

THE ORIGINS OF TOTALITARIANISM PART 1: INTRODUCTION

The *Origins of Totalitarianism* is Hannah Arendt's analysis of the rise of totalitarian governments, the Nazis under Hitler in Germany and the Communists under Stalin in Russia. It was published in 1951, though it was largely completed in 1945. In its original form it focused primarily on Nazism, and as more detail emerged about Stalinist Russia, the book was revised. There are three sections, Antisemitism, Imperialism and Totalitarianism. The book can be read [here](#). Page numbers at this link correspond to the page cites I'll be using.

Rationale

Why this book? Anyone following current US politics has seen references to a fascist turn in Republican politics, and in the crowds surrounding at least one of the candidates. Similar but much smaller outbreaks occurred at campaign appearances of Sarah Palin in 2008 and at other Republican and conservative gatherings. One early user of the term fascism was @billmon1 on the Twitter, also [here](#). Arendt's detailed exploration of the rise of fascism, particularly in Germany, is a tool to help us understand its genesis, and perhaps see certain parallels to today.

In *Modernity on Endless Trial*, Leszek Kolakowski says:

If we are to believe Hegel – or Collingwood – no age, no civilization, is capable of conceptually identifying itself. This can only be done after its demise, and even then, as we know too well, such an identification is never certain or universally accepted. Both the general morphology of civilizations and the descriptions of their constitutive characteristics are

notoriously controversial and heavily loaded with ideological biases, whether they express a need for self-assertion by comparison with the past or a malaise in one's own cultural environment and the resulting nostalgia for the good times of old. Collingwood suggests that each historical period has a number of basic ("absolute") presuppositions which it is unable clearly to articulate and which provide a latent inspiration for its explicit values and beliefs, its typical reactions and aspirations. If so, we might try to uncover those presuppositions in the lives of our ancient or medieval ancestors and perhaps build on this basis a "history of mentalities" (as opposed to the "history of ideas"); but we are in principle prevented from revealing them in our own age, unless, of course, ... we are living in the twilight, at the very end of an epoch. P. 3.

Maybe so, but I think most ages are blessed with a few people capable of identifying at least the central points of a civilization, as they write the first drafts of history from the perspective of those who lived through it. They give us signposts for thinking about the best way to proceed into the future, and ways of understanding aspects of we humans and our societies that seem ineradicable. I'm also dubious about the term "historical period", because there are few ideas that ever really disappear once installed in human minds. Instead they hide in the corners of society until conditions are ripe for another outbreak.

Arendt and Polanyi both wrote near the end of WWII. Both were Jews, educated in Europe after WWI, and both left Europe as Antisemitism struck at their ability to work and to live. Arendt left Germany in 1933, first to Czechoslovakia and then Geneva, then Paris. She was picked up by the Vichy regime in France, and interned in a

camp. She was permitted to leave France in 1941 and moved to the US using an illegal visa issued by a US diplomat, Hiram Bingham, and with the aid of a noted rescue worker, Varian Fry. Polanyi left Vienna in 1933, and moved first to London, and then to the US. After WWII, he was unable to obtain a visa because his wife was a former Communist, so they moved to Canada and Polanyi commuted to New York where he taught at Columbia.

The technique adopted by Karl Polanyi in ***The Great Transformation*** was to look far back into history to show the wave that swept over European nations with the Industrial Revolution and the rise of capitalism as the dominant form of economic organization. Foucault uses the same technique, for example in ***Discipline and Punish***, which describes the impact of the Industrial Revolution on the working people of France. Arendt uses the same technique. She gives a broad historical perspective to the rise of fascism and communism and their transformation of Germany and Russia into totalitarian states. This technique offers a way to begin to identify a civilization, or a social structure, to get at its roots. Thus, all three follow Kolakowski's model.

In this post, I described Polanyi's discussion of the rise of fascism in Germany. It is similar to Arendt's analysis in ***The Origins of Totalitarianism***. They both see the destruction of social roles of huge numbers of people, primarily from the lower and middle classes, as a crucial element of that change, though they use different sources and different language. Polanyi points to the large numbers of people who lost status and social position and roles in the sweeping changes of the Industrial Revolution, and in the wake of the Great Depression. As we will see, Arendt points to the dislocation of millions as the Industrial Revolution progressed, and to the dislocation of the lives of many Germans in the wake of defeat in WWI, exacerbated by hyperinflation in the early 20s and then worsened by the Great

Depression.

It seems to me that the wave of neoliberalism that rose to new heights under the Reagan and Thatcher administrations and has wedged itself in our minds since, is a cultural change, not of the magnitude of the rise of totalitarian states or the Industrial Revolution, but still with an enormous impact on the lives of individuals. For many in the upper class, the neoliberal turn has removed any sense of responsibility to society or to the planet. For others in the upper class, there is increasing fear for the future because of global warming and the rise of oligarchy.

In the case of the lower and middle classes, that impact has been much more concrete. After years of stagnating wages and pointless wars followed by a frightening financial crash, and more wars and political deadlock, the middle class is disappearing. People experience dropping from the middle class as a loss of status, of a place in society, a role, and even a purpose. There is nothing in US society to replace that status, or to provide a new sense of belonging. These dislocated people are not in any way organized. The neoliberal system dismisses them as moochers and leeches seeking handouts while taking no responsibility for themselves. People who are nominally still middle class are feeling similar pain as their future prospects and those of their children dwindle.

The parallels to today are uncertain. But I think it's worth examining this argument in detail to see if we can learn something useful.

General Plan

The Origins of Totalitarianism is divided into three sections: Antisemitism, Imperialism, and Totalitarianism. I intend to focus on Totalitarianism. I see the first two sections as setting up the third. One of the central ideas in the section on Antisemitism is that the Jews in Europe were never assimilated. There are several forces described in the section on

Imperialism that reach full flower in
Totalitarianism. Among others, these include the
idea of superfluous humans and superfluous
capital, which are associated with Arendt's
categories of the mob and the masses, and the
whirlwind of capitalism. I'll take those up
briefly, and quite incompletely, before turning
to the main discussion.

