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Cary Coglianese

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Repository Citation

Coglianese, Cary, "Law as Scapegoat" (2020). *Faculty Scholarship at Penn Carey Law*. 2200.
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Law as Scapegoat

Cary Coglianese*

Around the world, public trust in governmental institutions and legal systems has been wavering for years. In the wake of this declining trust, populist and nationalist demagogues have emerged in many countries to make nostalgic appeals and sow racial and ethnic division.¹ These populist leaders also often advance policies that retreat from both global engagement and democratic commitments, leading their countries on paths toward market isolationism and authoritarian government.

The causal connection between decreasing public trust and increasing populism are complex and interactive. Decreased trust and confidence in government provides a fertile soil within which populism grows, but populist leaders can themselves stoke fires of distrust and discord, exacerbating crises of public confidence rather than working to restore faith in institutions of governance. This concluding chapter focuses on a particularly sinister way that populist leaders can seek to fuel public distrust: by treating the law itself as a scapegoat. By blaming legislation and regulation for the very social and economic conditions that make members of the public angry and frustrated, populist leaders risk a downward, self-perpetuating spiral of public cynicism, making it harder for societies to ward off a collapse of governmental legitimacy and efficacy.

Using examples from political developments in the United Kingdom, Brazil, and the United States, I argue that legal scapegoating is an important, possibly growing, phenomenon worthy of attention. I also explicate what I see as some of the political economy dynamics behind populist leaders' efforts to treat law as a scapegoat. In particular, I show how relatively easy it is to make law as a scapegoat. In this regard, law bears surprising similarities to other

* Edward B. Shils Professor of Law and Political Science, Director, Penn Program on Regulation, University of Pennsylvania Law School. This paper expands on the keynote address the author delivered at the International Association of Legislation's conference on 'The Crisis of Confidence in Legislation,' held in Rome in 2019. The author is grateful for valuable comments and conversations with Nicoletta Rangone, Maria De Benedetto, and conference participants. He appreciates helpful research assistance by Isabella Fierro, Ben Meltzer, Roxanna Pasquier, Emma Ronzetti, Madeleine Vaziri, and Roshie Xing. Special thanks go to Emma Ronzetti for truly stellar and extensive assistance in preparing this paper. This paper is forthcoming as the concluding chapter in Maria De Benedetto, Nicola Lupo & Nicoletta Rangone, eds., *The Crisis of Confidence in Legislation*.

¹ Pippa Norris and Ronald Inglehart, *Cultural Backlash: Trump, Brexit, and Authoritarian Populism* (Cambridge University Press 2019).

vulnerable targets of populist antipathy, such as migrants and minorities. The law can be easily framed as ‘the other’ in times of economic stress—and easily blamed for negative social conditions which emanate from entirely other causes. Legal scholars and social scientists have more work to do understand the precise causes and full consequences of legal scapegoating. But the first step toward such greater understanding is to identify the phenomenon as real and worthy of inclusion in a larger research agenda focused more generally on the causes and consequences of a global crisis of public confidence in the rule of law.

The Crisis in Legal Confidence

In countries around the world, members of the public have lost confidence in their public institutions.² Only a minority of people—45 percent

