

## Conclusion

### A commitment to equality begins at home

To build a legal system that is regular, public, and general is to set the state on a course in which its overwhelming power is to be used against the people in the community only when those who wield it can explain, to the satisfaction of a watchful public, how its use is consistent with the equal standing of those against whom it is to be used. To establish such a system is to declare a commitment to equality; to maintain it is to rely on that commitment across the political community. That, in two sentences, has been the argument of this book.

The promotion and maintenance of the rule of law is an urgent human rights problem. There are countless people living and dying in terror at the hands of thugs in uniforms, and more who are doomed to social, economic, and political inferiority and misery by unjust and hierarchical legal systems. I do not expect that this small book can contribute much to resolve these problems. If it helps at all, it may only be by offering a language in which we can discuss the rule of law without focusing on the self-absorbed economic and political interests of the wealthy and powerful. The rule of law is a way of respecting the equal moral worth of all humans; we ought to say so, and work to build this equality across the world.

Contemporary rule of law talk often sounds like those who seek to promote the law in the developing world placidly assume that it's being exported from countries in the developed world that have successfully held on to the value. But critics within the developed world have called this into question. For example, many have argued that the war on terror has undermined the commitment of the United States and other Western democracies to rule of law values in favor of regimes of so-called enhanced interrogation, secret and procedurally bare military trials, extrajudicial assassinations, torture, and the like.<sup>1</sup>

Nor may we be complacent about maintaining the rule of law in the Western democracies to the extent it does exist. One important implication of the strategic analysis in Chapter 6 is that the rule of law is sensitive to shifts in political, economic, and military power. If power shifts away from the lowest socioeconomic classes, there is a long-term risk to the generality of the legal system: if the lowest classes are no longer needed to hold officials to complying with the law, then the law need not

take their interests into account. Similarly, if power shifts away from nonofficials as a whole, even the weak version of the rule of law is put at risk, to the extent nonofficials no longer have the resources to effectively sanction officials for ignoring the law. Several developments in the Western democracies – particularly the United States – over the past few years appear to pose these dangers. The most obvious developments include increasing economic inequality<sup>2</sup> and the capture of political institutions by powerful and narrow interests.<sup>3</sup>

Equally worrying is the advent of private military contractors, and the potential for increased use of professional and elite military units, automated drones, and other developments that shift military force away from mass publics and toward centralized control. To the extent that top-level officials have greater centralized control over military force, this deprives ordinary citizens of the power to resist officials by, for example, refusing to fire on their fellow citizens to enforce illegal policies (as we saw during the Arab Spring in Egypt<sup>4</sup>), and midlevel officials of the administrative power to resist higher-level officials by depriving them of military force or by turning it against them.<sup>5</sup> Even the “big data” revolution poses risks: a government that has copious information about its citizens thereby increases its discretion over them: imagine if traffic police could monitor all our driving activity, and choose to punish any of us for the numerous minor traffic violations we may commit each day. Open threats can appear in the aggregate as well as the discrete.

As alarming as the way the Western democracies are treating those who are perceived as an external threat is the way minorities are being treated in our own communities. In the United States, African-Americans in particular (but also other racial minorities, particularly Latinos in the border states) are subject to extraordinary police paranoia and misconduct. In Europe, the targets du jour are Muslims (who are, of course, not free from official discrimination in the United States, either).<sup>6</sup> Some basic data are incredibly damning: according to the National Association for the Advancement of Colored People (NAACP), blacks and Latinos together make up only about a quarter of the population, but (as of 2008) 58 percent of the prison population; the incarceration rate for blacks is six times that of whites; and “[i]f current trends continue, one in three black males born today can expect to spend time in prison during his lifetime.”<sup>7</sup> The racial composition of juries has an alarming effect on conviction rates by race: with no black people in the jury, conviction rates go significantly up for black people and down for white people.<sup>8</sup> White crime victims receive significantly faster and more effective responses from the police than do black victims.<sup>9</sup> Blacks receive significantly harsher sentences.<sup>10</sup>

The consequences of this system have been amply documented by Michelle Alexander: the United States effectively operates a racialized system of segregation via the criminal justice system in which blacks are grossly disproportionately stopped, arrested, convicted, and punished, and then subjected to lifelong disabilities,

including exclusion from employment, housing, juries, the franchise, and public benefits, all of which lead to reincarceration, poverty, and broken families.<sup>11</sup>

