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Start

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I begin by noting that there has never been the rule of law in the United States, at least not for all. African-Americans continue to be subject to arbitrary police violence as well as rampant abuse of police and prosecutorial discretion in the regime of mass incarceration, although the particular causal pathway from racial injustice to mass incarceration has recently been subject to some scholarly debate.¹ In our current political environment, it is imperative to also note that there are many reports of arbitrary police action against groups of persons, such as Latinx individuals, whose ethnic, racial, or religious identity is associated with stereotypes about undocumented immigration status, and that these arbitrary actions long precede the administration of Donald Trump.²

The United States has arguably had a version of the rule of law for whites, however imperfect, for some time. But even if we assume the privileged standpoint of those who have not been the persistent victims of racialized lawlessness, the attentive reader may have noticed that many historians, political scientists, and constitutional law scholars have expressed dire alarm about the rule of law since

¹[See generally @alexander2012new; @pfaffLockedTrueCauses2017.]

²See Families for Freedom and NYU Immigrant Rights Clinic, “Uncovering USBP: Bonus Programs for U.S. Border Patrol Agents and the Arrest of Lawfully Present Individuals, January 2013, <https://familiesforfreedom.org/sites/default/files/resources/Uncovering%20USBP-FFF%20Report%202013.pdf> (reporting on documents revealed by Freedom of Information Act litigation revealing large statistical disparity in ethnic/racial backgrounds of lawfully present persons, including U.S. citizens, wrongly arrested by border patrol); [@romero_racial_2006] (detailing origins of late 1990’s Arizona immigration raid in race and class-based animus, use of race and class as proxies for immigration status in conduct of raid). See also Adiel Kaplan and Vanessa Swales, “Border Patrol searches have increased on Greyhound, other buses far from border,” NBC News, June 5, 2019, <https://www.nbcnews.com/politics/immigration/border-patrol-searches-have-increased-greyhound-other-buses-far-border-n1012596> (describing passenger reports of racial profiling by border patrol agents in suspicionless bus interrogations); Alex Kane, “Even Muslim-American Citizens Have Been Caught in the Net of Trump’s Travel Ban,” The Nation, March 23, 2017, <https://www.thenation.com/article/even-muslim-american-citizens-have-been-caught-in-the-net-of-trumps-travel-ban/> (recounting instances of interrogation of Muslim lawful residents and citizens at border, including Muhammad Ali’s son). See generally *United States v. Brignoni-Ponce*, 422 U.S. 873 (1975) (forbidding race as sole basis for immigration interrogation, but permitting racial profiling in conjunction with other factors).

Donald Trump began to occupy the White House.³ Here is some more text.⁴ And more text. Just for testing of my markdown functionality.

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³Observe the growing literature from academics in these disciplines about the danger to the Constitution or to democracy—[see, e.g., @huq_how_2018; @levitsky_how_2019; some of the chapters in @sunstein_can_2018; @lieberman_trump_2019; @primus_republic_2018; @mounk_people_2018; @siegel_political_2018]. I observe for conceptual clarity that there is a difference between the destruction of American democracy or the Constitution and the rule of law, but that the destruction of either of which would most likely also entail the destruction of the rule of law, as most paths to doing so go through officials ignoring the legal constraints on their behavior. However, while a President who is free to ignore the Constitution would unquestionably count as a failure of the rule of law (since, after all, the Constitution is law that binds the President), we should be careful to distinguish between a threat to democracy and a threat to the rule of law as such. It might be possible for the U.S. to slip into a kind of lawful non-democracy in which the President takes advantage of extreme political polarization to win laws permitting the destruction of democratic autonomy, such as by entrenching the power of his allies. One example of tactics potentially leading to such a state of affairs is be the “constitutional hardball” in which the Republican-dominated legislature in North Carolina stripped the incoming Democratic governor of power before he could take office. [@levitsky_how_2019, 209-212] That behavior is anti-democratic, but does not necessarily undermine the rule of law.

⁴And another footnote.