³² The rule of law depends on mass collective action to hold officials to the law.³³ But when the only experience ordinary people have with the legal system is that they have no rights, they cannot expect fair treatment from any government

²⁹ On occupancy permits, see my previous discussion in Gowder (n 9) 246–47.

³⁰ 'In 2017, [Earned Income Tax Credit – a credit for the working poor] recipients were audited at twice the rate of taxpayers with income between \$200,000 and \$500,000.' P Kiel and J Eisinger, 'Who's More Likely to Be Audited: A Person Making \$20,000 – or \$400,000?' (*ProPublica*, 12 December 2018) www.propublica.org/article/earned-income-tax-credit-irs-audit-working-poor?token=Tu5C70R2pCBv8Yj33AkMh2E-mHz3d6iu.

³¹ M Desmond, *Evicted: Poverty and Profit in the American City*, 1st edn (Crown Publishers, 2016) 304; A Natapoff, 'Criminal Municipal Courts' (2021) 134 *Harvard Law Review* 964.

³² Compare the worlds portrayed in TR Tyler, *Why People Obey the Law* (Yale University Press, 1990); and D Graeber, *The Utopia of Rules: On Technology, Stupidity, and the Secret Joys of Bureaucracy* (Melville House, 2016).

³³ Gowder (n 9) chs 6, 8.

agency or private company, they will be held to the letter of every single form shoved in front of their faces but the government and companies are under no obligations whatsoever, why would we ever expect them to come to the defence of the legal system when, for example, that legal system declares that a politician whom they support is breaking the law?

I think we have seen the consequences of legal alienation in the political domain. In the 2016 presidential debates, when Hillary Clinton criticised Donald Trump for avoiding income taxes, his response was ‘that makes me smart’.³⁴ And millions of voters apparently thought that was a perfectly fine thing to say.³⁵ But are ordinary Americans wrong to see the legal system as Donald Trump evidently treats it – as a bunch of meaningless argle-bargle that certain kinds of coastal elites can utter in order to seize advantage from others, but which may be safely ignored by those with power? Why shouldn’t Donald Trump cheat on his taxes? Our tax system is filled with endless loopholes for the benefit of the rich, and even the miserable *process* of filling out tax forms is a canonical example of corrupted law in which the lobbyists for the tax preparation industry have successfully blocked legislation to simplify it.³⁶ Is this really the sort of thing that ordinary citizens ought to perceive as legitimate, such that they should really be expected to punish a politician who casually flouts it?

Burke explained the danger long ago – ironically in a letter on the American Revolution itself: ‘People crushed by law have no hopes but from power. If laws are their enemies, they will be enemies to laws; and those who have much to hope and nothing to lose will always be dangerous, more or less.’³⁷

Returning to America’s founding dichotomy between republican and liberal citizenship, we can see this kind of attitude as the failure state of extreme liberalism. At the limit, a legally alienated citizen sees the law not as an element of a co-created civic identity but as a hostile external force that must be monitored because of the threat it poses. Statements of legal rules are just utterances about stuff that powerful people will do to you if you make them mad, and are meaningful only to the extent they enable one to make predictions about those top-down exercises of power: an individual has their personal plans, and those

³⁴ C Vinograd, ‘2016 Presidential Debate: Donald Trump’s Remark About Paying Taxes Raises Eyebrows’ (*NBC News*, 27 September 2016) www.nbcnews.com/storyline/2016-presidential-debates/presidential-debate-donald-trump-s-remark-about-paying-taxes-raises-n655261.

³⁵ They also evidently thought his boasting about being able to ‘stand in the middle of Fifth Avenue and shoot someone’, J Johnson, ‘Donald Trump: They Say I Could “Shoot Somebody” and Still Have Support’ (*Washington Post*, 23 January 2016) www.washingtonpost.com/news/post-politics/wp/2016/01/23/donald-trump-i-could-shoot-somebody-and-still-have-support/, and ‘grab [women] by the pussy’, D Paquette, ‘Why the Most Outrageous Part of Donald Trump’s “Hot Mic” Comments Isn’t the Vulgar Language’ (*Washington Post*, 7 October 2016) www.washingtonpost.com/news/wonk/wp/2016/10/07/the-real-issue-with-donald-trump-saying-a-man-can-do-anything-to-a-woman/-ie-sexually-assault-them-was-just-fine.

³⁶ P Herd and DP Moynihan, *Administrative Burden: Policymaking by Other Means* (Russell Sage Foundation, 2018) 9–11.

³⁷ E Burke, letter to Charles James Fox, 8 October 1777, in *The Works of The Right Honorable Edmund Burke*, vol. XI (Little, Brown and Company, 1899), 147.

plans will have to be adjusted if an external thing called ‘the legal system’ signals to one that people with guns may garnish one’s bank account or put one in a cage for engaging in certain activities.

When those legal rules are also substantively unjust; when they do real world harm on a regular basis to the vulnerable; when they provide the framework for a profoundly unequal social order; it’s hard to really blame some 60 million people for voting for a guy for the highest office in the land whose entire campaign was a gleeful celebration of crime. If the critical legal studies scholars are right about what American law is, then perhaps the people ought to abandon it.

Long before CLS, Walter Benjamin, confronting much grimmer circumstances, articulated what we might take as a concise summary of the negative side of this volume in his eighth thesis on the philosophy of history:

The tradition of the oppressed teaches us that the ‘state of emergency’ in which we live is not the exception but the rule. We must attain to a conception of history that is in keeping with this insight. Then we shall clearly realize that it is our task to bring about a real state of emergency, and this will improve our position in the struggle against Fascism. One reason why Fascism has a chance is that in the name of progress its opponents treat it as a historical norm. The current amazement that the things we are experiencing are ‘still’ possible in the twentieth century is not philosophical. This amazement is not the beginning of knowledge – unless it is the knowledge that the view of history which gives rise to it is untenable.³⁸

Those words are not fully suitable for our current situation. For the United States rule of law has come a long way from slavery, from Indian Removal, from Chinese Exclusion – largely thanks to the tireless work of Black activists and other activists of colour for self-liberation. But there is still a long way to go before the US satisfies the rule of law ideals against which its institutions have been framed. And it is incumbent on those of us who value what the American legal system could be to seek its reform – to demand an end to the big abuses, like police violence against Black Americans and kangaroo-court immigration adjudications, and to the little but pervasive abuses, like the corporate use of contracts to evade traditional common-law individual legal rights – and to demand real progress toward the social and economic equality without which the rule of law cannot be sustained – in order that the American rule of law may ultimately grow into the virtues that its advocates have always said it has.

³⁸ W Benjamin in Hannah Arendt (ed) and Harry Zorn (trans), *Illuminations* (Schocken Books, 1968) 259.