² Political scientist Donald Kettl has observed that ‘more than half of the public in more than half of the countries distrust their governments.’ Donald F. Kettl, *Can Governments Earn Our Trust?* (Polity Press 2017) 1. The OECD notes that ‘the 2008 global financial crisis and ensuing recession ... profoundly shook the public’s confidence in institutions, and people’s trust in public institutions has fared especially poorly.’ OECD, ‘Trust in Government’ (OECD, 2019) <<https://www.oecd.org/gov/trust-in-government.htm>> accessed 29 January 2020. Despite this secular downward trend, some polling data indicate that, in the face of a global outbreak of a novel coronavirus in early 2020, people around the world turned to their governments to protect them—leading to a quick uptick in trust in governmental institutions. Spring 2020 polling by the Edelman communications firm has shown that, across ten major countries, trust in government has increased on average of about 13 percent compared to polling from the fall 2019. Edelman, ‘Edelman Trust Barometer 2020: Global Report’ (Edelman, 2020) <<https://cdn2.hubspot.net/hubfs/440941/Trust%20Barometer%202020/2020%20Edelman%20Trust%20Barometer%20Global%20Report.pdf>> accessed 23 June 2020; Edelman, ‘Spring Update: Trust and the Covid-19 Pandemic’ (Edelman, 2020) <<https://www.edelman.com/sites/g/files/aatuss191/files/2020-05/2020%20Edelman%20Trust%20Barometer%20Spring%20Update%20U.S..pdf>> accessed 23 June 2020 (comparing data for Canada, France, Germany, India, Japan, Mexico, Saudi Arabia, South Korea, the United Kingdom, and the United States). This does not mean that trust in government has increased in every country since the outbreak nor that it is still at a normatively desirable level in many countries. From just April to May 2020, polling by Reuters showed that in the United Kingdom the public’s trust just the public health information released by the government about the coronavirus declined from 67 percent to 48 percent. Richard Fletcher, Antonis Kalogeropoulos, and Rasmus Kleos Nielsen, ‘Trust in UK Government and News Media COVID-19 Information Down, Concerns over Misinformation from Government and Politicians Up’ (Reuters, June 2020) <https://reutersinstitute.politics.ox.ac.uk/sites/default/files/2020-06/UK_COVID-19_News_and_Information_Factsheet_4_FINAL.pdf> accessed 23 June 2020. In the United States, trust in the federal government has declined among Democrats from the fall 2019 to the spring of 2020. Edelman, ‘Edelman Trust Barometer 2020: Spring Update: Trust and the COVID-19 Pandemic’ (Edelman, 2020) <<https://www.edelman.com/sites/g/files/aatuss191/files/2020-05/2020%20Edelman%20Trust%20Barometer%20Spring%20Update%20U.S..pdf>> accessed 23 June 2020.

on average—in OECD countries have faith in their governments.³ In the United States, the level of public trust has declined markedly over the last half century: in 1964, about 77 percent of the U.S. public trusted its government most or all of the time,⁴ while in 2019 that level was only 17 percent.⁵ In Brazil, only 37 percent of the public say they trust their government.⁶ The British public's trust in its government has not risen above 41 percent since 2012.⁷

Such low levels of confidence in these and other countries undoubtedly derive from a variety of factors which vary from country to country. Relevant factors include economic dislocations in the wake of the global financial crisis of 2008, as well as increasing ideological polarization and a widening gulf of inequality in many societies.⁸ Distrust can be exacerbated by high levels of unemployment and the lack of opportunities for individuals to overcome socioeconomic barriers. It can also be fueled by a government's inability to respond adequately to dire economic disruptions, natural disasters, and public health threats. High levels of corruption also propagate distrust.

In more recent years, the rise of social media has tended to fuel public suspicion and cynicism. In many countries, members of the public worry about

[//www.edelman.com/sites/g/files/aatuss191/files/2020-05/2020%20Edelman%20Trust%20Barometer%20Spring%20Update.pdf](https://www.edelman.com/sites/g/files/aatuss191/files/2020-05/2020%20Edelman%20Trust%20Barometer%20Spring%20Update.pdf)> accessed 23 June 2020.

³ OECD 'Government at a Glance 2019' (*OECD*, 2019) <https://www.oecd-ilibrary.org/governance/government-at-a-glance-2019_8ccf5c38-en;jsessionid=OuCTvjDASmymfud-2qRf_BKt.ip-10-240-5-99> accessed 23 March 2020.

⁴ Kettl, (n 2) 5.

⁵ Pew Research Center, 'Little Public Support for Reductions in Federal Spending' (*PRC*, 11 April 2019) <<https://www.people-press.org/2019/04/11/little-public-support-for-reductions-in-federal-spending/>> accessed 9 February 2020.

⁶ Edelman, 'Edelman Trust Barometer 2020: Global Report' (*Edelman*, 2020) <https://cdn2.hubspot.net/hubfs/440941/Trust%20Barometer%202020/2020%20Edelman%20Trust%20Barometer%20Global%20Report.pdf?utm_campaign=Global:%20Trust%20Barometer%202020&utm_source=Website:%20Edelman,%202020%20Spring%20update,%20https://www.edelman.com/sites/g/files/aatuss191/files/2020-05/2020%20Edelman%20Trust%20Barometer%20Spring%20Update.pdf> accessed 23 March 2020.

⁷ Edelman, 'Edelman Trust Barometer 2020: UK Supplement' (*Edelman*, 2020) <<https://www.edelman.co.uk/sites/g/files/aatuss301/files/2020-02/2020%20Edelman%20Trust%20Barometer%20UK%20Launch%20Deck.pdf>> accessed 23 March 2020.

