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On the Interdependence of Liberal and Illiberal/Authoritarian Legal Forms in Racial Capitalist Regimes. . .The Case of the United States

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Abstract

Scholars conventionally distinguish between liberal and illiberal, or authoritarian, legal orders. Such distinctions are useful but often simplistic and misleading, as many regimes are governed by plural, dual, or hybrid legal institutions, principles, and practices. This is no less true for the United States, which often is misidentified as the paradigmatic liberal constitutional order. Historical and critical scholarship, including recent studies of law under racial capitalism, provide reason to identify American law as a dual state in which legal forms that govern property ownership, contract relations, and civil liberties of free citizens differ from the more illiberal, authoritarian legal forms that rule over subaltern populations, particularly racialized, low-wage workers, Indigenous populations, the poor, immigrants, and women. This dual state, we argue, did undergo changes to adopt more procedurally liberal, professional, overtly deracialized legal forms after World War II, but these changes masked more than tamed the continuing illiberal, authoritarian violence that targeted marginalized citizens. While constantly changing, the American legal system is best understood not as a singular liberal order but instead as a hybrid system of mutually constitutive liberal and illiberal and authoritarian legal practices.

INTRODUCTION

Scholars have long distinguished between liberal and illiberal, or authoritarian, legal orders. But the basic elements of the distinction are often vague. Democratic and authoritarian political systems traditionally have been differentiated by the modes of transition between ruling leadership groups. Authoritarian polities tend to entrench ruling elites or parties, insulating them against meaningful or fair institutional challenge and competition for replacement. Many authoritarian regimes do feature elections, but the systems are rigged to prevent de facto competition for rule, popular accountability, and regime change. Authoritarian legal orders may or may not feature constitutions, but the legal organization of government ensures more centralized, unitary control by officials; recognizes only limited rights of challengers in society; and relies heavily on surveillance-intensive, often violent modes of social control. The interrelationships between authoritarian governance and authoritarian legal orders are complex and variable but substantial. Together, they typically facilitate practices of state and social elites that undermine both political accountability and respect for human rights (Glasius 2018).

Liberal democratic political orders, by contrast, tend to be characterized by modes of peaceful, orderly transition among leaders, usually in the form of relatively open, fair, and binding elections (Schumpeter 1943). Relatedly, liberal legal forms typically feature constitutional checks and balances among separate governmental branches with overlapping authority, as well as protections for basic rights of property ownership, free speech and association, religious practice, and due process and equal treatment for individuals (Dahl 1971, Glasius 2018). It follows that liberal legal orders not only confine the exercise of coercion by formal rules (Meierhenrich 2018, p. 231) but aim to exercise an "economy of violence," which is to say, the least coercion that is deemed necessary to protect basic security of individuals and public order. While all legal orders perform a mix of regulatory and adjudicative functions, it is common to distinguish between liberal rule of law, with the United States often cited as the paradigmatic case, and authoritarian or illiberal rule by law (Chua 2014, 2019; Ginsburg & Moustafa 2008).

For the purposes of this review, we follow Glasius (2018) in emphasizing that the key feature of authoritarian legal order is its limited accountability to the subjects over which law rules. Illiberal law, by contrast, is characterized primarily by the denial of core rights status and rights protections to large swathes of legal subjects. Again, authoritarian and illiberal elements of legal rule are often fused, but they need not be.

The simple binary distinction between liberal and illiberal or authoritarian law has been complicated by much recent political experience and research, however. Perhaps most striking have been the many studies of authoritarian political and legal orders that have incorporated various elements of liberal legality into their inherited systems, thus producing hybrid legal orders, especially after World War II. Much of this literature shows that authoritarian regimes sometimes strengthen courts and judicial processes, grant some citizen rights, or pass liberal laws in certain issue areas to attract foreign capital (Moustafa 2007), appease political opponents, mollify human rights claimants, and discourage rebellious uprisings (Gallagher 2017, Rajah 2012, Whiting 2017). In short, liberal rights–based reforms serve to shore up ruling elite power in the authoritarian state, often while providing few resources for constraining state power or protecting citizen rights (Massoud 2013).

LEGAL PLURALISM, THE DUAL STATE, AND RACIAL CAPITALISM

These developments of hybrid legal orders represent variants on the broader category of what scholars characterize as legal pluralism. Indeed, legal pluralism, whereby "two or more legal systems coexist in the same social field," is a dominant feature of most legal orders worldwide

(Merry 1988, p. 870; Swenson 2018; von Benda-Beckmann & Turner 2018). The most widely recognized form of legal pluralism resulted from the politics of colonial administrative rule by which European states expropriated resources and labor in the Global South. Along with imposing European secular law, colonial administrations typically created and promoted customary personal law through selective racialized reconstruction of indigenous traditions and dispute resolution systems to solidify the commodification of land and better control indigenous populations (Dudas 2001, 2004; Merry 1991; Snyder 1981). Swenson (2018, p. 441) explains that "legal pluralism became a defining feature of colonial administrations that sought to harness local dispute resolution mechanisms to help legitimize and institutionalize their rule."

Our primary interest in this article, however, is the very different version of legal hybridity identified with Fraenkel's (1941) classic conception of the dual state in Nazi Germany. Fraenkel distinguished between a normative legal state that protected property rights and contractual exchanges among the dominant racial group of citizens in the capitalist marketplace and a prerogative state that governed in largely arbitrary, violent ways over "enemies of the state," those racialized groups who were the stigmatized "civil dead" and denied rights protections. In this way, German legal rule could be said to be at once liberal, for some, and authoritarian and illiberal, for others. Meierhenrich (2018) deserves credit for recently calling attention to Fraenkel's work and, in a separate book-length study, brilliantly applying the concept to South Africa (Meierhenrich 2008), and more generally beyond. Others have picked up and applied the idea as legal hybridity elsewhere, to Singapore (Jayasuriya 2001, Tushnet 2015), Chile (Hilbink 2007), Venezuela (Urribarri 2011), Egypt (Moustafa 2008), and many other polities, although only Hendley (2017) explicitly employs the dual (but nonracialized) state concept.

