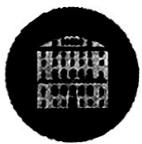


RULE OF LAW

Cases, Strategies, and Interpretations

Edited by Barbara Faedda

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What Things Undermine the Rule of Law?

Ongoing Lessons from American Legal Decay

Paul Gowder

In a consolidated rule-of-law state, the constraint of government power by law is likely to rest on twin foundations of mass solidarity and elite socialization. Sociopolitical changes that undermine either foundation pose serious dangers for the decline or outright collapse of existing rule of law systems. The abuse of immigrant communities, particularly in the United States but also in Europe, reveals how these two threats may go together and stands as an urgent warning of the dangers of undermining legal equality for all.

Mass Solidarity

The rule of law incorporates a pragmatic paradox: it requires that the entity that is by definition the most powerful wielder of force, namely, the state, be constrained. While there are many institutional devices that can be used to achieve this, all rest on a foundation of coordinated mass action, and hence mass solidarity.¹ At the limit, the people must be willing to protest, vote against lawless leaders, and even riot or rebel; common soldiers in the army must be willing to disobey orders and refuse to fire on demonstrators; to achieve these things, ordinary people need to generally perceive a shared interest in holding their leaders to law.² Moreover, this col-

1. For details, see Paul Gowder, "What the Laws Demand of Socrates—and of Us," *Monist* 98, no. 4 (2015): 360–62.

2. The precise scope of this shared perception may vary depending on underlying political and technological features of a state; for example, a state with a feudal or federalist organization may contain sufficiently powerful midlevel leaders with interests sufficiently common to one another and sufficiently diverse from top-level leaders to be able to successfully resist elite lawlessness

with fairly minimal public support. See Yadira Gonzalez De Lara, Avner Greif, and Saumitra Jha, "The Administrative Foundations of Self-Enforcing Constitutions," *American Economic Review* 98, no. 2 (2008): 105–9; Paul Gowder, *The Rule of Law in the Real World* (New York: Cambridge University Press, 2016), 148–49. However, most modern states, even states such as the United States with nominally federal structures, are sufficiently centralized to require mass solidarity.

lective commitment to resist lawless officials is most secure when it is the subject of common knowledge among the entire political community, for it is under those circumstances that officials who might wish to engage in arbitrary coercion know that doing so will yield immediate punishment. In the language of the game theoretic study of deterrence, such a system is one in which official lawlessness and its costly collective punishment are off the equilibrium path.

For that reason, one indicator of the rule of law's impending failure is a radical divergence in the underlying capacity of mass publics to perceive a genuine unity of interest. For example, in times of extreme partisan polarization, some in the public may perceive their political opponents as a greater threat to their interests than official lawlessness and thus may support or at least not oppose arbitrary official action against the other side—for example, by applauding the use of police violence against protests by their opponents. In the contemporary developed world, growing economic inequality and stark social inequality precipitated by the excesses of capital, refugee crises due to war and climate change, and the consequences of colonialism and ethno-racial hierarchy raise the worry that members of advantaged socioeconomic, ethnic, national, and racial communities may fail to see shared interests between themselves and subordinated communities and may support or ignore state repression of their demands for inclusion. One cannot help but notice, for example, that the familiar stories of unrestrained police brutality and harassment in segregated Black communities in the United States bear a striking resemblance to abuses by French special police units in the predominantly immigrant *banlieues*.³

3. On U.S. policing, see Monica C Bell, "Police Reform and the Dismantling of Legal Estrangement," *Yale Law Journal* 126, no. 7 (2017): 2054–2150; Devon W. Carbado, "Predatory Policing," *UMKC Law Review* 85, no. 3 (2017): 545–66. On *banlieues*, see Didier Fassin, *Enforcing Order: An Ethnography of Urban Policing*. (Hoboken, NJ: Wiley, 2013).

I have discussed American legal decline in more detail in Paul Gowder, "The Dangers to the American Rule of Law Will Outlast the Next Election," *Cardozo Law Review de Novo 2020* (2020): 126–64, <http://cardozolawreview.com/the-dangers-to-the-american-rule-of-law-will-outlast-the-next-election/>.

Elite Socialization

As E. P. Thompson observed, even a cynical (in his case, Marxist) observer of a rule of law legal system nonetheless cannot ignore that such a system tends to recruit people for the job of interpreting and applying the laws, even against the powerful and against the government, and tends to cause them to mouth all kinds of cant about justice and equality in the process.⁴ As Thompson argued, such a system tends to induce in these officials some belief in what they're doing, and some genuine behavior in accordance with that belief. Such elite socialization supports the rule of law, since well-socialized officials may be motivated to impede lawless uses of state power by other officials. To the extent one accepts the prior theoretical work suggesting that a key function of institutions like independent judiciaries is to monitor the conduct of other officials and send signals to the general public when those officials are violating the law—hence permitting the general public to act collectively to sanction such disobedient officials—Thompson-esque socialization also supports this indirect rule-of-law-preserving function.⁵