⁸ OECD, 'Trust and Public Policy – How Better Governance Can Help Rebuild Public Trust' (*OECD*, 2017) < <http://www.oecd.org/corruption-integrity/reports/trust-and-public-policy-9789264268920-en.html>> accessed 23 June 2020; Betsey Stevenson and Justin Wolfers, 'Trust in Public Institutions over the Business Cycle' (2011) 101(3) *Am. Econ. Rev.* <<https://www.nber.org/papers/w16891>> accessed 23 June 2020; Joseph S. Nye, Jr., Philip D. Zelikow, and David C. King (eds.), *Why People Don't Trust Government* (Harvard University Press 1997) 111-132.

the corruption of journalistic institutions and the propagation of so-called ‘fake news’. Global polling has indicated that as many as 70 percent of adults around the world are concerned about the use of misinformation as a political weapon.⁹ Perhaps as worrisome, 63 percent report that they cannot distinguish legitimate journalism from fake news.¹⁰

A climate of fake news can undermine trust in democratic elections in ways that play into the hands of populist or authoritarian leaders. Today, mistrust is exploited by such leaders who seek to blame ‘the other’—often migrants and minorities—for socioeconomic woes. Poorer and less-educated individuals in majority ethnic and racial groups may be most vulnerable to being heavily influenced by populist propaganda,¹¹ at least in part because they tend to have lower levels of trust.¹² Overall, divisive nationalist movements have fostered and relied on an ‘us versus them’ mentality to gain popularity.¹³ When mistrust festers, politicians with motives that are far from altruistic can exploit and deepen that distrust, sowing conditions for the dismantling of liberal, democratic governance.

Scapegoating Law

Among the many strategies that populist or nationalist leaders rely on to build support is one that scapegoats the law and the legal system. Scapegoating the law goes beyond merely criticizing specific laws and arguing that they need to be repealed or amended. All politicians do that. Scapegoating goes further. It involves vitriolic attacks that falsely blame the law for a nation’s social and economic woes, thereby contributing to a sense of crisis in existing legal institutions. That crisis then purports to justify the need for a political savior to rescue society and make dramatic changes to restore order and

⁹ Uri Friedman, ‘Trust is Collapsing in America,’ (*The Atlantic*, 2018) <<https://www.theatlantic.com/international/archive/2018/01/trust-trump-america-world/550964/>> accessed 27 April 2020.

¹⁰ Ibid.

¹¹ J. Lawrence Broz, Jeffrey Frieden, and Stephen Weymouth, ‘Populism in Place: The Economic Geography of the Globalization Backlash’ (2019) International Organization <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3501263> accessed 23 April 2020.

¹² Pew Research Center, ‘Key Findings about Americans’ Declining Trust in Government and Each Other’ (*PRC*, 22 July 2019) <<https://www.pewresearch.org/fact-tank/2019/07/22/key-findings-about-americans-declining-trust-in-government-and-each-other/>> accessed 29 April 2020.

¹³ Ian Bremmer, *Us vs. Them: The Failure of Globalism* (Portfolio/Penguin 2018).

prosperity.¹⁴ Ironically, populist or nationalist leaders may even scapegoat the law at the same time that they claim to seek to restore law and order during disruptive times, especially by invoking law to constrain migration or trample dissent. Authoritarians today often seek to consolidate power by preserving at least the fig leaf of legality to their actions—but that does not necessarily stop them from seeking support by blaming law too.¹⁵

In recent years, legal scapegoating has been a significant part of the political strategy and rhetorical appeal behind populist-oriented political leaders in democratic countries on at least three continents, specifically in the United Kingdom, Brazil, and the United States. Each of these countries has witnessed high levels of public mistrust that has helped to provide an initial platform for populist movements. In each of these countries, successful populist strategies have included making law a particular target of blame by using exaggerated and false claims about how the law, particularly regulation, contributes to each nation's economic woes.

Brexit and Legal Scapegoating

The Brexit campaign was, in many respects, a rather conventional populist campaign against outsiders, targeting the European Union (E.U.), criticizing open borders, and lamenting a loss of British sovereignty. These conventional appeals were used by advocates of Brexit to blame the E.U. for inflated healthcare costs and various other maladies affecting the British public. But legal scapegoating was also central to the narrative underlying the Brexit campaign. Politicians repeatedly raised examples purporting to show the oppressiveness of E.U. regulations, even framing European rules as absurd.