Defenders of racial profiling allege that there are statistical correlations between race and crime, which, if true, might conceivably constitute a public reason for the practice. However, that argument falls prey to three fatal problems. First is the easy one: even when whites unambiguously commit crimes as often or more often than blacks, it's blacks who are disproportionately subjected to every stage of the criminal justice system.<sup>12</sup> Second is a simple confusion about generality: as the argument in Chapters 2 and 3 establishes, to the extent the state is substantially responsible for the poverty and inequality of subordinated minorities, as it doubtless is, it cannot use the consequences of that poverty as an excuse to impose unequal policing on those groups consistent with public reason.<sup>13</sup> Third, such practices become a self-fulfilling prophecy: investigating more crimes among racially subordinated groups means that more crimes will be discovered among those groups, even relative to their rates of criminal behavior; the consequence will be further apparent justification in crime statistics for profiling in a vicious cycle that leads to the creation of presumptively criminal classes; additional investigation and disparate punishing will exacerbate also the cycle of poverty in a community, and thereby increase actual as well as perceived crime rates.

Communicating to racial, ethnic, and religious minorities that they are seen as subordinate legal classes predisposed to criminality will make it more difficult for the subordinated minorities to take the internal point of view on the law. Substantially more blacks than whites think that the US criminal justice system does not give fair trials or treat people equally.<sup>14</sup> A substantially higher proportion of blacks than whites in the United States view the criminal justice system as unfair to blacks.<sup>15</sup> This disparity extends to juveniles: black and Latino teenagers hold less positive views of the police than white teenagers hold.<sup>16</sup> The obvious surmise is that this suspicion and contempt are caused by police misconduct toward blacks; this surmise is supported by the data.<sup>17</sup> Not only does this plausibly feed individual crime, but it also feeds collective violence: racial disparities in policing and racial police brutality have contributed to numerous riots in the United States.<sup>18</sup> And it feeds organized opposition to criminal justice institutions: police violence was a major factor in the formation, for example, of the Black Panther Party and its revolutionary ideology.<sup>19</sup>

To the extent we in the Western democracies are unwilling to defend the legal rights of those in our societies whom we perceive as threatening, either because of statistical and stereotypical association with criminality or because of religious and ethnic similarity with some of the members of one particular subgroup of terrorists, we undermine our ability to defend the rule of law for other, less unpopular, groups in the future. This is a straightforward implication of the coordination account in Chapter 6. To the extent the courts disregard the rights of blacks or Muslims, they undermine their power to signal violations of the rule of law in the future; to the

extent the white/non-Muslim public does not resist lawless official action against blacks and Muslims, they undermine the collective trust and faith in the system necessary to deter lawless official action against themselves tomorrow. Of course, that's not the only reason to defend the rights of the victims of racism in contemporary democracies. There's a moral obligation to do so. But sometimes powerful majorities need more self-interested reasons: here's one that advocates of the rule of law can offer.<sup>20</sup>

The case of the black community in the United States can stand as the final, abbreviated case study with which to conclude this book. The risk of imprisonment by age 30 for African-American men born in the late 1970s has been calculated at more than 25 percent – a figure that does not even include interactions with the criminal justice system short of imprisonment such as constant police harassment, serving time in local jails, and taking plea bargains leading to suspended sentences (and all the lifelong collateral consequences of a criminal record).<sup>21</sup> As Alexander details, much of the racial disparity in mass incarceration is driven by a legal system that permits unbounded discretion in the war on drugs, both to police (to carry out pretextual stops and notional “consent” searches based on conscious and unconscious racial bias, and to focus their enforcement efforts on blacks even when whites commit crimes at the same or higher rates) and to prosecutors (to grossly overcharge blacks, channel blacks to the harsher federal system, and leave blacks languishing in prison with steep bonds in order to extract plea bargains even from the innocent) and in doing so impose a life of stigma and civil disability on a huge proportion of the black community, and reestablish the racial caste system supposedly destroyed by the civil rights movement.