Hence the failure of official socialization threatens the rule of law. One source of this risk is the undermining of existing legal institutions, as by the familiar process in which an increasing number of political questions are shunted to constitutional courts (known as the “judicialization of politics”), followed by increasing efforts by political actors to influence, and hence corrupt, legal decision making (the “politicization of the judiciary”).⁶ Judicial politicization may undermine the rule of law in at least two respects. First, it may directly lead to judges declining to rule against the lawless behavior of executives from their own party. Second, and more insidiously, even if courts remain nonpartisan in fact, the politicization of judicial appointments and public discourse about the judiciary may undermine public confidence in judicial neutrality,

4. E. P. Thompson, *Whigs and Hunters: The Origin of the Black Act* (London: Allen Lane, 1975), 262–64.

5. David S. Law, “A Theory of Judicial Power and Judicial Review,” *Georgetown Law Journal* 97, no. 3 (2009): 723–802; Gillian Hadfield and Barry Weingast, “Microfoundations of the Rule of Law,” *Annual Review of Political Science* 17 (2014):

33–34; Gowder, *The Rule of Law in the Real World*, 156–57.

6. John Ferejohn, “Judicializing Politics, Politicizing Law,” *Law and Contemporary Problems* 65, no. 3 (2002): 41–68; Ran Hirschl, “The Judicialization of Mega-Politics and the Rise of Political Courts,” *Annual Review of Political Science* 11, no. 1 (2008): 93–118.

and in that way undermine the capacity of the courts to send a credible signal of official lawlessness.

Official socialization may also be undermined by the reckless creation of novel organizational forms to deliver state coercion without internal socialization processes. For example, the United States has created arbitrary coercive institutions that occupy liminal spaces in the law but may be deployed in the core by executive authorities—to wit, border and immigration control agencies, whose customary domain of operation (at the edges of U.S. territory and with persons whose rights are largely neglected by the state) features minimal legal constraints and effectively no legal culture.⁷ Their potential to spread lawlessness was realized in protests against U.S. police brutality in the summer of 2020 when Donald Trump deployed Border Patrol and potentially other Homeland Security forces to Portland, Oregon, to carry out beatings in the streets and unlawful arrests in unmarked vans.⁸ As Jacob Levy has explained, “the lawlessness of the border undermines the rule of law and civil liberty within”—lacking any internalized norms requiring respect for the legal rights of those whom they might encounter, such agencies were readily available when needed for repressive purposes.⁹

The example of the U.S. Border Patrol should be of central importance to all rule of law states. A longstanding failure condition for all kinds of legal and political institutions is the creation of purportedly time-limited, person-limited, or geog-

7. Elizabeth F. Cohen, *Illegal: How America's Lawless Immigration Regime Threatens Us All* (New York: Basic Books, 2020), describes the key legal failures of the American immigration regime. The Department of Homeland Security, in which the immigration enforcement agencies are embedded, is a product of the post-September 11, 2001, war on terror. On the complete abandonment of ordinary legal order in the war on terror, see Ryan Alford, *Permanent State of Emergency: Unchecked Executive Power and the Demise of the Rule of Law* (Montreal: McGill University Press, 2017). On the Department of Homeland Security, see Tom Jawetz, Philip E Wolgin, and Claudia Flores, “5 Immediate Steps to Rein in DHS in the Wake of Portland” (Center for American Progress, September 2020), <https://www.americanprogress.org/issues/immigration/reports/2020/09/02/489934/5-immediate-steps-rein-dhs-wake-portland/>.

8. John Ismay, “A Navy Veteran Had a Question for the Feds in Portland. They Beat Him in Re-

sponse,” *New York Times*, July 20, 2020, <https://www.nytimes.com/2020/07/20/us/portland-protests-navy-christopher-david.html>; Sergio Olmos, Mike Baker, and Zolan Kanno-Youngs, “Federal Agents Unleash Militarized Crackdown on Portland,” *New York Times*, July 17, 2020, <https://www.nytimes.com/2020/07/17/us/portland-protests.html>; Ed Pilkington, “‘These Are His People’: Inside the Elite Border Patrol Unit Trump Sent to Portland,” *The Guardian*, July 27, 2020, <https://www.theguardian.com/us-news/2020/jul/27/trump-border-patrol-troops-portland-bortac>; Conrad Wilson and Jonathan Levinson, “Federal Law Enforcement Use Unmarked Vehicles to Grab Protesters Off Portland Streets,” Oregon Public Broadcasting, July 16, 2020, <https://www.opb.org/news/article/federal-law-enforcement-unmarked-vehicles-portland-protesters/>.