Boris Johnson—who would eventually become the Prime Minister who finalized the U.K.'s Brexit deal in 2020—showed himself to be particularly adept at crafting *reductio absurdum* arguments against E.U. regulation as a means of building support for the initial public vote in 2016 on whether Britain should leave the European Union. Johnson claimed that Europeans had adopted ludicrous regulations governing the smell of manure,¹⁶ the shape of

¹⁴ On some of the dynamics involved in scapegoating elites and building public support for populism, see Michael Hameleers, Linda Bos, and Claes de Vreese, 'Framing Blame: Toward a Better Understanding of the Effects of Populist Communication on Populist Party Preferences' 2017 20(7) *Information, Communication, & Society* <<https://www.tandfonline.com/doi/full/10.1080/17457289.2017.1407326>> accessed 16 April 2020.

¹⁵ Steven Levitsky and Daniel Ziblatt, *How Democracies Die* (Crown 2018).

¹⁶ William Booth and Karla Adam, 'Want to Understand Boris Johnson, Britain's Probable Next Prime Minister? Read His Incendiary Journalism' (*The Washington Post*, 20 July 2019)

bananas,¹⁷ and the size of condoms.¹⁸ He ‘warned Britons that their prawn-cocktail-flavored chips could be banned, that their sausages were under threat and that their fishermen would be required to wear hairnets’.¹⁹ These kind of misleading or false claims permeated British popular discourse in the lead up to the initial vote to authorize the United Kingdom to withdraw from the European Union.

Following the public vote authorizing Brexit, ‘leave’ advocates continued to make similar exaggerated claims during the period when U.K. leaders negotiated with E.U. officials over the terms of the nation’s withdrawal. In January 2018, for example, Conservative Member of Parliament Jacob Rees-Mogg, who has since become the leader of the House of Commons, gave a major address in which he envisioned two different types of futures for the United Kingdom. One future, he said, would perpetuate ‘a gradual erosion of our wealth, our success and ultimately our values’.²⁰ This erosion would follow from continuing ‘to put our future into [the] constrained hands’ of European regulators.²¹ But there was an alternative future, he said, one which would liberate Britain from the economic devastation allegedly caused by E.U. regulation. Britain could throw off the E.U.’s regulatory shackles and create ‘a bright future’, one in which regulation ‘encourages enterprise’ and helps ensure that ‘the next great economic revolution will be made in Britain’.²² According to Rees-Mogg’s argument, the only barrier to British prosperity seemed to be the application of European law—as if home-grown U.K. regulation could single-handedly drive the country’s economic resurgence.

Boris Johnson also continued to denigrate E.U. law in the period following the public vote supporting Brexit. In one famous instance, he railed

<https://www.washingtonpost.com/world/europe/boris-johnson-britains-likely-next-prime-minister-is-a-hack--a-journalist-who-has-reached-the-pinnacle-of-power/2019/07/20/0fff5146-a98d-11e9-8733-48c87235f396_story.html> accessed 19 January 2020.

¹⁷ Jon Henley, ‘Is the EU Really Dictating the Shape of Your Bananas?’ (*The Guardian*, 11 May 2016) <<https://www.theguardian.com/politics/2016/may/11/boris-johnson-launches-the-vote-leave-battlebus-in-cornwall>> accessed 21 January 2020.

¹⁸ Christian Oliver and Jim Brunsten, ‘Fact or Fiction? Boris Johnsons Euro Claims’ (*The Financial Times*, 22 February 2016) <<https://www.ft.com/content/6b31460a-d96b-11e5-a72f-1e7744c66818>> accessed 28 January 2020.

¹⁹ Booth and Adam (n 16).

²⁰ ‘Speech - by Jacob Rees-Mogg M.P. at Churcher’s College, Petersfield, 25 January 2018’ (Richard Drax, 25 January 2018) <<https://www.richarddrax.com/news/speech-jacob-rees-mogg-mp-churchers-college-petersfield-25-january-2018>> accessed 19 January 2020.

²¹ Ibid.