These studies illustrate that the balance of legal orders in hybrid or dual regimes is highly volatile. Meierhenrich (2008) demonstrates that the liberal elements of South African law provided leverage to challenge and reform the authoritarian legal order sustaining racialized apartheid repression of the Black population. But other hybrid postcolonial regimes that liberalized after WWII often have been overtaken by more illiberal, authoritarian legal forces at various times, as recently in Brazil, Hungary, and Poland. In short, the drift in the balance of liberal and authoritarian or illiberal legal practices in hybrid or dual legal orders over time can go both ways.

We underline that, unlike postcolonial hybrids of modern state and traditional law, the dual state model emphasizes relatively separate but interdependent, mutually constitutive legal orders that are the concurrent products entirely of modern nation state development. Our interest in this article concerns dual legal systems that emerged historically and persist in the present to govern the classic racial capitalist regime of the United States (Melamed 2011, 2015). This framework underlines that official state law developed to structure the terms of property exchange, commercial trade, and capital accumulation beginning in the seventeenth century. At the same time, capitalism historically was built on the inheritance of racial, gender, and religious differentiation and devaluation (Dawson & Francis 2016, Goldberg 2002, Mills 1997, Robinson 2000). Property ownership and citizen status were restricted almost exclusively to men of white, Protestant, European lineage, whereas broad categories of devalued, nonwhite persons, forced into expropriated and exploited labor required to generate surplus value, have been governed by separate forms of illiberal, authoritarian, or repressive law (McCann & Lovell 2020). Racial subordination contributed a structural dimension of capitalist development, but it also became a relatively autonomous force in social relations reflected and enforced by law.

The traditional view of the United States, at least in mainstream political rhetoric, is that populations long subjected to illiberal, authoritarian rule by dominant property-owning groups reflected the incomplete implementation of liberal legalism, or the slow, uneven "march of liberty" (Ginsburg et al. 2018, Hartz 1955, Urofsky & Finkelman 2011). Some people were just forgotten

or left outside of law, or "without the law" (Weiner 2006). By contrast, our review of copious historical scholarship aims to demonstrate that large populations historically have been denied basic rights and liberal legal treatment as full citizens not because of oversight or incomplete inclusion. Rather, they were, and remain, willfully, systematically subjected to repressive, violent legal rule that denied basic rights, minimized legal accountability of rulers, and enforced hierarchy (Mills 2008). These latter legal forms often are said to constitute the internal colony of racial capitalist apartheid in America. In short, separate, illiberal and authoritarian legal orders have coexisted with and sustained interdependent liberal legal practices among dominant groups from the start of the racial capitalist state-building project through the present. Just as capitalism and racial hierarchy were mutually constitutive, so have been liberal, illiberal, and authoritarian forms of law (Dawson & Francis 2016, McCann & Lovell 2020). We show these larger patterns in dual or hybrid legal systems through a brief tour of US historical literature.

THE AMERICAN DUAL LEGAL STATE: FROM SETTLER COLONIALISM THROUGH THE NEW DEAL

Many scholars (Dudas 2004, Frymer 2017, McCann & Lovell 2020, Rana 2010) have traced the roots of dual legal orders in North America to the settler colonial legacy. Despite the widely espoused origin story of an American revolt for independence from the colonial parent England, Americans and their constitutional project continued in unique ways the European project of empire expansion and racialized colonial rule. Rana (2010) argues that the early American project, one that most clearly propelled national development until the late nineteenth century, was animated by a commitment to republican freedom for those of Northern European heritage. This freedom was centered on the desire for individual economic independence manifest in property ownership as well as popular political expression. However, this commitment required constant territorial conquest to provide land for free white settlers, which in turn led to violent dispossession of indigenous peoples and systematic subjugation of marginalized slave and indentured labor. In this way, the pursuit of the civic republican ideal of freedom for white settlers and hierarchical, racialized subordination of nonsettlers were interdependent and mutually constitutive features of internal colonialism, two sides of the same national state-building project (Dawson & Francis 2016, Goldberg 2002). This dual venture, Rana (2012, p. 1022) argues, was grounded in "a complicated structure of overlapping hierarchies," which "provided each colonized community distinct modes of governance and levels of rights, depending on internal economic needs and the dictates of political order."

Building on these beginnings, both dimensions of the American dual legal order dynamically and interactively developed over the centuries. Liberal law principles adapted to the rise of corporate capitalism and the administrative state by the start of the twentieth century, as concentrations of wealth and economic power arguably undermined core promises of the republican ideals of propertied independence for many, including white working people (Rana 2012). Likewise, the plural forms of law governing the racialized labor classes and subaltern peoples generally varied for different ascriptively constructed groups, in different spaces of state and society, and at different historical moments (Haney-López 1997). Many of the most authoritarian and illiberal legal rules, institutions, and practices were administered by state governments, either directly or indirectly by deference to social groups such as property owners and production managers or vigilante groups like the Ku Klux Klan. Deference to states' rights and federalism by high courts and officials played a key ideological role in permitting and legally authorizing such repressive dynamics. Indeed, capitalist workplaces, including especially the plantation model in agricultural and extractive production, arguably have been among the most important but overlooked sites of arbitrary, coercive rule authorized by official liberal law until the contemporary period.

The tradition of legal governance over marginalized, disposable persons has, following the classic work of Nonet & Selznick (2001; see McCann & Lovell 2020), sometimes been labeled "repressive law," as opposed to liberal "autonomous" law.[1] For the purposes of this article, however, we highlight the earlier points that these legal traditions have been illiberal in that they have denied marginalized groups basic entitlements associated with white male citizenship and economic control; they have been authoritarian in that they have rendered legal rule unaccountable to subjects bound to obey but not bind law, although contestation has been persistent over the centuries (Glasius 2018). While the many legal forms of rule varied among different ascriptively defined groups, institutional sites, and time periods, they have shared common characteristics. Specifically, law for subjugated peoples has (*a*) enforced the relative unfree or semifree status of subjects, denying a wide range of rights to property ownership, due process, voting and political participation, racial intermarrying, and more (Fraser 2014, 2016; Smith 1997); (*b*) been far more surveillance intensive, violent, disciplinary, and restrictive than liberal law (Davenport 2005); (*c*) been often anchored in separate bodies of rules that are highly discretionary, informal, and arbitrary in exercise; and (*d*) aimed not to facilitate fair exchange relations among property owners, as did liberal or autonomous law, so much as to authorize administrative order management by dominant groups over underserving, disposable populations, not unlike law exercised by European colonial power over colonized peoples. Indeed, the image of internal colonialism in the United States has often been extended to various legally subjugated populations, both during and after the settler era, to underline parallels to classic European colonial legality (Du Bois 1935, Hayes 2017).