FDL: LOOKING AT THINGS AS THEY WERE; DREAMING OF THINGS THAT NEVER WOULD BE



There
are
multiple
better
voices
here to
address
the
apparent

demise of Firedoglake, whether briefly or at length. I was, in a way, an interloper by chance. By fortune, actually. Because I was asked, for inexplicable reasons I will never fully understand, but will always treasure, to join Emptywheel when it morphed from The Last Hurrah into the Emptywheel blog at Firedoglake. Yes, I had been a decent contributor to both Next Hurrah, and, often, FDL, but still it was a bit of a shock when it came.

I can honestly say I, as a result, encountered some of the finest and most genuine people in my life. That happened because of FDL, both as to the lifetime friendships with people that are here with us, including, most notably, Marcy, and all the others. Marcy, Rayne, Jim White, Ed

Walker, Rosalind....and, please, let us not forget Mary and some of the others no longer here. All that came, at least for me, out of seeing Scooter Libby coverage early on nearly a decade ago. At FDL.

This medium may be digital, but it has wings and real life beyond the URL's and binary code or whatever. The people I have met and interacted with as a result of being around FDL were, with little exception, remarkable, intelligent, wonderful and I think the world has been made better by them.

So, to Jane Hamsher, Christy Hardin Smith, Siun, Pachacutec, Richard Taylor, Karl, Suzanne, Bev Wright (Bev and Book Salon was one of the most awesome things ever), Ellie, each and every one of the fantastic moderators who were the ones who kept the enterprise really alive for so long, and a host of others that allowed me to participate with them, thank you. There are too many to list, and I love one and all. You will all be missed, and I apologize to the too many other friends I met there and have not listed. You know who you are, and thank you.

I am starting to see eulogies all over the web, and most are quite decent. FDL was right, and early so, about the rule of law, the Cheney Administration, torture, surveillance, marriage equality and ACA/Obamacare, just to name a few of the plethora of topics breached on her pages. The voices have not died, but, now, the common enterprise has.

I will leave it to others to say where exactly FDL fits into the hierarchy and history of the blogosphere, but it was certainly up there. Thanks, and vaya con dios FDL.

Update, from emptywheel: bmaz forgot to mention DDay, but I'm certain it was an oversight.

A TALE OF CELEBRITY BON VIVANT CIVIL SERVANTS AND ACCESS JOURNALISM



There
is a
distinct
problem
in
this
country
with
excess

ive inbreeding of politicians, lobbyists and journalists. In a country where so many are now ruled by so few in power, it is becoming, if not already become, the biggest threat to American democracy. I would add in corporations, but, heck, who do you think the politicians, lobbyists and journalists represent at this point?

Now, corporations and their money through their mouthpiece lobbyists have long had a stranglehold on politics, whether through the corps themselves or their wealthy owners. But the one saving mechanism has historically been claimed to be the "Fourth Estate" of the American press who were there on behalf of the people as a check on power. But what if the Fourth Estate becomes, in fact, part of the power? What then?

What if the crucial check on federal and state power is by journalists who are little more than stenographers clamoring for access and/or co-opted social friends and elites with the powers that be? What if the sacrosanct civil servants of this country are nothing but Kardashian like shills out for a free gilded ride before they leave office to cash in with private sector riches befitting their holiness?

Golly, if only there was an example of this incestuous degradation. Oh, wait, get a load of this just put up by Kate Bennett's KGB File at Politico:

In a generally stay-at-home administration, one member of the Obama Cabinet is proving to be the toast of the town. Jeh Johnson, the oh-so-serious-on-the-outside secretary of Homeland Security, is fast becoming Washington's No. 1 social butterfly, dining out at posh restaurants like CityCenter's DBGB, as he did last week with a small group that included Amy Klobuchar, Steny Hoyer, CNN's Jim Sciutto, the New York Times' Ashley Parker, author Aaron Cooley, and lobbyist Jack Quinn and his wife Susanna.

For a guy who's been running a 24/7 war against terror since 2013, Johnson seems to have a lot of time to trip the light fantastic. He can often be seen enjoying regular catch-up sessions with BFF Wolf Blitzer at Café Milano (back table, naturally); and mingling at black-tie soirées, such as the Kennedy Center Spring Gala, the Opera Ball, or a champagne-fueled VIP garden party at Mount Vernon to toast French-American relations, all of which Johnson attended—and stayed at beyond the requisite cocktail-hour schmooze.
Story Continued Below

"There's rarely an invitation he'll turn down," says an aide to Johnson, who prefers to remain anonymous, of his boss's penchant for spending three-to-four evenings a week at social functions — and actually enjoying them.

I am not going to bother to dissect that, it speaks all too clearly for itself. And it is hard to figure which is more pukeworthy, the bon

vivant civil servant or the elitism displayed by the supposed watcher last bastion journalists. It is all of the same cloth.

What's wrong in Washington DC? Here you go. When the pathology on the boneyard of American democracy is run, this vignette will appear.

Maybe this is why Tom Vilsack could find a spare couple of hours out of one of his days to explain in a deposition why he and the Obama Administration knee jerkily demanded Shirley Sherrod's resignation based upon a crank fraudulent video by a schlock like Andrew Breitbart.

Because "Executive Privilege" now means "Privileged Executives" who can party all night with their elitist journalistic pals and screw the rest of the government, and people it serves, during the day. Just like the Founders envisioned obviously.

CRIMINAL SEXUAL ASSAULT: NO MEANS NO BURDEN SHIFTING



Late last night here, early this morning where many of you are, I saw an article pop up on the New York Times website by Judith Shulevitz on "Regulating Sex". The title seemed benign

enough, but thanks to my friend Scott Greenfield, and his blog Simple Justice, Ms. Shulevitz has been on my radar for a while. So I

sent the article (which is worth a read) to Scott knowing he would likely pounce on it when he got up.

And Scott did just that, in a post called "With Friends Like These", while I was still comfortably tucked in:

A lot of people sent me a link to Judith Shulevitz's New York Times op-ed, Regulating Sex. As any regular SJ reader knows, there is nothing in there that hasn't been discussed here, sometimes long ago, at far greater depth. But Shulevitz is against the affirmative consent trend, which she calls a "doctrine," so it's all good, right?