²² Ibid.

against ‘pointless, expensive, environmentally damaging’ regulations imposed on the shipping of kippers, a smoked herring that many Britons consume at breakfast.²³ He waved a package of the smoked fish above his head at a campaign rally, decrying E.U. regulations that purportedly required the producers of kipper to ship fish in plastic ‘pillows’ with ice. If only the United Kingdom could escape from the E.U.’s ‘regulatory overkill’, Johnson promised, then the nation could ‘bring the kippers back’.²⁴

Of course, it turns out that Johnson’s claims about E.U. kipper shipping requirements were simply not true. As both the British press and the European Commission itself confirmed, the kipper rules lambasted by Johnson were British regulations, not E.U. ones.²⁵ But when scapegoating law, facts do not matter.

Brazil, Bolsonaro, and Bullying the Law

In January 2019, Jair Bolsonaro assumed the office of the Brazilian presidency after having won a 55-percent vote in a runoff election.²⁶ Bolsonaro, an ardent right-wing politician, has been wont to say degrading things about women and LGBTQ individuals.²⁷ He has even said that minorities should

²³ Ben Quinn, ‘Kipper Rules Boris Johnson Blamed on EU Are Actually British, Says Brussels’ (*The Guardian*, 18 July 2019) <<https://www.theguardian.com/politics/2019/jul/18/boris-johnson-claims-about-kippers-fishy-brussels-says>> accessed 27 January 2020.

²⁴ Alice Tidey, ‘EU Debunks Boris Johnson’s Fishy Claims About Food Regulation’ (*EuroNews*, 19 September 2019) <<https://www.euronews.com/2019/07/19/eu-debunks-boris-johnson-s-fishy-claims-about-food-regulation>> accessed 29 January 2020.

²⁵ Ben Quinn, ‘Kipper Rules Boris Johnson Blamed on EU Are Actually British, Says Brussels’ (*The Guardian*, 18 July 2019) <<https://www.theguardian.com/politics/2019/jul/18/boris-johnson-claims-about-kippers-fishy-brussels-says>> accessed 27 January 2020.

²⁶ Ernesto Londoño and Shasta Darlington, ‘Jair Bolsonaro Wins Brazil’s Presidency, in a Shift to the Far Right’ (*The New York Times*, 28 October 2018) <<https://www.nytimes.com/2018/10/28/world/americas/jair-bolsonaro-brazil-election.html>> accessed 27 January 2020.

²⁷ Jill Langlois and Kate Linthicum, ‘Far Right Populist Jair Bolsonaro Wins Brazil Presidential Election’ (*Los Angeles Times*, 28 October 2018) <<https://www.latimes.com/world/la-fg-brazil-election-20181028-story.html>> accessed 21 April 2020; Terrence McCoy, ‘Anyone Could Be a Threat’: In Bolsonaro’s Brazil, LGBT People Take Personal Defense into Their Own Hands’ (*The Washington Post*, 22 July 2019) <https://www.washingtonpost.com/world/the_americas/anyone-could-be-a-threat-in-bolsonaros-brazil-lgbt-people-are-taking-personal-defense-into-their-own-hands/2019/07/21/5aaa7578-a716-11e9-a3a6-ab670962db05_story.html> accessed 20 April 2020.

‘either adapt or simply vanish’.²⁸ He has flirted with authoritarianism, at times touting torture and celebrating coups.²⁹ But at the same time, he also campaigned for the presidency on a decidedly anti-regulatory platform, and his attacks on Brazilian regulation and legal norms have continued during his time as President.

Brazil had experienced a severe recession from 2014 to 2016, which undoubtedly made attractive Bolsonaro’s promises to free the country from regulation as means of helping the economy.³⁰ Brazil has long had a bureaucratic-heavy government replete with ‘serpentine red tape’ for opening up new businesses.³¹ But while reducing unnecessary administrative burdens would surely seem an appropriate reform idea, that hardly means that regulation was to blame for the country’s sluggish recovery from its recession nor that lifting regulation would serve as the country’s ticket to restored economic growth and prosperity.³² After all, Brazil had a dense bureaucratic system even before the recession, and other factors, such as high taxes, crime, and real estate prices, explain what is sometimes known as the ‘Brazil cost’—that is, the higher cost of doing business in Brazil.³³ Regulation neither caused Brazil’s deep recession nor could it be any panacea for restoring the country’s economic vigor.³⁴

²⁸ Jean Chemnick, ‘Conservationists Worry about Amazon’s Fate over Bolsonaro’s Victory in Brazil’ (*Scientific American*, 30 October 2018) <<https://www.scientificamerican.com/article/conservationists-worry-about-amazons-fate-after-bolsonaros-victory-in-brazil/>> accessed 28 January 2020.