These histories are generally known, but we briefly recount some of the manifestations of law that were at once authoritarian and illiberal in governing African Americans, Native peoples, Mexicans, Asian Americans, women, and low-wage workers, among others.

From Slave Codes to Black Codes and Jim Crow

The American liberal project was constructed on the backs of forced slave labor production and the capital accumulation that slavery facilitated (Robinson 2000, Williams 1994). Building on English slave codes in Barbados (1661) and Jamaica (1664) and facilitated by growing commercial trade, several North American colonies developed their own slave codes over the following century. The institution of slavery and status of slaves as unfree persons owned by free persons were secured initially by a variety of provisions in the US Constitution, including the three-fifths clause regarding taxation and representation, as well as the fugitive slave provisions.

Slave codes varied among places and over time, but most focused on restricting freedoms and denying rights of slaves—to property ownership, free movement, free speech, firearm ownership or use, legally recognized marriage, public assembly as groups, civic voting, trade and commerce, and reading education (Tushnet 1981). Most slave codes prescribed how slaves could be disciplined and punished, as well as the penalties for excessive harm to slaves by slave owners and other white persons. In general, slaves were regarded as inherently dangerous, undisciplined, and virtually rightsless existential criminals requiring repressive surveillance and policing, including by legal and extralegal slave patrols of plantation owners and other free whites (Hadden 2001). Hence, slavery was governed by white employers, militias, and vigilantes relatively unrestrained

[1]Nonet & Selznick (2001) identify autonomous law, which resembles what we call liberal law in this article, as the historical successor to repressive law, although many elements of the latter have persisted into modern times.

by liberal law. The law(s) of slavery were the clearest expression of highly discretionary, even arbitrary illiberal and violent authoritarian legal orders that coexisted and were interdependent with liberal constitutional law in early America.

In 1865, the Thirteenth Amendment banned the slave system in the United States, although servitude was still permitted for those persons convicted of crimes, continuing the linkage of criminalization, repressive law, and the racialized underclass. Indeed, despite the Fourteenth Amendment guarantee of equal protection for all persons and the Fifteenth Amendment guarantee of voting rights, the bulk of newly "freed" African Americans after the Civil War soon experienced new forms of legally administered and authorized repression, what is often called "slavery by another name" (Blackmon 2008). The core legal mechanisms were the Black Codes (or Black Laws), which restricted Black people's right to own property, buy and lease land, conduct business, and move freely in public spaces. Core features of the Black Codes were newly expanded vagrancy laws and a peonage system that criminalized persons (mostly men) who were out of work or working in unauthorized jobs, as well as for failure to pay special taxes. Penalties for theft and other minor crimes were extremely harsh and arbitrarily administered. The threat of vagrancy laws forced Black workers into low-wage work in degrading conditions, condemning most to poverty and debt. Many people prosecuted for vagrancy were forced into wageless labor for public benefit in the convict leasing system, which in turn incentivized increasing criminal arrests. The Freedmen's Bureau provided some protections but mostly worked to support the oppressive system of forced contract labor. Some states did legislate expanded rights for freedmen, including rights to property ownership and marriage, although racially defined anti-miscegenation laws proliferated around the nation (Blackmon 2008). The US Supreme Court upheld pervasive, racially discriminatory practices and Jim Crow in *Plessy v. Ferguson* (1896), providing the constitutional bedrock for the Jim Crow–era racial caste system. The Black Codes were widespread in the North before the Civil War but became most prominent after the war, so segregation and racism were rampant in the North for many decades that followed, and remain so today (Mickey 2015).

The modern institution of domestic police developed to a large extent in the Jim Crow era from the tradition of slave patrols and vigilantism (Lepore 2020). Progressive-era policing, much of it grounded in American colonial experience abroad (Go 2020), worked to "criminalize" and thus "condemn" Blackness, as historian Muhammad (2010) has argued. Police focused patrolling and arrests in Black neighborhoods; prosecutors disproportionately indicted Black people; juries tended to convict Black people more often; and judges gave Black people longer sentences (Muhammad 2010). All of this took place in the context of social scientists designing studies to show that criminal behavior was a matter of biology: Black people were existentially criminal (Weiner 2006). These and many other strands of authoritarian, illiberal official law and unofficial but legally tolerated social violence—especially widespread practices of lynching (Francis 2014, Kato 2012)—converged to enforce the physical, geographic, economic, and political segregation and subjugation of African Americans into the middle of the twentieth century and beyond.

White American Legal Rule of Indigenous Peoples

The republican ideological commitments of white settler society constituted the differentiated legalities related to indigenous peoples as well. For one thing, the American liberal legal tradition anchored in property and contract among "civilized" white people provided a colonial cultural lens for defining the differences and dangers that marked Native peoples (or Indians), who from the first encounters were viewed as uncivilized and lacking inclination for property ownership (Dudas 2001, Rogin 1974). Absent the discipline required for full citizen rights and self-governance, Native persons required strong paternal white rule. This in turn led to violent

removal from Western lands and eventually the reservation system for Native Americans that mimicked structures of colonial indirect rule, backed by coercive force, in parts of Africa and Asia. "As with some overseas European colonies" writes Rana (2012, p. 1023), "federal courts and administrators sought on the one hand to limit federal responsibility for Indian welfare while on the other hand ensuring that settlers possessed an overriding authority to claim indigenous land or to reconstruct tribal institutions if necessary."

