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AMERICAN CRIMINAL LAW: FROM INEQUALITY TO IMPUNITY

ALEXANDRA NATAPOFF

An unmarked car screeches up to the curb and the doors pop open. Heavily armed officers spill out into the street, guns pointed, and the terrified crowd scatters. Officers chase down the slowest runners, tackling them to the ground and throwing them into the back of the car before they speed away down the dark street.

In 2026, this story became shockingly familiar, describing ICE agents dragging people unlawfully off the streets. But this particular tale of governance failure is not about ICE. It is from 2015 in West Baltimore, where a gang of police officers known as the Gun Trace Task Force ran rampant for nearly a decade. These officers terrorized residents with so-called “door pops,” robbed homes, made false arrests, and generally struck fear into Baltimore’s poorest neighborhoods. When residents and defendants reported the conduct, they were disbelieved and ignored.

American rule of law has long failed the vulnerable, even as it offers enormous benefits to the privileged. Our criminal system routinely tolerates official lawlessness, state violence, and other egregious governance failures in disadvantaged communities and against ordinary people in ways that would never be tolerated in wealthier communities or by more powerful people. Millions of Americans suffer from systemic breakdowns in the basic operations of the criminal process: illegal stop-and-frisk programs, racially motivated arrest practices, unconstitutional bail proceedings, profiteering from fines and fees, abysmal failures to provide constitutionally-required defense counsel, harsh sentences for minor conduct, and violent, even lethal jail conditions. From Rodney King to George Floyd, and for millions of poor and working people whose names

we will never know, the criminal system is a place that exacerbates their disadvantages and where rule of law is a luxury item they can't afford.

Rule of law, however, is not rocket science. Even as the criminal process repeatedly fails at the enormous bottom of the penal pyramid, it clearly knows how to lavish due process and care on a small, elite, high functioning top. Wealthy defendants with excellent lawyers typically get the full benefit of their constitutional rights, protected by official norms of legal precision and restraint. Until recently, at the U.S. Department of Justice and the FBI, in well-resourced federal courts and in high-profile financial cases, we have seen over and over how rule of law can work well when we want it to: based on facts, according to law, with a measure of care, respect, and attention to the equities. No institution is perfect, of course, and there is plenty of injustice in elite legal spaces. But at the top of the penal pyramid, for a fortunate minority, rule of law has worked about as well as could be expected in a constitutional democracy run by actual human beings.

That is, until now. Today, we are witnessing governance failures and the unraveling of basic criminal legal principles in elite spaces. In 2026, a presidential pardon can be openly sought through million-dollar campaign donations. The U.S. Department of Justice's enforcement priorities, as well as those of the FBI, are being redirected away from traditional criminal law enforcement and toward political reward and retribution. Meanwhile, lawyers and law firms adverse to the administration have been threatened with discipline and even prosecution just for doing their jobs, as have judges and politicians who engage in the standard checks and balances contemplated by the separation of powers. As a result of these distortions, criminal justice institutions that used to represent the gold standard are turning into a cautionary tale about law's fragility in the face of unchecked, unprincipled power. We know that criminal law often fails those with too little power. But it also falters in the face of those with too much.

Although this recent demise is extreme, its basic ingredients are not new. The powerful and wealthy, for example, have always enjoyed zones of impunity. Wall Street bankers have long gotten away with defrauding millions of consumers. Police have long gotten away with killing unarmed Black people. Powerful sex offenders routinely escaped accountability.

Rule of law is not self-executing, and its all-too-human agents have always accommodated power and influence to some extent. But today's unapologetic embrace of elite and politicized impunity exceeds even those egregious failures.

The monetary piece isn't entirely novel either. The American criminal system has a well-known alter ego as a revenue generator, extracting fines and fees from poor and working people in millions of low-level cases. By contrast, today's highly profitable leniency market—from campaign donations to millions in financial and other benefits for both the pardoner and the pardoned—feeds off of serious cases and the wealthiest offenders.

The predicates for the current wave of violent immigration enforcement are also old, rooted in our collective tolerance of routine violence against people labeled "criminal." Today's vilification of criminal immigrants wouldn't work so well if we hadn't spent the last forty years dehumanizing people who commit crimes while stripping them of protections against the state. In the normal course of things, U.S. law casually accepts that police may forcibly arrest and incarcerate people merely because they violate a traffic ordinance or cannot pay a fine. Civilian police forces have been given military equipment to use against their own city residents. Violence and rape remain common in our prisons and jails. ICE's excesses are not *sui generis* but rather descendants of the kinds of official violence that have been routinely deployed by the criminal system for years. Indeed, Baltimore's abusive Gun Trace Task Force was ostensibly created in 2007 to go after "the worst of the worst," the very same justification used today to support ICE's unprecedented expansion.

Even the market for lenience is not new. Criminal guilt has been a legally tradable commodity since at least the 1970s. Ninety-five percent of all convictions in this country are the result of a plea deal in which defendants trade away their constitutional rights in exchange for lesser punishment. Defendants who cooperate can often escape liability altogether, a kind of poor man's pardon where defendants pay the government with information, access to friends and family, and even by risking their own lives. Criminal justice has always been negotiable. But today's market has devolved into an open bazaar for the well-connected.

Put differently, the federal government and the privately powerful are cashing in on the enormous amount of authority and elbow room that

we have given law enforcement to make legally and ethically problematic decisions. We collectively tolerated those compromises, or just ignored them, when their costs were imposed mainly on the vulnerable. But now, the murky waters from the basement of the criminal system have risen up into the main house and are visibly flooding the living room. The flood is startling; many living room inhabitants never imagined that such things could happen in such well-resourced, protected spaces. To be sure, some of the current excesses are obviously illegal or unconstitutional. But at least some represent technically legal exercises of existing criminal authority—unfettered law enforcement selection discretion, negotiations over guilt, making money off of criminal cases—that have been on the books for ages. The kinds of official violence, unequal treatment, craven instrumentalism, and gross unfairness that we have long excused in ordinary courts and jails and in disadvantaged communities around the country have mutated into new legal disorders. These maladies are now infecting the highest echelons of the criminal system, in places that once served as exemplars of lawful restraint.

These are foundational democratic challenges. A criminal system is a kind of governance fingerprint: it reflects our communal tolerance not only of crime, violence, and victimization, but also of social inequality, unchecked power, and official lawlessness. In 1776, the criminal system was relatively tiny and bore almost no resemblance to the one that we have today. And yet even then, the Founders recognized the existential need to constrain the carceral power of the state. Much of the Constitution's Bill of Rights exists precisely because the Founders feared the threat of executive branch criminal enforcement overreach. Two hundred and fifty years later, our high tolerance for executive discretion, state violence, and unprincipled enforcement in our least powerful communities has made its way up into the highest levels of governance. Rule of law in the criminal system has always been elusive for the powerless. Now the rest of us are learning what that feels like.