²⁹ ‘Brazil: Bolsonaro’s Coup Celebration Barred by Judge’ (*BBC*, 30 March 2019) <<https://www.bbc.com/news/world-latin-america-47757616>> accessed 19 January 2020; Jamie Timson, ‘Jair Bolsonaro: How ‘South America’s Trump’ Will Change Brazil’ (*The Week*, 29 October 2018) <<https://www.theweek.co.uk/97396/jair-bolsonaro-how-south-america-s-trump-will-change-brazil>> accessed 25 January 2020.

³⁰ ‘What to Make of Brazil’s New Firebrand President, Jair Bolsonaro’ (*The Economist*, 3 January 2019) < <https://www.economist.com/the-americas/2019/01/03/what-to-make-of-brazils-new-firebrand-president-jair-bolsonaro>> accessed 5 February 2020.

³¹ ‘Jair Bolsonaro and the Perversion of Liberalism’ (*The Economist*, 27 October 2018) <<https://www.economist.com/the-americas/2018/10/27/jair-bolsonaro-and-the-perversion-of-liberalism> > accessed 10 February 2020.

³² For discussion of the politics of administrative burdens, see Pamela Herd and Donald P. Moynihan, *Administrative Burden: Policymaking by Other Means* (Russell Sage 2018).

³³ ‘Special Report – Brazil: The Price is Wrong’ (*The Economist*, 28 September 2013) <<https://www.economist.com/special-report/2013/09/26/the-price-is-wrong>> accessed 10 February 2020.

³⁴ Bruno Queiroz Cunha, ‘From Regulation and Development to Development *with* Regulation: Alternatives to Regulatory Orthodoxy’ (ECPR Standing Group on Regulatory Governance Biennial Conference, Lusanne/Switzerland, 4 to 6 July 2018) accessed 3 May

Yet candidate Bolsonaro proclaimed that regulations were ‘suffocating’ the country.³⁵ As a citizen, Bolsonaro had himself been fined for breaking environmental regulations in 2012, so perhaps it was not surprising that he made environmental regulations a special target for his rhetorical ire.³⁶ He proposed on the campaign trail making the Environment Ministry a subdivision within the Agriculture Ministry.³⁷ He also promised that, if elected, he would get rid of the ‘*fine* industry’, the phrase he used for regulators because they impose monetary fines on those who violate the law.³⁸ He urged relaxing mining regulations.³⁹ He also publicly discounted climate change. At one point, candidate Bolsonaro said that, if he were elected, he would withdraw Brazil from the Paris Agreement, even though that is not something that the Brazilian president can do by himself.⁴⁰

Candidate Bolsonaro also rejected regulations that protected Amazon territory occupied by indigenous people, promising that under his leadership

2020. In a review of national regulatory policies and procedures in 2016, the OECD actually reported that Brazil outranked all other OECD countries in its processes of public involvement in the regulatory process. The OECD did, though, indicate that Brazil could do better to make the use of regulatory impact assessment and ex post evaluation more ‘consistent’ across government. ‘Indicators of Regulatory Policy and Governance Latin America 2016: Brazil’ (OECD, 2016) <<https://www.oecd.org/gov/regulatory-policy/Brazil-regulatory-policy-ireg-2016.pdf>> accessed 15 February 2020.

³⁵ Justin Wise, ‘The Amazon Rainforest is Burning at a Record Rate. Here’s What’s Going On’ (*The Hill*, 21 August 2019) <<https://thehill.com/policy/energy-environment/458281-the-amazon-rainforest-is-burning-at-a-record-rate-heres-whats-going>> accessed 13 February 2020.

³⁶ Carol Pires, ‘The Trump Ally Who is Allowing the Amazon to Burn’ (*The New Yorker*, 28 August 2019) <<https://www.newyorker.com/news/news-desk/the-trump-ally-who-is-allowing-the-amazon-to-burn>> accessed 12 February 2020.

³⁷ Jonathan Watts, ‘Fears for Amazon as Bolsonaro Plans to Merge Environment and Agriculture Ministries’ (*The Guardian*, 1 November 2018) <<https://www.theguardian.com/world/2018/nov/01/bolsonaro-environment-agriculture-ministries-amazon>> accessed 20 February 2020.