Federal US policy toward Native Americans has been forged by a mosaic of shifting and often contradictory policies, but scholars agree that the Supreme Court's early articulation of their unique legal status has been generally consistent over time (Churchill 1992; Deloria & Lytle 1984; Dudas 2001, 2004). Native American tribes are not independent sovereign nations but, rather, "domestic dependent nations," Justice Marshall wrote in *The Cherokee Nation v. The State of Georgia* (1831). "They occupy a territory to which we asserted a title independent of their will. . ..They are in a state of pupilage. . ..(like) that of a ward to a guardian." Although dependent on federal government discretion for protection, the tribes retained "self government. . .and. . .exclusive authority" immune from the compelled rule of separate American states [*Worcester v. Georgia* (1832)]. Ever since, the Supreme Court has invoked this "national duty" to protect and support Native tribes in ways that limit their capacity for self-rule. This has entailed limitations not binding on states, including prosecution of crimes committed by nonresidents within tribal boundaries and authority to regulate sales of alcohol. Tribes have retained some authority over the legal rule of their internal affairs, including economic development and personal relationships, but by entering into treaties they yielded their authority in many aspects of "external" relations, including "the right to enter as an independent party in to economic agreements or military alliances or treaties with other states" (Buchanan 1993, p. 586). Perhaps most important, the Dawes Act and several Supreme Court cases have extended federal jurisdiction over what Weiner (2006, p. 36) calls "Indian crime," abolishing Indian tribal property and sovereignty in the process. Once again, mainstream American relations with Native tribes have evidenced a plural legal system grounded in differential status and authority, much like traditional European rule over colonial wards (Churchill 1992, Dudas 2001).

All in all, Native peoples were not left outside of, or without, American law. Rather, liberal constitutional law authorized, administrated, and negotiated rule over natives and their resources that was at once illiberal and violently authoritarian.

Non-European Immigrants and Immigration/Citizenship Law

The largest groups of immigrants prior to the Civil War, we have noted, were white Northern Europeans in search of economic and religious freedom, as well as more than half a million Africans forced into slave labor. The 1790 Naturalization Act restricted naturalization to those with several years of residency, "good moral character," and status as a "free white person"; in practice, it was limited to white male heterosexual property owners (Ngai 2004). After the Fourteenth Amendment declared all persons born within the United States to be citizens and bestowed formal citizenship on freedmen, Congress in 1870 extended naturalization eligibility to "aliens of African nativity and to persons of African descent," essentially using geography as a proxy for skin color. Left open for legal contestation was the definition of "white" and the means to become "whitened." This question became salient from the 1880s to the Depression years, when 20 million immigrants from Central, Eastern, and Southern Europe arrived to escape religious persecution and seek economic opportunity, many of them as low-wage laborers in industrializing capitalism (Roediger 2005). Immigration policies and practices were left largely to states and varied widely.

Three waves of Asians, starting with the Chinese in the 1850s, along with Mexicans were admitted as noncitizens to provide additional low-wage labor, especially in the extraction industries

of the American West (Ngai 2004). Members of these groups were recruited to facilitate production and capital accumulation, but they generally were racialized and resented, even hated and feared by xenophobic white citizens, producing considerable social and legal conflict. This led to one of the first federal legislative acts governing immigration, the Chinese Exclusion Act of 1882. As Japanese and Filipinos increased in numbers, Congress passed the Immigration Act of 1924. The act created a quota system that restricted entry to 2% of the total number of people of each nationality identified by the 1890 national census, a system that again favored Western European immigrants and prohibited immigrants from Asia (Daniels 2004, Ngai 2004). Asians who did manage to enter, many conscripted by labor contractors, generally were denied rights of naturalization, except for those who performed military service or were children born in the United States. Filipinos were legally neither citizens nor aliens but rather a newly defined category of colonial "national" semi-citizens (McCann & Lovell 2020). Japanese Americans were deprived of rights and incarcerated in concentration camps during WWII. Mexican immigrants, mostly migrant workers, likewise were subject to semi-free, nearly rightsless status from the Civil War through WWII. Some were eligible for naturalization, and children born in the United States were citizens. But Mexican workers were subject to the same restrictive legal and legally authorized treatment as other racialized immigrant workers of color. The Bracero program, granting limited rights to millions of conscripted Mexican workers in the mid-twentieth century, was one of the clearest examples of differentiated law, formally semi-liberal but in practice arbitrary, exploitative, and repressive. All of these groups were subject to the constant terror of deportation, which underlined their rightsless disposability (Calavita 1992).

All in all, racialized foreigners, like African Americans and Native people, for scores of years were kept outside of the nation's civic boundaries by "a culturally potent and institutionally productive language of law," what Weiner (2006, p. 1) calls "judicial racialism" (see also Smith 1997). However, we suggest that it makes sense to treat these marginalized minorities not as "without" or outside law, as Weiner puts it, but rather as constructed subjectivities denied liberal citizenship rights and very much subjected to alternative networks of official law and legal practice that were at once illiberal and authoritarian in character (De Genova 2004, Ngai 2004). Again, these groups served the structural needs of capitalist profit and became driving forces of racial resentment in themselves.

Law, Gender, and Sexual Hierarchies in Private and Public Life

We have embraced the term racial capitalism to underline the previously discussed historical interrelationship between racial and capitalist hierarchy in ostensibly liberal constitutional republics like the United States. But to emphasize racial capitalism is not to suggest that race and class are the only intersectional dimensions of systematic inequality among workers in modern political economies. Racial capitalism also developed in a dependent relationship with heteronormative patriarchal privilege. It is widely accepted that capitalism built on and reconstructed inherited forms of patriarchy and gender hierarchy that, like racial hierarchy, preceded capitalism (Pateman 1988). Early modes of production and social reproduction in market-based societies depended on wageless domestic labor by women in private household economies. Women in particular were charged with child rearing, education, and household service—crop and craft production, cooking, cleaning, consumption arrangements, order maintenance, child socialization—in the bourgeois family unit. Much of this care work was provided in white family units by legally designated wives in the marriage contract, but in many contexts, especially among upper-income or plantation-owning whites, domestic care work was provided also by unfree minority-race servants, slaves, or other low-waged workers.