9. Jacob Levy, “Law and Border,” Niskanen Center Blog, July 25, 2018, <https://www.niskanencenter.org/law-and-border/>.

rathy-limited “states of exception” in which ordinary political and legal constraints on government power do not apply, but which inevitably leak out from their limitations into the general political body. David Luban made an important variation of this point in his case against torture in liberal democracies.¹⁰ As Luban explains, admitting of any torture, even in the hyperspecific hypothetical circumstance of a “ticking time bomb,” necessarily corrupts a liberal democracy. To have just a little bit of torture requires that one have a bunch of torturers waiting around. It requires a training program to produce such persons and bureaucracies in which they reside—in short, it requires creating monsters and monstrous systems, and such monsters are rarely left quietly in their cages for long. The same is true for lawless bureaucracies such as the U.S. Department of Homeland Security.

The United States, among all nations, ought to have been alert to this danger, for it features prominently in the legal history of its most infamous crime against humanity, namely, racialized chattel slavery. Abolitionists in the nineteenth century correctly recognized that the fundamental lawlessness of slavery could not be kept within its institutional and geographic bounds. To the contrary, slavery inevitably undermined the rule of law more broadly, including the legal rights of free African Americans in the North and even those of whites, subjecting the former to kidnapping and quasi-judicial railroading under the Fugitive Slave Act regime and the latter to censorship and political repression for trying to exercise their democratic liberties in opposition to it.¹¹ Indeed, there is a troubling similarity between the antebellum capacity of Southern agents to go roaming about the North looking for alleged fugitive slaves to be carried into slavery via kangaroo-court “commissioner” processes, and the current claimed capacity of the U.S. Border Patrol to roam up to a hundred miles into the interior of the United States—a range the American Civil Liberties Union has estimated en-

10. David Luban, “Liberalism, Torture and the Ticking Bomb,” *Virginia Law Review* 91, no. 6 (2005): 1445–52.

11. Paul Finkelman, *An Imperfect Union: Slavery, Federalism, and Comity* (Chapel Hill: University of North Carolina Press, 1981), provides an overview of the inevitability of slavery’s leakage into the North. On kidnapping, see Carol Wilson,

Freedom at Risk: The Kidnapping of Free Blacks in America, 1780–1865 (Lexington: University Press of Kentucky, 1994). On censorship, see Michael Kent Curtis, “Curious History of Attempts to Suppress Antislavery Speech, Press, and Petition in 1835–37,” *Northwestern University Law Review* 89, no. 3 (1994–1995): 785–870.

compasses two-thirds of the U.S. population—to capture alleged undocumented immigrants and subject them to an “expedited” nonjudicial removal procedure.¹²

Conclusion: The Imperative of Resisting Outlawry

It is not a coincidence that the repression of immigrant communities appears in both of the key pathways to the decline of the rule of law. The United States, like many countries in Europe, relegates immigrant communities to a kind of legal liminality or even outlawry. Because members of the general public view immigrants through the lens of stereotypes associated with social disorder and challenges to entrenched local economic interests, they have responded with a troubling lack of solidarity to the absence of immigrant legal and human rights protections. This lack of solidarity has enabled the government to operate lawless agencies to control immigrant communities.

This phenomenon is not limited to the United States. It is notable that the lawless police behavior that Didier Fassin observed in the *banlieues* was conducted by special anticrime units (*brigades anti-criminalité*) created for that specific purpose. These units developed a lawless organizational culture, glorying in their reputation for violence and seen by other police alternately as a “necessary evil” and a source of corruption.¹³ It seems unlikely that ordinary French citizens would have tolerated the existence of such lawless police units except for the purpose of controlling a segregated and stigmatized community of outcasts, much as many Americans tolerate the criminality of the immigrant policing agencies under the influence of xenophobic political appeals and tolerate the lawless regime of “stop-and-frisk” policing in Black communities under the influence of racism and segregation and the belief that whites are immune from it.

12. On the hundred-mile “border,” see American Civil Liberties Union, “The Constitution in the 100 Mile Border Zone,” <https://www.aclu.org/other/constitution-100-mile-border-zone>. The Department of Homeland Security claims the authority to subject anyone captured in this zone to “expedited removal,” i.e., administrative removal by

bureaucrats whose jobs are to administer (universally xenophobic) executive policy with almost no judicial scrutiny. Bureau of Customs and Border Protection notice, “Designating Aliens for Expedited Removal,” 69 Fed. Reg. 48877-01 (August 11, 2004).

13. Fassin, *Enforcing Order*, 53–56, 60.

But the Trump regime's behavior in Portland shows that official lawlessness cannot be quarantined to outcast communities. Once the people allow arbitrary power to be wielded against some among them, it becomes vastly easier for leaders inclined to authoritarianism to cast aside the rule of law in general, for two reasons. First, because the initial act of public toleration of lawlessness undermines common knowledge among the public of their shared legal commitment and willingness to act collectively in the defense of the rule of law—common knowledge that is instrumental in collectively deterring official lawlessness; and second, because bureaucratic organizations capable of wielding arbitrary power will be close at hand.

Accordingly, the preservation and restoration of a widespread culture of legal solidarity must be a priority of countries and citizens wishing to secure themselves against legal decline. The people in existing rule-of-law states must vigorously and universally resist the creation of extraordinary police and security agencies directed against stigmatized groups and should demand the immediate abolition of such agencies where they exist.