As I write these words in the summer of 2015, the United States has just suffered through a heartbreaking year of astonishing police-initiated bloodshed of African-Americans. Ezell Ford, John Crawford, 12-year-old Tamir Rice, Eric Garner, Akai Gurley, Michael Brown, Walter Scott, and Freddie Gray have died, among others. Protests have shaken dozens of American cities. Riots have broken out in Ferguson, Missouri, and in Baltimore, Maryland. Worse, this year has simply made salient the fears of black families across the nation. America's police departments seem to have learned nothing from the long history of shock and horror at their treatment of blacks, like Oscar Grant, Rodney King, Amadou Diallo, Abner Louima, and many others. And there is precious little evidence of accountability. Officers are often not charged; if charged, they are often not convicted, and are sometimes given preferential treatment; in one notorious example in the Baltimore case, a killer cop was given a lighter bail than one of the rioters who rose up in response, even though the cop was charged with murder and the rioter had merely vandalized a police car.<sup>22</sup>

Freddie Gray is believed by many to have died after a “rough ride” – an informal custom of illegal police violence in which a victim is put in a police vehicle without a seatbelt and then thrown around by its motion. In Los Angeles, a similar technique is apparently called a “screen test,” the twisted witticism referring both to the native movie industry and to the screen that separates arrestee from officer in a police car,

and into which the arrestee is thrown by deliberately erratic driving.<sup>23</sup> One longtime Baltimore city journalist explained the customs that, in the days prior to the war on drugs, used to govern the illegal police use of arbitrary arrests and arbitrary violence.<sup>24</sup> According to this journalist, there used to be an informal “code” indicating which kinds of behavior would generate an arbitrary arrest (what he called “a humble” – “a cheap, inconsequential arrest that nonetheless gives the guy a night or two in jail before he sees a court commissioner”). The code also regulated the conditions under which the police would inflict arbitrary violence on a citizen, to an astonishingly fine-grained level: calling an officer a “motherfucker” was okay, but calling one an “asshole” meant “you’re going hard into the wagon in Baltimore.”

However, astonishingly, that world – in which police brutality was apparently governed by an informal and unenforced code specifying the degree of disrespect one was allowed to show before being subjected to arbitrary extreme violence – was the “good old days,” when there were rules (albeit illegal and corrupt ones) governing the violent abuse of the authority of the police and the weapons with which they are entrusted, before the pressure of the war on drugs undermined even those rules. Today, if this journalist is to be believed, all bets would appear to be off. Even the mayor of New York has felt the need to warn his son about the dangers of having dark skin and dealing with the New York Police Department.<sup>25</sup> In retaliation for Mayor de Blasio’s expression of concern for his child, and apparently horrified at the notion that anyone in authority would acknowledge their out-of-control racial aggression in public, the police turned their backs on him at an officer’s funeral and staged a work slowdown.<sup>26</sup> According to one anonymously sourced press report, the public housing authority in New York has told its workers to wear bright orange vests in order to not be mistaken for residents and shot by the police.<sup>27</sup>

In famously liberal San Francisco, a number of police officers were fired for sending text messages among themselves that included repeated use of the term “nigger,” references to cross burning, “white power,” and this lovely sequence of messages: (1) “I hate to tell you this but my wife friend is over with their kids and her husband is black! If is an Attorney but should I be worried?” (2) “Get ur pocket gun. Keep it available in case the monkey returns to his roots. Its not against the law to put an animal down.” (3) “Well said!”<sup>28</sup> Does “pocket gun” mean a gun to be planted on the officer’s dead victim? Does it just mean a secondary gun to be used to kill the victim based on the concession that one ought not to commit a murder with one’s actual service revolver? Who can tell?

Arbitrary violence against African-Americans is not the only gross misconduct to which the modern American police department seems to be susceptible. The unrest in Ferguson was also driven by an egregious record of petty authoritarianism in St. Louis County, in which poor African-Americans were aggressively taxed by an endless parade of penny-ante regulations and citations, leading to endless cycles of fines, penalties, arrest warrants for not paying the fines and penalties, further fines and penalties, and so forth, and an astonishing statistic:

in 2013, Ferguson issued 1.5 arrest warrants per resident.<sup>29</sup> This state of affairs can only be described as a conspiracy between the police, local elected officials, and local courts against poor blacks – and if it took a killing and a riot to bring the conditions in St. Louis County to the attention of the rest of the country, how many more have not been revealed?