These domestic relations of reproduction were the foundation on which male participation in the capitalist marketplace developed, adjuncts to property-based, profit-driven productive processes in many sectors. The prevailing arrangement was that "males should occupy the public sphere of commerce and politics and women the private sphere, and law should reinforce that boundary" (Rhode 1989, p. 266; Gordon 2006). Women were constructed by the highest law of the land as "unfit for many of the occupations of civil life"; women's "paramount destiny" was to fulfill the "noble and benign offices of wife and mother" [*Bradwell v. State* (1872), pp. 130, 141]. Although often romanticized as maternally based "havens from the heartless" world of market competition, however, the domestic sphere of women's work was grounded in gendered and racialized inequality, exploitation, and violence. Women, like servants or slaves, explicitly were limited in formal rights in matters of contract, property control, or public participation as citizens until far into the twentieth century; constitutionally supported statutory law at all levels enforced male privilege and female subordination. Women's designated roles reproduced both basic biological life and hierarchical social life in the racialized, capitalistic, patriarchal social order (Hartmann 1976, Hartsock 1983). Once again, legally supported, authorized, even enforced patriarchal hierarchy should frankly be recognized as at once illiberal and authoritarian and contributing to capitalist economic order.

Authoritarian Private Governance of Work

We underline that privately owned production defined a particularly coercive, disciplinary, and even violent space of legally sanctioned exploitation for all of these groups. For all the classical liberal language of property rights, contractual exchange, and republican freedom, workplaces were institutional sites of authoritarian, illiberal private government secured by the American Constitution and lacking in rights protections for workers associated with public citizenship (Anderson 2017). Slavery and immigrant work were structured on a hierarchical, segregated, brutal plantation model of what journalist McWilliams (1939) famously called "factories in the field." McWilliams (1939; McCann & Lovell 2020) described West Coast agricultural production in the early twentieth century on "fascist farms"—with absentee owners; centralized bank financiers; hierarchical control of production processes; harsh discipline for laborers; elaborate mechanisms of "espionage" and "propaganda" to supplement direct control; residence in fenced labor concentration camps; and strong-arm, brutal repression of unionizing efforts and dissidents. As scholar Orren (1991) argued, American employment law was, even for formally "free" white wage earners, grounded in illiberal, authoritarian, feudal principles of master–servant relations until at least the 1930s. Household social and material production were no less hierarchical, segregated, and often violent for many women (Du Bois 1935).

Summary

Overall, there can be little question about the interdependent, mutually constitutive character of the dual American legal orders' endurance through the Second World War. The multiple illiberal, authoritarian legal traditions were not uniform, as they instead were dynamically tailored to target subject populations and institutional contexts at different historical moments. But they all expressed both illiberal and authoritarian features of administrative order management serving capital accumulation at once separate from and mutually constitutive of the white supremacist liberal legal tradition. The palpable reality of race- and class-based illiberal law provided Hitler and his cronies with an "American model" for Nazi Germany, what Fraenkel called the "dual state" (Whitman 2017), distinguishing between contract-based normative law for members of dominant

groups and violent, administrative prerogative law to manage those persons undeserving of full citizen status and condemned to provide disposable labor.

POST-WWII LEGAL RECONSTRUCTION: FROM DUAL TO SEMI-DUAL HYBRID LEGAL ORDERS

The civil rights reforms of the 1950s and 1960s expanded formal, de jure rights against explicit racial and gender discrimination for most people, thus ushering in a second Reconstruction that further advanced the liberal constitutional project. A host of high court decisions declared Jim Crow–era public racial segregation unconstitutional, and national legislation of the 1963 Equal Pay Act, the 1964 Civil Rights Act, the 1965 Voting Rights Act, and the 1965 Immigration and Nationality Act seemed to go a long way toward abolishing the longstanding dual legal system, the two forms of sovereign rule that long had governed the American "Herrenvolk republic" (Roediger 1991, p. 172). Gone were the most overt remnants of the Black codes and explicit Jim Crow laws, the race-based exclusionary acts, race- or ethnicity-based immigration laws, and overt constraints on women's rights. European Jewish immigrants were initially marginalized but never legally persecuted in the United States, as was the case in Hitler's Germany (Whitman 2017, p. 103), and they generally prospered at new levels in the post–New Deal American era. The dual state appeared to be replaced by a more robust, comprehensive official commitment to liberal constitutional ideals and ideas. Parallel liberal legal transformations spread in Europe and the Global South, marking a period of "racial break" from older, overt white supremacist rule (Melamed 2011, Omi & Winant 1994, Winant 2001).

Still, the relative ascendance of what King & Smith (2005) call the liberal "egalitarian order" over "white supremacy" did not end the socioeconomic inequality and violent legal subjugation for many persons, especially persons of color (Melamed 2011), in the corporatized racial capitalist order. For one thing, the civil rights and due process revolutions provided limited ideological or institutional resources for leveraging redistribution of economic, social, and political power denied for centuries to racialized, gendered, and other semi-free persons generally, even those granted formal rights and citizen status (McCann 1989). Political discourse and policy agendas became less overtly racist but found more nuanced codes for segregated hierarchy. Richard Nixon's law-and-order refrain and Ronald Reagan's renewed call for states' rights were subtly racialized codes, implicitly communicating opposition to progressive policies like school busing or affirmative action, propelling criminalization logics toward racially unruly and marginalized subjects, and tapping into white status anxieties about a rapidly integrating society (Beckett 1997, Scheingold 1984). With explicitly racist appeals now socially taboo, symbolic and ostensibly liberal color-blind gestures made the transition easier by reframing questions about race, gender, and class as instead about free markets, individual responsibility, and smaller government. Racial segregation could be achieved without openly championing it, social hierarchy maintained by willfully ignoring it.

The official legal order and informal legal practices followed the cues of electoral and cultural politics. As we review below, advances in formal rights and neutral, color- and gender-blind law did not end the long-standing practices of repressive legal governance targeting subaltern subjects or the de facto socioeconomic abuses routinely imposed on those in the disposable laboring classes and designated surplus populations. Indeed, many scholars have argued that we should not allow liberal pretenses to obscure the oppressive "second face" of the US legal rule manifest in institutions that govern citizens by "means of coercion, containment, repression, surveillance, regulation, predation, discipline, and violence" (Soss & Weaver 2017, p. 567; Tian 2019). That said, the manifest institutionalized forms of repressive law sustaining order management of racialized and gendered noncitizens and second-class citizens generally did undergo changes in the era

of racial liberalism. In short, the older informal, discretionary, decentralized modes and practices of repressive law were reorganized into new, more bureaucratic, facially neutral, systematically coordinated, professionally led, procedurally legalistic—that is, quasi-liberalized—administrative systems to produce order management among allegedly unruly, racialized, mostly poor and disposable populations. These legalistic developments arguably did not tame so much as routinize, rationalize, and normalize state-administered discriminatory violence targeting subaltern groups in the racial capitalist order (Cover 1986; Melamed 2011, 2015; Reddy 2011; but see Epp 2010). As a result, the prevailing legal system became a more integrated hybrid of old and new legal forms that created a semblance of racial, gender, and class innocence while maintaining disparate treatment for different populations and in different institutional sites (Murakawa & Beckett 2010). We outline a few of the more dramatic dimensions and sites of this hybrid of liberal and illiberal, authoritarian legal practice.