What Shulevitz accomplishes is a very well written, easily digestible, version of the problem that serves to alert the general public, those unaware of law, the issues of gender and sexual politics, the litany of excuses that have framed the debate and the seriousness of its implications, to the existence of this deeply problematic trend. She notes that one of its primary ALI proponents, NYU lawprof Stephen J. Schulhofer, calls the case for affirmative consent "compelling." She neglects to note this is a meaningless word in the discussion. Still, it's in there.

On the one hand, I think Scott is right that there is really nothing all that new here in the bigger picture, and, really he is right that Ms. Shulevitz is far from a goat, even if a little nebulous and wishy washy.

No, what struck me like a hammer was the ease with which academics like Georgetown's Abbe Smith and NYU professor Stephen J. Schulhofer, not to mention the truly formidable American Law Institute (ALI) are propagating the idea of alteration of criminal sexual assault law. In

short, are willing to put lip gloss on the pig of shifting the burden of proof on a major felony crime of moral turpitude.

And it is an outrageous and destructive concession. This is not a slippery slope, it is a black ice downhill. You might as well be rewriting the American ethos to say "Well, no, all men and women are not created equal". In criminal law, that is the kind of foundation being attacked here.

Scott did not really hit on this in his main post, but in a reply comment to some poor soul that weighed in with the old trope of "gee, it really is not too much to give" kind of naive rhetoric, Mr. Greenfield hit the true mark:

The reason I (and, I guess, others) haven't spent a lot of time and energy providing concrete examples is because it's so obvious. Apparently, not to everyone. So here's the shift:

Accuser alleges rape because of lack of consent, saying: "He touched me without my consent." That's it. Case proven. Nothing more is required and, in the absence of a viable defense, the accused loses.

Now, it's up to the accused student to prove, by a preponderance of the evidence (which means more than 50%) that there was consent. There was consent at every point in time. There was clear and unambiguous consent. And most importantly, that the accused's assertion of consent somehow is proven to be more credible than the accuser's assertion of lack of consent.

Let's assume the accuser says "I did not consent," and the accused says, "you did consent." The two allegations are equally credible. The accused loses, because the accuser's assertion is sufficient to establish the offense, and the burden then shifts to the accused,

whose defense fails to suffice as being more credible than the accusation.

Mind you, under American jurisprudence, this shifting compels the accused to prove innocence, which is something our jurisprudence would not otherwise require, merely upon the fact of an accusation, or be peremptorily "convicted."

Is that sufficiently concrete for you?

Yeah, and do you want that star chamber logic in not just public university settings, but embedded with a solid foothold in common criminal law? Because those are the stakes. Constitutional law, criminal law, and criminal procedure are not vehicles for feel good patina on general social ills and outrages de jour, in fact they are instead designed, and must be, a bulwark against exactly those people who would claim the former mantle.

First they came for the Fourth and Fifth Amendments, and you poo poohed the cries from criminal defense lawyers, going back to at least the mid-80's, about the dangerous slippery slope that was being germinated. Whether the results have touched you, or your greater "family", yet or not, it is pretty hard to objectively look at today's posture and not admit the "slippery slope" criers thirty years ago were right. Of course they were.

People operating from wholly, or mostly, within the criminal justice system, whether as lawyer or client/family, just have a different, and more immediate, perspective. A position rarely understood without having tangible skin in the game.

Maybe listen this time. The battle over racial and sexual equality is far from over, but it is well underway intellectually, and headed in a better direction. It gets better. So, make it better in criminal justice too, do not let it be the destructive war pit morality betterment in

the US falls in to.

BEAUTIFUL EQUALITY COMES TO MARRIAGES IN AMERICA



Love will
find a way,
and it
finally has.
There are
many, many
friends I am
thinking of
right now,
and they all
know exactly
who they are.
Congratulations,
and it

was far too long coming. Here is the opinion.

EQUALITY

There is so much to say, that it is hard to know what to actually say. There are many quotes like this one, but it is indicative of the decision:

“laws excluding same-sex couples from the marriage right impose stigma and injury of the kind prohibited by our basic charter.”

What I don't find in the majority decision, as wonderful as it is, is discussion of heightened scrutiny, strict scrutiny, or other clear cut, across the board protection for the status of sexual identity. And that is disappointing. Also why I cried bit when SCOTUS, two years ago to this very day, callously refused to take the incredibly wonderful tee shot that Vaughn Walker

gave them in the Proposition 8 case previously.

I guess the handwriting was on the wall when even the old liberal lion Steve Reinhardt, a man I have met, and a judge I truly love and revere, pulled up short and did not have the balls to take the root concept of sexual identity “equality” where it naturally flowed when he had the pen in his wise hand. But he didn’t then, and his old friend Tony Kennedy has not today.

So, while there is so much to cheer right this moment, we, and this country, are still far from where we need to be with regard to inclusion of all our citizens in the concept of equality. It is more than black and white, it is straight, gay and trans too. We are all on this patch of earth together, and we all are equal, and that needs to be admitted legally by the highest court in the land and understood by all the people it serves.

So, there are still miles to be traveled. Let the four, count them four, spittle laced, bigoted, backwards, and disgusting dissents in the *Obergefell* decision speak for themselves. Honestly, they make me want to puke. For all that were celebrating the enlightened liberal thought of Chief Justice John G. Roberts yesterday, today is a rough reminder of who and what he really is. And you really have to read Scalia and Alito to understand the fucked up pathology of the dissenters. Wow.

NO, THERE IS NO RELATIVE HUMAN VALUE STATUS IN TRAGIC SHOOTINGS

The BREAKING NEWS tonight is nine people being shot to death in Charleston South Carolina. From

ABC News:

Nine people were killed when a gunman opened fire in a historic Charleston, South Carolina church Wednesday evening and police were searching for the suspect.

Police said that eight people were found dead inside the church. Two other people were rushed to the hospital and one died.

"We're still gathering information so it's not the time yet for details," Mayor Joe Riley told local newspaper The Post and Courier. "I will say that this is an unspeakable and heartbreaking tragedy in this most historic church, an evil and hateful person took the lives of citizens who had come to worship and pray together."