Moreover, while blacks get the brunt of the abuse, there have also been astonishing stories of nonracial (or less obviously racial) abuse. Most astonishingly in the past year, *The Guardian* broke the story of the “black site” maintained by the Chicago police department, where off-the-books interrogations were conducted.<sup>30</sup>

All of these stories came out in the past twelve months, as of this writing. Broader trends are equally alarming. The police have come up with a name for their own (apparently routine) perjury: “testilying.”<sup>31</sup> Police departments regularly seize the assets of citizens who are not convicted of any crime, and keep the money.<sup>32</sup> And they do it with a growing arsenal of totally unnecessary military-level equipment and tactics, going so far as to serve minor warrants with heavily armed SWAT teams.<sup>33</sup> The deaths of young black men are also not new: the killings of black men by police have outstripped those of white men consistently since 1960.<sup>34</sup>

It is extremely difficult to avoid the impression that police departments in the United States have gone completely out of control, and in some communities act more like an occupying military force than the police of a stable liberal democracy under the rule of law. And the rest of the population has not responded to these infamies in the way one would expect from a stable rule of law state (i.e., demanding that politicians bring the police to heel, and removing them from office if they fail to do so). African-Americans seem to have been excluded from the rule of law collective commitment and enforcement bargain. And the fact that police abuse is showing signs of expansion to citizens of other races (black sites, asset forfeitures, etc.) is just what the theory of this book would predict in such a situation: the police are learning that the rest of the community does not always credibly threaten to hold them to account for their use of power; the rest of the American public is becoming habituated to allowing police misconduct to pass by unsanctioned.

This cannot be tolerated. As police slip further out of control without public intervention, it becomes harder to believe that the American people are genuinely committed to the rule of law, and harder for us to trust one another to enforce it more generally. We doubtless have a long way to go before the rule of law melts down altogether – but American whites should pray that the day never comes when the defense of their rights requires coordinated political action from long-neglected and abused blacks and other racial minorities, for it is hard to see why the latter should see themselves as having a stake in the system. And it is a great moral stain: the United States reinforces the social subordination of people of color by subjecting them to daily hubris and terror from law enforcement.

The time may have come to seriously contemplate truly radical reforms to American policing. I am no criminal justice expert; however, several policy options

seem worthy of consideration. For example, we might abolish civil asset forfeiture altogether. We might remove SWAT teams from the operational control of ordinary police, and place them under the operational control of locally elected civilian leaders, to be deployed only when both police and civilians agree that they are necessary. We might institute mandatory grand jury inquiries in the case of every civilian killed in police custody or by a police weapon. We might consider restricting ordinary patrol officers to carry nonlethal weapons only.

We may even borrow some of the ideas about radical localism developed in the previous chapter and apply them at home. Existing methods of incorporating citizens into the legal system are not fully optimized for recruiting public support for their judgments: grand jury proceedings are entirely secret and totally controlled by prosecutors, while petit juries deliberate in secret and are hampered by the sanitized information that makes it through the rules of evidence and a limited decisional scope (“questions of fact”).

We could involve the public more deeply. Trials of police officers whose actions have led to citizen deaths could, for example, be conducted by wholly public (and large) deliberative assemblies, selected genuinely randomly from the whole population (rather than from the subset with driver’s licenses and voter registrations and subject to challenge from lawyers), with the authority to come to an all-things-considered judgment on the propriety of the officer’s act, subject only to deferential appellate review by professional judges.

Whatever we do, we must stop the racial disparities that exist at every level of the criminal justice system. Police officers need to be punished for using unnecessary violence against African-Americans. Police departments need to be punished, or even disbanded, for maintaining policies and training programs that encourage this behavior. The private citizens who facilitate racist policing by summoning the state whenever they come across a neighbor who seems suspicious only because of the color of his or her skin should be fined for filing frivolous police reports. Municipalities that fund their operations via the systematic juridical expropriation of racial minorities and the poor should lose their charters and be annexed into larger urban areas that are more resistant to capture. Policy options need to be investigated to ameliorate the truly difficult root problem underlying these disasters – the persistent *de facto* residential segregation that allows the United States to be divided into poor minority neighborhoods with oppressive local governments and richer and whiter neighborhoods with solicitous ones.<sup>35</sup> Criminal sentences need to be overturned or reduced on appeal to the extent that the variation among them can be attributed, statistically, to broader patterns of racial disparity in charging and sentencing; arrests and charges need to be dismissed on the same grounds.<sup>36</sup> Felon disenfranchisement must end. Only then will we be able to hold out American institutions as the model of the rule of law to be followed across the world. Rule of law reform begins at home.