³⁸ Mariana Simões, ‘Brazil’s Bolsonaro on the Environment, in His Own Words’ (*The New York Times*, 27 August 2019) <<https://www.nytimes.com/2019/08/27/world/americas/bolsonaro-brazil-environment.html>> accessed 28 January 2020.

³⁹ Ibid.

⁴⁰ And in fact, Bolsonaro has not made moves to have Brazil exit the Paris Agreement. But as president he did back out of hosting the next COP25 climate change meeting that had been scheduled to take place in Brazil. Jake Spring, ‘No Longer the Host, Brazil Still Aims for Key Role at UN Climate Talks’ (*Reuters*, 15 October 2019) <<https://www.reuters.com/article/us-climate-change-brazil/no-longer-the-host-brazil-still-aims-for-key-role-at-u-n-climate-talks-idUSKBN1WU2YF>> accessed 28 January 2020.

‘there won’t be a square centimeter demarcated as an indigenous reserve’.⁴¹ He blamed the laws protecting indigenous peoples lands for the country’s economic woes, because, in his account, ‘where there is indigenous land, there is wealth underneath it’⁴²—as if lifting regulations would reveal a pot of gold. Brazil’s agency for indigenous affairs, the National Indian Foundation (FUNAI), found itself especially targeted by Bolsonaro’s violent rhetoric: ‘If I’m elected, I’ll serve a blow to FUNAI; a blow to the neck. There’s no other way. It’s not useful anymore’.⁴³

Since assuming office, Bolsonaro has pursued his targeted attacks on regulation. One of his first actions as president was to end new designations of land protected for indigenous people.⁴⁴ He shifted responsibility for certain environmental regulatory responsibilities to the ministry of agriculture headed by a former industry representative.⁴⁵ He interfered with health authorities and energy regulators. His highly popular justice minister quit, accusing Bolsonaro of having improperly meddled in law enforcement matters.⁴⁶ All the while, Bolsonaro’s administration has rolled back regulations and slashed funding for regulatory enforcement.⁴⁷

⁴¹ Somini Sengupta, ‘What Jair Bolsonaro’s Victory Could Mean for the Amazon, and the Planet’ (*The New York Times*, 17 October 2018) <<https://www.nytimes.com/2018/10/17/climate/brazil-election-amazon-environment.html>> accessed 16 February 2020.

⁴² Ibid.

⁴³ ‘What Brazil’s President, Jair Bolsonaro, Has Said About Brazil’s Indigenous Peoples’ (*Survival International*) <<https://www.survivalinternational.org/articles/3540-Bolsonaro>> accessed 16 February 2020. He has also said that it is ‘a shame that the Brazilian cavalry wasn’t as efficient as the Americans, who exterminated the Indians.’ Fiona Watson, ‘In Just 100 Days, Jair Bolsonaro Has Destroyed the Lives of Brazil’s Indigenous People’ (*The Independent*, 10 April 2019) <<https://www.independent.co.uk/voices/jair-bolsonaro-brazil-indigenous-people-president-100-days-a8863161.html>> accessed 23 February 2020.

⁴⁴ Shannon Sims, ‘Here’s How Jair Bolsonaro Wants to Transform Brazil’ (*The Atlantic*, 12 January 2019) <<https://www.theatlantic.com/international/archive/2019/01/heres-how-jair-bolsonaro-wants-to-transform-brazil/580207/>> accessed 23 February 2020.

⁴⁵ Watts (n 37).

⁴⁶ Ricardo Brito, ‘Brazil ‘Super Minister’ Quits in Bolsonaro’s Worst Crisis Yet’ (*Reuters*, 24 April 2020) <<https://www.reuters.com/article/us-brazil-politics/bolsonaro-fires-head-of-brazils-federal-police-amid-political-spat-idUSKCN2261KW?il=0>> accessed 30 April 2020; Tom Phillips, ‘Brazil’s Star Justice Minister Sergio Moro Resigns in Blow to Jair Bolsonaro’ (*The Guardian*, 24 April 2020) <<https://www.theguardian.com/world/2020/apr/24/brazil-justice-minister-sergio-moro-resigns-jair-bolsonaro>> accessed 30 April 2020.

⁴⁷ Oliver Stuenkel, ‘Bolsonaro Fans the Flames’ (*Foreign Affairs*, 30 August 2019) <<https://www.foreignaffairs.com/articles/americas/2019-08-30/bolsonaro-fans-flames>> accessed 25 February 2020.