CNN further reported that the knee jerk mayor of Charleston told reporters that it is all obviously a "hate crime" because people in a church were shot.

Is this, yet another, mass murder with all too easy to bring to bear and fire guns in the US tragic? Yes, obviously. Tragic is being too kind and semantically vague. It is horrid.

But, please, it is NOT worse because the victims were church goers, as their lives are not worth more than agnostics, atheists or other humans. Black children are worth no less than white suburbians. One faith is worth no more than the next or none at all. Just stop with that blithering idiocy.

Human life is precious, and we are all entitled to live. You are not privileged more than me, no matter how pious you may be, or pretend to be.

So, grieve mightily the gross and unnecessary loss of life in Charleston South Carolina tonight. But those lives are worth nothing more than Eric Garner, Walter Scott, Michael Brown or

other human senselessly slain in the ridiculous gun fetish culture of the United States. And, no, Mr. Mayor, the locus of the shooting in a church does not *de facto* make it a “hate crime”. Stop with that bogus over claim too. Hyperbole is the antithesis of informed viewpoints.

LORETTA LYNCH IS A DUBIOUS NOMINEE FOR ATTORNEY GENERAL

Loretta Lynch is an excellent nominee for Attorney General, and her prior actions in whitewashing the blatant and rampant criminality of HSBC should not be held against her, because she didn't know that at the time she last whitewashed that criminal enterprise, right?



No. Nothing could be further from the truth.

This is a cop out by Lynch's advocates. Lynch either knew, or damn well should have known. She signed off on the HSBC Deferred Prosecution Agreement (DPA), if she was less than fully informed, that is on her. That is what signing legal documents stands for....responsibility. Banks like HSBC, Credit Suisse, ING etc were, and still are, a cesspool of criminal activity and avoidance schemes. Willful blindness to the same old bankster crimes by Lynch doesn't cut it (great piece by David Dayen by the way).

But, all the above ignores the Swiss Alps sized

mountains of evidence that we know Lynch was aware of and blithely swept under the rug by her HSBC DPA. So, we are basically left to decide whether Lynch is a bankster loving toady that is her own woman and cravenly whitewashed this all on her own, or whether she is a clueless stooge taking orders to whitewash it by DOJ Main. Both views are terminally unattractive and emblematic of the oblivious, turn the other cheek to protect the monied class, rot that infects the Department of Justice on the crimes of the century to date.

And that is only scratching the real surface of my objections to Lynch. There are many other areas where Lynch has proven herself to be a dedicated, dyed in the wool "law and order adherent" and, as Marcy Wheeler artfully coined, "executive maximalist". Lynch's ridiculous contortion, and expansion, of extraterritorial jurisdiction to suit the convenient whims of the Obama Administration's unparalleled assault on the Rule of Law in the war on terror is incredibly troubling. Though, to be fair, EDNY is the landing point of JFK International and a frequent jurisdiction by designation. Some of these same questions could have been asked of Preet Bharara (see, e.g. *U.S. v. Warsame*) Loretta Lynch has every bit the same, if not indeed more, skin in the game as Bharara, whether by choice or chance.

Lynch has never uttered a word in dissent from this ridiculous expansion of extraterritorial jurisdiction. Lynch's record in this regard is crystal clear from cases like *US v. Ahmed, Yousef, et. al.* where even Lynch and her office acknowledged that their targets could not have "posed a specific threat to the United States" much less have committed specific acts against the US.

This unconscionable expansion is clearly all good by Lynch, and the ends justify the means because there might be "scary terrorists" out there. That is just dandy by American "executive maximalists", but it is toxic to the Rule of

Law, both domestically and internationally (See, supra). If the US, and its putative Attorney General, are to set precedents in jurisdictional reach on common alleged terroristic support, then they ought live by them on seminal concerns like torture and war crimes under international legal norms. Loretta Lynch has demonstrated a proclivity for the convenience of the former and a toady like disdain for the latter.

And the same willingness to go along to get along with contortion of the Rule of Law in that regard seems beyond certain to extend to her treatment of surveillance issues and warrant applications, state secrets, over-classification, attack on the press and, critically, separation of powers issues. Those types of concerns, along with how the Civil Rights Division is utilized to rein in out of control militarized cops and voting rights issues, how the OLC stands up to Executive overreach, whether OPR is allowed to continue to shield disgraceful and unethical AUSAs, and whether she has the balls to stand up to the infamously insulated inner Obama circle in the White House. Do you really think Loretta Lynch would have backed up Carolyn Krass and OLC in telling Obama no on the Libyan War Powers Resolution issue?

For my part, I don't think there is a chance in hell Lynch would have stood up to Obama on a war powers, nor any other critical issue, and that is a huge problem. Krass and Holder may have lost the Libyan WPR battle, but at least they had the guts to stand up and say no, and leave a record of the same for posterity.

That is what really counts, not the tripe being discussed in the press, and the typically preening clown show "hearing" in front of SJC. That is where the rubber meets the road for an AG nominee, not that she simply put away some mobsters and did not disgrace herself – well, beyond the above, anyway (which she absolutely did) – during her time as US Attorney in EDNY. If you are a participant in, or interested

observer of, the criminal justice system as I am, we should aspire to something better than Eric Holder. Holder may not have been everything hoped for from an Obama AG when the Administration took office in January of 2009, but he was a breath of fresh air coming off the AG line of the Bush/Cheney regime. Loretta Lynch is not better, and is not forward progress from Holder, indeed she is several steps down in the wrong direction. That is not the way to go.

The fact that Loretta Lynch is celebrated as a great nominee by not just Democrats in general, but the so called progressives in specific, is embarrassing. She is absolutely horrible. If Bush had put her up for nomination, people of the progressive ilk, far and wide, would be screaming bloody murder. Well, she is the same person, and she is a terrible nominee. And that does not bode well for the Rule of Law over the remainder of the Obama Administration.