Jim Crow Reborn in the Penal Industrial Complex

The most dramatic and highly publicized hybrid manifestation of the new illiberal and authoritarian legal order has been the complex web of policing, surveillance, and mass incarceration practices. Famously labeling it the New Jim Crow penal caste system, Alexander (2012) has shown how millions of racialized "second-class" citizens and unfree persons have been "trapped in a parallel social universe, denied basic and human rights" (Gilmore 2007). Political scientist Gottschalk (2008, p. 245) echoes the characterization: "The carceral state has helped to legitimate the idea of creating a separate political universe for whole categories of people" who have been described as "partial citizens" and "internal exiles," disenfranchised from many forms of civic engagement. For young African American men in some urban areas, the correctional state is by far the state they know best (Soss & Weaver 2017; also Wacquant 2009). Native American men are sent to prison at four times the rate of white men and Native women at six times the rate of white women. Native Americans are the racial group most likely to be killed by law enforcement (Hartney & Vuong 2009, p. 3). As in earlier eras, prison conditions are harsh and brutal, and prison labor, ostensibly voluntary for some but mandatory for many others, continues to be far less well compensated and far more degrading than low-paying work outside in civil society. Meanwhile, the elaborate web of costly monetary sanctions—e.g., fines, fees, bonds, wage garnishing, asset forfeiture—extracted disproportionately from low-income people of color greatly multiplies the punitiveness of the system (Harris 2016). In addition to these illiberal laws that disproportionately punish the poor and racial minorities, the authoritarian legal order prohibits their ability to change the system through democratic means. Felons in most states are denied voting status on release, thus removing them from civic participation and condemning them to "social death" (Cacho 2012).

The new system is similar to the old Jim Crow in its violently punitive modes of order management targeting subproletarian persons of color, but the contemporary criminal justice system is more bureaucratic in organization, professionalized, and legalistically structured around a maze of facially neutral rules than earlier forms of repressive law (Murakawa 2014). For example, numerous studies have confirmed the palpable patterns of racial profiling by police while making investigatory stops of African American and Hispanic drivers, but these invasive, authoritarian practices are shrouded in a host of ostensibly color-blind protocols, rights-respecting procedures, and even rituals of courtesy that confer a semblance of undifferentiated legal treatment (Epp et al. 2014) yet often lead to confrontations and violent actions, including killings. Contemporary police are minimally better trained in standard procedures, but their militarized capacity for coordinated legal violence against alleged street criminals and political protestors far surpasses that of earlier eras (Balko 2013). Likewise, the procedurally legalistic, judicially authorized, and

technocratically administered state executions today are different from the volatile, racist mob lynchings of long ago and yet functionally similar and more constitutionally secure (Ogletree & Sarat 2006). In short, the machinery of contemporary criminal justice is more legalistic and facially deracialized than in the distant past, but the ghosts of slavery and past violent practices still haunt the repressive institutional system that overwhelmingly targets racialized, lower-class persons (McCann & Lovell 2020; see also Dayan 2013, Murakawa 2014, Simon 2006).

Modern Crimmigration

The modern American complex of immigration regulation is, as in the past, closely intertwined with the security state and punitive criminal justice systems regulating poor, dark-skinned, racialized migrant workers, most conscripted or escaping from Mexico and Latin America but also recently from Muslim-predominant nations (De Genova 2010, Hernández 2018). The estimated population of undocumented migrants grew from approximately one million in the early 1970s to well over ten million in the 2000s, around 3% of the US population. The contemporary crimmigration apparatus, as it is often labeled, is built on policies and practices developed over the previous century. It escalated rapidly in punitiveness with new laws, policies, and bureaucratic coordination during the Reagan administration's War on Drugs and continued to expand during subsequent administrations, especially with the Clinton-era 1996 Illegal Immigration Reform and Immigrant Responsibility Act and Antiterrorism and Effective Death Penalty Act, as well as accelerated national security measures following the terrorist attacks of 9/11. Brutal immigration control practices and denial of claims by refugees and asylum seekers in the Trump era sought political justification by further inflating fears of criminal gangs, human trafficking, and foreign terrorists—all identifying the ranks of undocumented migrants in racialized nativist terms as inherently dangerous, much as in the past (Provine & Doty 2011, Wasem 2020).

Illegal entry into the United States can be prosecuted as a criminal offense, whereas undocumented status is a civil violation, but illegals have continued to be treated generally like, or worse than, criminals. Immigration control is administered by an elaborate, Kafkaesque network of interlocking federal, state, local, and privately contracted agents. The key protocols still include surveillance, detention, deportation, and incarceration. Pretrial and mandatory detention by Immigration and Customs Enforcement officials is highly discretionary and relies on rituals of civil confinement that mimic criminal detention but fall short on actual due process, including Fourth, Fifth, and Sixth Amendment rights, again constructing a veneer of bureaucratic legalism to mask routinely discriminatory, often brutal treatment (Hernández 2018). Deportation condemns migrants, like felons, to a form of civic death or bare life, sometimes leading to physical death (Cacho 2012). Indeed, the highly discretionary terms of deportability underline the ultimate disposability of imported, commodified laborers (De Genova 2004, 2010). For undocumented immigrants, including longtime residents in the United States, law's violence thus reigns as a condition of constant state terror. As Hernández (2018, p. 200) argues, "This is not an area of law characterized by harsh edges or the one-off example of excessiveness. Its very core is damaging. People, institutions, and the legal system itself suffer from crimmigration law's fundamental precepts" (see also Gleeson 2010).