And this post has not even touched on more mundane, day to day, criminal law and procedure issues on which Lynch is terrible. And horrible regression from Eric Holder. Say for instance pot. Decriminalization, indeed legalization, of marijuana is one of the backbone elements of reducing both the jail and prison incarceration rate, especially in relation to minorities. Loretta Lynch is unconscionably against that (See, e.g., p. 49 (of pdf) et. seq.). Lynch appears no more enlightened on other sentencing and prison reform, indeed, she seems to be of a standard hard core prosecutorial wind up law and order lock em up mentality. Lynch's positions on relentless Brady violations by the DOJ were equally milquetoast, if not pathetic (See, e.g. p. 203 (of pdf) et. seq.). This discussion could go on and on, but Loretta Lynch will never come out to be a better nominee for Attorney General.

Observers ought stop and think about the legal quality, or lack thereof, of the nominee they are blindly endorsing. If you want more enlightened criminal justice policy, to really combat the prison state and war on drugs, and to

rein in the out of control security state and war on terror apparatus, Loretta Lynch is a patently terrible choice; we can, and should, do better.

MARISSA ALEXANDER, JEFF TOOBIN AND BLACKLEDGE

By now,
you
probably
know the
story of
Marissa
Alexander
, a
charming
young
woman who
tried to
defend
herself
and her
children



from a criminally abusive ex in Florida. Another soul outrageously and scandalously prosecuted by the, by all appearances, morally and ethically bereft Angela Corey, the state prosecutor in Florida's 4th Judicial Circuit. Marissa was, finally, released from jail today pursuant to a forced plea agreement. Via Reuters:

A Florida woman who says she fired a warning shot at her abusive husband was released from a Jacksonville jail on Tuesday under a plea deal that capped her sentence to the three years she had already served.

Marissa Alexander, 34, was initially

sentenced to 20 years in prison in 2012 but her conviction was later overturned. She faced another trial on charges that could have put her behind bars for 60 years before she agreed to a plea deal in November.

Her case helped to inspire a new state law permitting warning shots in some circumstances.

Leaving the courthouse, Alexander cried as she thanked her supporters, sharing plans to continue her education in order to work as a paralegal.

Ms. Alexander is indeed out of incarceration and home tonight, though she will still, pursuant to the plea she entered, have to serve two years on home confinement, starting from this date going forward. She appeared on Anderson Cooper's "AC 360" tonight on CNN and looked simply radiant. I don't normally get into red carpet like descriptions of people in legal cases I comment on, but in this case it really seems appropriate. She is quite a woman, and it is impossible not to be charmed by her, and wish her the very best.

But what I really come to write about is the commentary of Jeffrey Toobin, who was on after Marissa's appearance to discuss the legal considerations with Cooper. Toobin was strident, unflinching, and spot on in what he said. So much so I nearly stood up and cheered. Instead, I made a transcript:

AC: Why would Angela Corey suddenly say [to Marissa Alexander] okay, if we are going to go to trial you face 60 years, we are going to go for 60 years in jail instead of the 20 years sentence?

JT: Because Angela Corey incompetent, because she is vicious and because she is a disgrace to prosecutors around the country"

AC: Really?

JT: I mean this is one of the most appalling examples of prosecutorial abuse I have ever seen. The harassment, the endless pursuit of this woman [Alexander] is just a blot on Florida, and our whole country.

AC: What makes it particularly, and why it captures so many people's focus is during the George Zimmerman trial where obviously "stand your ground" was an issue, was raised, it seems it is a completely different interpretation of stand your ground.

JT: Well, that's right. And I don't know motive. I can't tell you why Angela Corey pursued her so obsessively, and I...thinks it's important to...all I know is what she did. All I know is what the facts are. The facts are that this woman had a very legitimate defense, this guy [Alexander's ex] was a monster. He had a history of abuse of women, and that she [Alexander] would be pursued this way is just sickening.

AC: It is interesting, because the statute was amended subsequently basically to allow for warning shots and you wouldn't necessarily be prosecuted for that, but it was not retroactive.

JT: Fortunately, this case has prompted a lot of outrage in Florida and around the country and that change in the law is one effect of this that was too late for her, too late to help her.

AC: It has to be such a gut wrenching decision, to decide to take a plea, to serve another 65 days in jail and then you get out, you have a record then, and you are under house arrest for another two years...or, maintain you innocence and risk another 60 years.

JT: It is a heartbreaking dilemma, but one thing tipped this case. You know,

Angela Corey was not even negotiating, as far as I can tell, in good faith, but her lawyers, including Faith Gay of Quinn Emanuel, they were working pro bono on this case, they got a ruling from the trial judge that they could introduce evidence of all the abuse that Gray had imposed on other women...so that's the trial setting that was going to happen.

Angela Corey is incompetent, vicious and a disgrace. Thank you Mr. Toobin, I could not possibly have said it better. As perfect as the description is, it may still be an understatement.

But, how did this come to be? How did Marissa Alexander face 20 years, get convicted, win an appeal, and come out of the appellate win only to face 60 years if she lost the retrial? Well, that is a subject that goes deeper than Jeff Toobin could really get into in a basic 3-4 minute cable TV hit.

Normally, a defendant such as Marissa Alexander might expect to be protected from such an escalation of sentence by the state's attorney through the edicts of a case known as *Blackledge v. Perry*.

Blackledge v. Perry is a famous case known in criminal defense circles as the "upping the ante case". Blackledge was convicted of a misdemeanor and appealed, which in North Carolina at the time meant he would get a new trial in a higher court. The state retaliated by filing the charge as a felony in the higher court, thus "upping the ante". The Supreme Court in *Blackledge* held that to be impermissibly vindictive.

A prosecutor clearly has a considerable stake in discouraging convicted misdemeanants from appealing and thus obtaining a [new trial] in the Superior Court, since such an appeal will clearly require increased expenditures of

prosecutorial resources. . . . And, if the prosecutor has the means readily at hand to discourage such appeals – by “upping the ante” through a felony indictment whenever a convicted misdemeanant pursues his statutory appellate remedy – the State can insure that only the most hardy defendants will brave the hazards of a [new] trial.

. . . A person convicted of an offense is entitled to pursue his statutory right to a trial . . ., without apprehension that the State will retaliate by substituting a more serious charge for the original one, thus subjecting him to a significantly increased potential period of incarceration.

So, Angela Corey impermissibly “upped the ante”, in violation of *Blackledge*, on Marissa Alexander when she sought 60 years imprisonment on Alexander upon retrial even though the sentence from the first trial was “only” 20 years, right? Unfortunately no.

You see, Corey did not up the number or nature of charges when charging the retrial, she alleged the same three counts, it is just that the law in Florida had changed, and Corey cravenly took advantage of it to unconscionably bludgeon Marissa Alexander.

Alexander, 33, was previously convicted in 2012 of three counts of aggravated assault with a deadly weapon and was sentenced to 20 years in prison by Circuit Judge James Daniel under the state’s 10-20-life law. Daniel actually imposed three separate 20-year sentences on Alexander but ordered that they be served concurrently, which meant Alexander would get out in 20 years.

The conviction was thrown out after the 1st District Court of Appeal in

Tallahassee ruled that Daniel made a mistake in shifting the burden to Alexander to prove she was acting in self-defense. During jury instructions, Daniel said she must prove beyond a reasonable doubt that she was battered by her husband.

...

But Assistant State Attorney Richard Mantei, the lead prosecutor in the case, told the Times-Union his office was simply following the sentencing laws of the state of Florida.

The same appeals court that ordered Alexander's retrial separately ruled last year that when a defendant is convicted of multiple counts under 10-20-life that arose from the same crime, judges must make the sentences consecutive and are not allowed to impose them concurrently.

The law has not changed since Alexander was sentenced in 2012, but courts throughout the state have been struggling to interpret what the Legislature meant when it passed sentencing laws regarding 10-20-life.

The Alexander case inspired the so-called "warning-shot" bill that will be part of the Florida legislative session that begins Tuesday. The proposal, which is expected to pass, would create an exception to the 10-20-life law and prohibit those who fire a warning shot from getting 20 years in prison.

So, it is, unfortunately, not really within the ambit of *Blackledge*. Which leaves us back where we started. Angela Corey. Corey was ridiculously aggressive in not affording Alexander, a victim herself, the benefit of the doubt on self defense, including the much misunderstood, and misdescribed, "stand your ground" provision.

With no protection from *Blackledge* and its progeny, and the curious ability of Marissa Alexander to be subject to the new “consecutive” provision in Florida’s 10-20-life gun laws, but not the new provisions on warning shots in stand your ground cases, this was the position Marissa Alexander found herself. Take a scandalous plea, the only one being offered by the contemptible Circuit Attorney Corey, or risk her children never seeing her out of custody in her natural lifetime. After seeing what Corey was willing to do, how could Alexander not take the deal?

But, make no mistake, the only reason that this situation got to where it did is out of the sheer evil avarice of a woman not fit to represent the people of Florida, nor the justice system in America. Angela Corey is a walking talking picture of injustice. Thanks again to Jeff Toobin for saying that so clearly. And, best wishes and godspeed to Marissa Alexander.

CUBA LIBRE! A MOMENTOUS SHIFT IN RELATIONS

Without any question, the news of the day is the direct turnabout in relations between the United States and Cuba announced this morning. There is a rather long list of areas in which many people, including me, have profound disappointment with Barack Obama over. Lack of accountability for torture is but the latest and greatest in the news consciousness of the attuned public. But today is not such a day; today Barack Obama has risen to at least part of his once heralded promise. Today, Mr. Obama has my love and affection. Today is one of the type and kind of foreign policy, whether toward middle east or other global neighbors, moments promised in Cairo and rarely, if ever, fulfilled

in tangible deeds instead of words. So, today, sincere thanks and appreciation to President Obama.

Here are the basics from the AP:

The United States and Cuba have agreed to re-establish diplomatic relations and open economic and travel ties, marking a historic shift in U.S. policy toward the communist island after a half-century of enmity dating back to the Cold War, American officials said Wednesday.

The announcement came amid a series of sudden confidence-building measures between the longtime foes, including the release of American prisoner Alan Gross, as well as a swap for a U.S. intelligence asset held in Cuba and the freeing of three Cubans jailed in the U.S.

President Barack Obama and Cuban President Raul Castro were to separately address their nations around noon Wednesday. The two leaders spoke by phone for more than 45 minutes Tuesday, the first substantive presidential-level discussion between the U.S. and Cuba since 1961.

Wednesday's announcements followed more than a year of secret talks between U.S. and Cuban officials in Canada and the Vatican. U.S. officials said Pope Francis was personally engaged in the process and sent separate letters to Obama and Castro this summer urging them to restart relations.

This news alone would have constituted something earth shattering, but there is much more than just that. In fact, the AP laid out the merest of backgrounds with that opening. There is much, much, more. I have the official press release, and

it is so good, and compelling, I am going to put it up, all here, right now (it is long, and makes this post long, so bear with me. If you want to, feel free to skip back down to analysis and thoughts):

Today, the United States is taking historic steps to chart a new course in our relations with Cuba and to further engage and empower the Cuban people. We are separated by 90 miles of water, but brought together through the relationships between the two million Cubans and Americans of Cuban descent that live in the United States, and the 11 million Cubans who share similar hopes for a more positive future for Cuba.

It is clear that decades of U.S. isolation of Cuba have failed to accomplish our enduring objective of promoting the emergence of a democratic, prosperous, and stable Cuba. At times, longstanding U.S. policy towards Cuba has isolated the United States from regional and international partners, constrained our ability to influence outcomes throughout the Western Hemisphere, and impaired the use of the full range of tools available to the United States to promote positive change in Cuba. Though this policy has been rooted in the best of intentions, it has had little effect – today, as in 1961, Cuba is governed by the Castros and the Communist party.

We cannot keep doing the same thing and expect a different result. It does not serve America's interests, or the Cuban people, to try to push Cuba toward collapse. We know from hard-learned experience that it is better to encourage and support reform than to impose policies that will render a country a failed state. With our actions

today, we are calling on Cuba to unleash the potential of 11 million Cubans by ending unnecessary restrictions on their political, social, and economic activities. In that spirit, we should not allow U.S. sanctions to add to the burden of Cuban citizens we seek to help.