Governing Through Crime: Varieties of Law's Violence

Leading sociolegal scholar Simon (2006) powerfully argued that the American legal state extended its reach of repressive, illiberal, authoritarian order management by integrating elements of

criminal, civil, and administrative law in a host of sectors in the late twentieth century. All of this "governing through crime" has been authorized and justified with militant discourses of the state—the wars on crime, on drugs, on terrorism, on poverty, and, in the Trump age, on whatever the executive finds threatening, strange, and nonwhite. We list several manifestations, some but not all of which Simon explores.

One dimension of expanded criminalization involves less confinement than social control of homeless persons through urban spatial exclusion, what Beckett & Herbert (2009, 2010) call "banishment" in municipalities. In many ways, this social control technique revitalizes archaic criminal vagrancy and loitering laws in the Black Codes that targeted propertyless, poor African Americans following the Civil War. Although the US Supreme Court ruled that most vagrancy statutes were unduly vague and thus unconstitutional, a variety of similar legal tools have been refashioned in off-limit orders, anti-loitering ordinances, park exclusion orders, civil gang injunctions, Stay Out of Drug Areas orders, trespass admonishments, and the like. The new codes authorize highly discretionary modern police actions treating as criminal many behaviors associated with homelessness, including panhandling, occupying of sidewalks, camping, drunkenness, and homelessness itself. Today's civility codes in practice represent another hybrid mix of civil, criminal, and administrative legal elements, but they restrict rights through punitive, often arbitrary means and accord at best minimum concern for due process. These informal legal forms of social control not only undercut freedom but sever persons from social connection, impede efforts to find paying jobs, decrease security, and rob autonomy and freedom. They are another manifestation of authoritarian and illiberal law directed at disposable, subproletarian persons (Feldman 2004).

A more pervasive institutional manifestation of illiberal, authoritarian law has been the criminalization of welfare policy and administration. Scholars, at least since the 1960s, have underlined how the welfare system degrades, punishes, and "regulates the poor" (Piven & Cloward 1993). Building on the familiar disparaging attribution of the welfare queen, welfare social policy at the federal and state level, especially from the 1980s forward, "wove the criminal justice system into the welfare system" (Gustafson 2011, p. 51; Hinton 2016). Indeed, the rhetoric of pathology and criminality has become essential to welfare policy, while attention to the hardships of poverty, not to mention racism and sexism, have been eclipsed. The welfare system relegated the poor to an inferior status of second-class citizenship, as welfare recipients have been framed as liars, cheaters, and thieves on par with parolees and probationers; they are not just economically poor but rights poor as well, as Gustafson (2009, p. 646) has documented at length. With the 1996 Personal Responsibility and Work Opportunity Reconciliation Act, which signaled the Democratic party's collapse before intensifying conservative and neoliberal political pressures, welfare administrators were empowered to increase already high levels of surveillance and punishment of women regarding practices in everyday life that are insulated by privacy entitlements for white middle-class persons (Gilliom 2001). In the pursuit of food, health care, and shelter for their families, welfare recipients are watched, analyzed, assessed, monitored, checked, and reevaluated in an ongoing process involving supercomputers, caseworkers, fraud control agents, and neighbors (Gilliom 2001, p. xiii).

The American security state has also continued longstanding policies and practices of criminalizing political dissidents. In the late 1940s and 1950s, as many as 15,000 left-leaning persons—including especially labor leaders like Harry Bridges and Carlos Bulosan—were surveilled, arrested, investigated, tried, and threatened with jail or deportation for alleged subversion (McCann & Lovell 2020; Schrecker 1998, p. 416). Most deportation charges were based on civil contempt and perjury violations, not criminal offenses. But the symbolism was to make dissidents into criminals, to delegitimize and mute their critical voices, visions, and aspirations.

"By putting Communists on trial, the Truman administration. . .transformed party members from political dissidents into criminals," historian Schrecker (1998, p. 27) concluded. Decades later, federal national security and law enforcement agencies systematically infiltrated and spied on African American communities, civil rights activists, and antiwar groups throughout the 1950s, 1960s, and early 1970s under COINTELPRO (the Counter Intelligence Program) (Glick 1989). The specific targets of state surveillance vary, but the logic stays the same: Surveil, control, and isolate the sources of perceived risk to prevent contagion to the rest of society, incarcerating and killing as necessary (Beck 1992, Davenport 2005). Since 9/11, Arab and Muslim communities have been the prime targets of domestic surveillance (Greenwald & Hussain 2014). As evidenced by Edward Snowden's revelations, millions of persons are under surveillance by the American national security complex (Marechal 2015, p. 56).

BEYOND DIRECT STATE CRIMINALIZATION

The focus on criminalization, even on the integration of hybrid criminal elements into civil and administrative law, can obscure the other dimensions of illiberal and authoritarian rule in the modern dual legal network. One good example is federal and state urban development, highway construction, and zoning policies starting in the 1940s that systematically expanded safe, affordable housing for white people in the suburbs while systematically moving people of color (especially black and brown people) out of integrated neighborhoods and into increasingly marginal, jobless, poor, and violence-plagued slums and ghettoes. In his aptly titled book, *The Color of Law*, Rothstein (2017) documented that these policies implemented state violence knowingly targeted at racialized, semi-free, second-class citizens emblematic of continued white supremacy. At the same time, the policies were embedded in elaborate technocratic planning processes authorized by abstractly framed race-neutral legislation and legally underwritten by a long string of federal court rulings over many decades (Rothstein 2017). The Fair Housing Act prohibited housing programs that compounded previous redlining segregation of protected minority groups without a legitimate state interest, but the legislation failed to limit multiple types of discriminatory non-housing government programs that reinforce segregation and unfreedom for many, including especially transportation policies (Massey 1990; Rothstein 2017, pp. 188–91).