Today, we are renewing our leadership in the Americas. We are choosing to cut loose the anchor of the past, because it is entirely necessary to reach a better future – for our national interests, for the American people, and for the Cuban people.

Key Components of the Updated Policy

Approach:

Since taking office in 2009, President Obama has taken steps aimed at supporting the ability of the Cuban people to gain greater control over their own lives and determine their country's future. Today, the President announced additional measures to end our outdated approach, and to promote more effectively change in Cuba that is consistent with U.S. support for the Cuban people and in line with U.S. national security interests. Major elements of the President's new approach include:

Establishing diplomatic relations with Cuba-

- The President has instructed the Secretary of State to immediately initiate discussions with Cuba on the re-establishment of diplomatic relations with Cuba, which were severed in January 1961.
- In the coming months, we will re-establish an embassy in Havana and carry out high-level exchanges and visits between our two governments as part of the normalization process. As an initial

step, the Assistant Secretary of State for Western Hemisphere Affairs will lead the U.S. Delegation to the next round of U.S.-Cuba Migration Talks in January 2015, in Havana.

- U.S. engagement will be critical when appropriate and will include continued strong support for improved human rights conditions and democratic reforms in Cuba and other measures aimed at fostering improved conditions for the Cuban people.

- The United States will work with Cuba on matters of mutual concern and that advance U.S. national interests, such as migration, counternarcotics, environmental protection, and trafficking in persons, among other issues.

Adjusting regulations to more effectively empower the Cuban people-

- The changes announced today will soon be implemented via amendments to regulations of the Departments of the Treasury and Commerce. Our new policy changes will further enhance our goal of empowering the Cuban population.

- Our travel and remittance policies are helping Cubans by providing alternative sources of information and opportunities for self-employment and private property ownership, and by strengthening independent civil society.

- These measures will further increase people-to-people contact; further support civil society in Cuba; and further enhance the free flow of information to, from, and among the Cuban people. Persons must comply with all provisions of the revised regulations; violations of the terms and conditions are enforceable under U.S. law.

Facilitating an expansion of travel under general licenses for the 12 existing categories of travel to Cuba authorized by law-

- General licenses will be made available for all authorized travelers in the following existing categories: (1) family visits; (2) official business of the U.S. government, foreign governments, and certain intergovernmental organizations; (3) journalistic activity; (4) professional research and professional meetings; (5) educational activities; (6) religious activities; (7) public performances, clinics, workshops, athletic and other competitions, and exhibitions; (8) support for the Cuban people; (9) humanitarian projects; (10) activities of private foundations or research or educational institutes; (11) exportation, importation, or transmission of information or information materials; and (12) certain export transactions that may be considered for authorization under existing regulations and guidelines.

- Travelers in the 12 categories of travel to Cuba authorized by law will be able to make arrangements through any service provider that complies with the U.S. Treasury's Office of Foreign Assets Control (OFAC) regulations governing travel services to Cuba, and general licenses will authorize provision of such services.

- The policy changes make it easier for Americans to provide business training for private Cuban businesses and small farmers and provide other support for the growth of Cuba's nascent private sector. Additional options for promoting the growth of entrepreneurship and the private sector in Cuba will be explored.

Facilitating remittances to Cuba by U.S. persons-

- Remittance levels will be raised from \$500 to \$2,000 per quarter for general donative remittances to Cuban nationals (except to certain officials of the government or the Communist party); and donative remittances for humanitarian projects, support for the Cuban people, and support for the development of private businesses in Cuba will no longer require a specific license.
- Remittance forwarders will no longer require a specific license.

Authorizing expanded commercial sales/exports from the United States of certain goods and services-

- The expansion will seek to empower the nascent Cuban private sector. Items that will be authorized for export include certain building materials for private residential construction, goods for use by private sector Cuban entrepreneurs, and agricultural equipment for small farmers. This change will make it easier for Cuban citizens to have access to certain lower-priced goods to improve their living standards and gain greater economic independence from the state.

Authorizing American citizens to import additional goods from Cuba-

- Licensed U.S. travelers to Cuba will be authorized to import \$400 worth of goods from Cuba, of which no more than \$100 can consist of tobacco products and alcohol combined.

Facilitating authorized transactions between the United States and Cuba-

- U.S. institutions will be permitted to open correspondent accounts at Cuban financial institutions to facilitate the processing of authorized transactions.
- The regulatory definition of the

statutory term “cash in advance” will be revised to specify that it means “cash before transfer of title”; this will provide more efficient financing of authorized trade with Cuba.

- U.S. credit and debit cards will be permitted for use by travelers to Cuba.
- These measures will improve the speed, efficiency, and oversight of authorized payments between the United States and Cuba.

Initiating new efforts to increase Cubans’ access to communications and their ability to communicate freely-

- Cuba has an internet penetration of about five percent—one of the lowest rates in the world. The cost of telecommunications in Cuba is exorbitantly high, while the services offered are extremely limited.
- The commercial export of certain items that will contribute to the ability of the Cuban people to communicate with people in the United States and the rest of the world will be authorized. This will include the commercial sale of certain consumer communications devices, related software, applications, hardware, and services, and items for the establishment and update of communications-related systems.
- Telecommunications providers will be allowed to establish the necessary mechanisms, including infrastructure, in Cuba to provide commercial telecommunications and internet services, which will improve telecommunications between the United States and Cuba.

Updating the application of Cuba sanctions in third countries-

- U.S.-owned or -controlled entities in third countries will be generally

licensed to provide services to, and engage in financial transactions with, Cuban individuals in third countries. In addition, general licenses will unblock the accounts at U.S. banks of Cuban nationals who have relocated outside of Cuba; permit U.S. persons to participate in third-country professional meetings and conferences related to Cuba; and, allow foreign vessels to enter the United States after engaging in certain humanitarian trade with Cuba, among other measures.

Pursuing discussions with the Cuban and Mexican governments to discuss our unresolved maritime boundary in the Gulf of Mexico-

- Previous agreements between the United States and Cuba delimit the maritime space between the two countries within 200 nautical miles from shore. The United States, Cuba, and Mexico have extended continental shelf in an area within the Gulf of Mexico where the three countries have not yet delimited any boundaries.