We also prominently feature the rapidly expanding scholarship on the pervasive authoritarian governance over our work and off-hours lives in the late twenty-first century. As Anderson (2017, p. 63) wrote, "private governments impose controls on workers that are unconstitutional for democratic states to impose on citizens who are not convicts or in the military." In fact, the property-based US legal system long has been notable among capitalist regimes in its restrictions on waged workers' substantive rights to organize and act collectively to represent their interests (Getman 2016, Kolin 2016, Orren 1991, Vinel 2013). New Deal–era advances in potentially empowering statutory labor laws were limited to mostly white industrial workers and were soon undercut by the Taft–Hartley Act, subsequent federal legislation, "deradicalizing" judicial decisions, state right-to-work laws, and routine use of police violence to crush worker dissent and basic political freedoms—all of which crippled unions and the potential for collective, democratic political power of workers both within workplaces and in public life during the postwar era (Getman 2016). As a result, employers can discipline, demote, terminate, or blacklist employees virtually at will, including for exercising political rights to speech and association. The prospects for even a modestly liberal democratic "workplace Constitution" guaranteeing basic rights for employees "all but vanished" by the 1980s (Lee 2014, pp. 257–58). Importantly, strikes—so important to early immigrant labor activists—by federal employees and most state public-sector workers are also subject to severe penalties. A "capitalist society is a class society...that has needed not just the occasional

enforcement of the law but the regular application of force...and a wide range of repressive interventions" against workers, writes political scientist Gourevitch (2015, p. 763).

The persistent patterns of legalized workplace exploitation of low-wage laborers in particular persist today. Many extraction industries have remained organized around the racially segregated, harshly administered plantation model, a model that a majority of the US Supreme Court has consistently found to be legally acceptable under its cramped reading of civil rights law (McCann & Lovell 2020). Many studies document the continuing patterns of legally authorized forms of race and gender discrimination, including sexual harassment, that remain pervasive in modern corporate production processes (Berrey et al. 2017). The judicial requirement that discrimination must be shown to be intentionally harmful along with the co-optive endogenization of symbolic in-house corporate civil rights administration have largely immunized racial and gender hierarchy from effective challenge (Edelman 2016; see also Lee 2014). As in other institutional spheres, de jure procedural rights hold little power to challenge systematic, de facto racial hierarchy and class exploitation. This is largely the case for a great many female workers generally and especially women of color (Ehrenreich & Hochschild 2003, McCann 1994), as well as for minority and immigrant male workers (Apostolidis 2018, Gleeson 2010), who tend to be concentrated in low-wage, dead-end, temporary, contingent, precarious work with few protections or benefits (Weil 2014). Indeed, the immigrant day laborer can be imagined as a synecdoche for the fate of nearly rightsless, semi-free, low-wage workers in the ruthlessly fissured workplaces of the gig economy (Apostolidis 2018, McCann & Lovell 2020, Weil 2014).

CONCLUSION

We could add much more, but the brief review above sketches how the intricate networks of modern American law continue to deny liberal rights status to many people, in many institutional and social sites. Whereas law generally continues to protect the wealthy and white property owners and their contractual relations, law pervasively disciplines large swathes of the semi-free working class and punishes racial minorities, immigrants, and the disposable poor (Wacquant 2009). In short, much law in the United States is both authoritarian, in that it is unaccountable to many of its legal subjects, and illiberal, in that it denies basic rights protections, propertied independence, and justice. As Merry (2016, p. 470) recognized, "The rule of law can mean simply a set of procedures rather than a mechanism to produce substantive justice. Indeed, in the context of neoliberalism, this is increasingly what the rule of law means." And all this developed well before President Trump tapped into resurgent illiberal American legal traditions of white patriarchal supremacy and heavy-handed prewar authoritarian governance, along with some practices taken from the playbook of contemporary autocrats whom Trump explicitly admired (Mednicoff 2018, Solnit 2019). But the Trump phenomenon demonstrates the significance of recognizing authoritarian and illiberal legal traditions, as they can be tapped and exploited further at any time by rogue populist leaders and their anxious party followers.

The analytical implication of our argument returns us to issues of comparative legal scholarship, though. We applaud the growing inclination of sociolegal scholars to think comparatively and historically about law and legal orders. But we insist on recognizing the misleading distortions of relying on simple binaries among entire unitary systems and among highly developed states in the Global North, which are in fact as plural, complex, variegated, and hierarchical as elsewhere in the world. Comparatively, claims that liberal legal orders offer greater opportunities for contestation over rights and justice are not wholly wrong, but they tend to be highly simplistic and cloak the illiberal and authoritarian elements embedded in ostensibly liberal orders. Far more nuanced historical, institutional, and group-based comparative specification is necessary. For example,

although Chua (2014) distinguishes generally between authoritarian and liberal state contexts, her classic study contrasts more specifically the challenges faced by gay rights activists lacking legal protections for speech, assembly, and association in Singapore to comparable activists who benefit from greater protections in the United States, although she notes that those latter rights protections have varied greatly over time in America. Within the United States, moreover, it is not enough just to identify the gaps between liberal legal ideals and practices, the historically incomplete fulfillment or recent demise of liberalism, as many sociolegal scholars and law professors routinely do (Ginsburg et al. 2018). The contemporary US legal system is not the same one that Hitler admired nearly a century ago, but it is not nearly as different as American scholars often posit. In both cases, we as scholars must be clear-eyed about the institutionally and ideologically embedded illiberal, authoritarian traditions that continue to be mobilized to compete with and constrain liberalism, not to mention radical democratic possibilities beyond liberalism (McCann & Lovell 2020). Again, contrary to familiar attributions of liberalism, American law has been and remains a dynamic mosaic of both liberal and illiberal, authoritarian, hierarchical elements.

Studies of the United States in comparative perspective have traditionally been rare, and those that exist have generally compared or identified the United States with other liberal democracies. An important implication of acknowledging illiberal and authoritarian traditions within the US legal system is that there is much to be learned from examining these US dynamics in comparison not only to other ostensibly liberal regimes but also to regimes deemed transitioning, hybrid, or fully authoritarian. Much of the scholarship on state repression, surveillance, and systematic disenfranchisement—as well as mobilization and resistance—in hybrid or authoritarian regimes can enhance our understanding of similar dynamics in the United States (Davenport 2012). We therefore urge scholars of the United States to integrate insights from the growing scholarship on state repression and activist mobilization strategies in authoritarian and hybrid regimes (Chua 2014, Gallagher 2017, Kahraman 2017, Moustafa 2008).

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