- The United States is prepared to invite the governments of Cuba and Mexico to discuss shared maritime boundaries in the Gulf of Mexico.

Initiating a review of Cuba's designation as a State Sponsor of Terrorism-

- The President has instructed the Secretary of State to immediately launch such a review, and provide a report to the President within six months regarding Cuba's support for international terrorism. Cuba was placed on the list in 1982.

Addressing Cuba's participation in the 2015 Summit of the Americas in Panama-

- President Obama will participate in the Summit of the Americas in Panama.

Human rights and democracy will be key Summit themes. Cuban civil society must be allowed to participate along with civil society from other countries participating in the Summit, consistent with the region's commitments under the Inter-American Democratic Charter. The United States welcomes a constructive dialogue among Summit governments on the Summit's principles.

**Unwavering Commitment to Democracy,
Human Rights, and Civil Society**

A critical focus of our increased engagement will include continued strong support by the United States for improved human rights conditions and democratic reforms in Cuba. The promotion of democracy supports universal human rights by empowering civil society and a person's right to speak freely, peacefully assemble, and associate, and by supporting the ability of people to freely determine their future. Our efforts are aimed at promoting the independence of the Cuban people so they do not need to rely on the Cuban state.

The U.S. Congress funds democracy programming in Cuba to provide humanitarian assistance, promote human rights and fundamental freedoms, and support the free flow of information in places where it is restricted and censored. The Administration will continue to implement U.S. programs aimed at promoting positive change in Cuba, and we will encourage reforms in our high level engagement with Cuban officials.

The United States encourages all nations and organizations engaged in diplomatic dialogue with the Cuban government to take every opportunity both publicly and privately to support increased respect

for human rights and fundamental freedoms in Cuba.

Ultimately, it will be the Cuban people who drive economic and political reforms. That is why President Obama took steps to increase the flow of resources and information to ordinary Cuban citizens in 2009, 2011, and today. The Cuban people deserve the support of the United States and of an entire region that has committed to promote and defend democracy through the Inter-American Democratic Charter.



The whole statement was put up here because every

type inch of it is worth knowing and pointing out. I wonder if this letter from "America's Society/Council of the Americas" didn't presage a lot of today's result (h/t Olivier Knox). Either way, it is nothing less than the formal ending of the cold war between the United States and Cuba, and that is one spectacular point in time. Cold War dead enders, and people whose hatred of the Castro regime supersedes their common sense and acceptance of a changed world, will decry today's move and slime Mr. Obama for having made it. Mental midgets, from both sides of the aisle of idiocy, such as Bob Menendez and Marco Rubio, have already done that. But they are the rotting rump of over 50 years of failed policy that has denied Cubans the very means and base from which to effect the very change the critics demand.

I think the press release is both elegant, detailed, and compelling. Other than bullheadedness, there hasn't been any good

reason to not do this for a long time. to quote Ken Gude on Twitter:

Is there any real argument for not normalizing relations with #Cuba? It has been the single dumbest & least effective US policy for decades.

Yes, that is exactly correct. Hey, even the Pope was involved! And Americans who do travel to Cuba will be able to legally bring back cigars. So there is that too for “cigar aficionados”, which undoubtedly, and illegally, have included some of the bellicose political humps in DC who have screamed against this for decades. Sorry backwards Beltway boobs, it is a new day now, and the American people, and even the Latino community in Florida, support the new day in substantial margins as shown in this Atlantic Council poll graph.

Okay, here are a few parting thoughts: First, Mr. Obama must immediately move his Administration to remove Cuba from the list of State Sponsors of Terrorism list. Secondly, the Obama Administration should immediately seek out and work with Bob Corker, the incoming Chair of the Senate Foreign Relations Committee, and a man whou ought be far more responsible and approachable than the foreign relations belligerent that has been Democrat Bob Menendez. Thirdly, the Administration should immediately facilitate, in every manner possible, the collaboration between American and Cuban health officials and modalities, both to fight ebola, AIDS, and as to general medicine and treatment.

In closing, while there is still much to be done, and many deadenders to overcome, this is a beautiful day. The language from the opening paragraph of the Administration press release is a perfect close:

We are separated by 90 miles of water, but brought together through the relationships between the two million Cubans and Americans of Cuban descent

that live in the United States, and the 11 million Cubans who share similar hopes for a more positive future for Cuba.

A more positive future for both sides of that 90 miles of water is in order. And a long time coming. Today is the first day of a new, and exciting beginning. Before I was born, my parents' favorite place to travel was to Cuba. It was not just my mother's love of Hemmingway, but both of their love for Havana and the people and places of Cuba. I very much look forward to seeing what they saw, and felt so strongly.

TORTURE? OBVIOUSLY, BUT WHAT ABOUT LITANY OF OTHER CRIMES?

So, just a quick thought here, and with a little prompting by Jon Turley, obviously there is torture, and outright homicide thereon, spelled out and specified by the SSCI Torture Report. As I have said on Twitter, there are many things covered in the SSCI Torture Report and, yet, many things left out.

There are too many instances in the SSCI Torture Report to catalogue individually, but let's be perfectly clear, the failure to prosecute the guilty in this cock up is NOT restricted to what is still far too euphemistically referred to as "torture".

No, the criminality of US Government officials goes far beyond that. And, no, it is NOT "partisan" to point out that the underlying facts occurred under the Cheney/Bush regime (so stated in their relative order of power and

significance on this particular issue).

As you read through the report, if you have any mood and mind for actual criminal law at all, please consider the following offenses:

18 U.S.C. §1001 False Statements

18 U.S.C. §1621 Perjury

18 U.S.C. §1505 Obstruction of Justice

These are but a few of the, normally, favorite things the DOJ leverages and kills defendants with in any remotely normal situation. I know my clients would love to have the self serving, toxically ignorant and duplicitous, work of John Yoo and Jay Bybee behind them. But, then, even if it were so, no judge, court, nor sentient human, would ever buy off on that bullshit.

So, here we are. As you read through the SSCI Torture Report, keep in mind that it is NOT just about "torture" and "homicide". No, there is oh so much more there in the way of normally prosecuted, and leveraged, federal crimes. Recognize it and report it.