In addition to delivering on his promise of reductions in fines, Bolsonaro has ‘fostered an atmosphere of impunity, encouraging loggers, ranchers, miners, and farmers to breach regulations and cut into the forest’.⁴⁸ As large sections of the Amazon continue to burn, the president, apparently ‘[w]ithout providing evidence, ... accused environmental NGOs of having started the fires’.⁴⁹ Notwithstanding commitments Brazil made under the Paris Agreement to slow deforestation, Bolsonaro berated the ‘environmental psychoses’ that have led to legal limits on Amazonian development, stating that ‘[w]e are going to get rid of all this crap in Brazil — crap that is corrupt and communist’.⁵⁰

Bolsonaro’s government has reportedly ‘incited its supporters to pressure the judiciary to issue verdicts in accordance with its wishes’.⁵¹ Wildlife preserve officials ‘have reported being met with increasingly violent responses from miners and forestry workers as they perform their environmental-protection duties’.⁵² It is said that Bolsonaro ‘stands for “order“, but not the law’.⁵³ But the ‘order’ he seems to prefer leaves plenty of room for the toleration, if not encouragement, of attacks on the law.

Donald Trump’s Assault on U.S. Law

Bolsonaro is often called ‘The Trump of the Tropics’.⁵⁴ The comparison is apt not only because of both presidents’ coarse, aggressive

⁴⁸ Stuenkel (n 46).

⁴⁹ Ibid.

⁵⁰ Andres Schipani, ‘Brazil: Jair Bolsonaro Pushes Culture War Over Economic Reform’ (*The Financial Times*, 24 August 2019) <<https://www.ft.com/content/f470734e-c41a-11e9-a8e9-296ca66511c9>> accessed 25 February 2020.

⁵¹ Raphael Tsavkko Garcia, ‘Bolsonaro is Laying the Foundations of a New Dictatorship’ (*Aljazeera*, 11 December 2019) <<https://www.aljazeera.com/indepth/opinion/bolsonaro-laying-foundations-dictatorship-191209153455904.html>> accessed 2 March 2020. Bolsonaro even joined a rally of his supporters calling for the closing of the Supreme Court in response to an investigation into his presidency. Anthony Beedle and Ricardo Brito, ‘Bolsonaro Joins Rally Against Brazil’s Top Court; Judge Warns Democracy at Risk’ (*Reuters*, 31 May 2020) <<https://www.reuters.com/article/us-brazil-politics/bolsonaro-joins-rally-against-brazils-top-court-judge-warns-democracy-at-risk-idUSKBN2370QJ>> accessed 4 June 2020.

⁵² Pires (n 35).

⁵³ *The Economist* (n 31).

⁵⁴ Jair Bolsonaro: ‘Brazil’s Firebrand Leader Dubbed the Trump of the Tropics’ (*BBC*, 31 December 2018) <<https://www.bbc.com/news/world-latin-america-45746013>> accessed 27 January 2020.

rhetoric, but also because of the similar ways that these two leaders have blamed law and regulation for what ails their countries. Trump's 2016 presidential campaign, organized around the theme of 'Make America Great Again', made classic populist and nationalist appeals.⁵⁵ Trump has himself dabbled in authoritarian appeals, even claiming that he 'alone can fix' what ails American society.⁵⁶ Since being elected, he has used his office and its privileges to investigate political opponents (and he has been impeached for doing so), and he regularly flouts other long-established legal and historical norms.⁵⁷

When it comes to public policy, Trump has made regulation a centerpiece of his agenda during both his campaign and administration, routinely using regulatory law as a scapegoat. Speaking to the Detroit Economic Club in one of his few substantive speeches as a candidate, Trump railed against regulation as 'a hidden tax on American consumers, and a massive lead weight on the American economy'.⁵⁸ Proclaiming that '[i]t is time to remove the anchor dragging us down', Trump trotted out a favorite canard of the political right, asserting that 'current overregulation is costing our

⁵⁵ As Trump has governed, observers have seen little that is populist about his policies. He has nominated numerous billionaires to his cabinet and his one major domestic policy accomplishment proved to deliver disproportionate tax relief benefits to the wealthy. David Smith, 'Trump's billionaire cabinet could be the wealthiest administration ever' (*The Guardian*, 2 December 2016) <<https://www.theguardian.com/us-news/2016/dec/02/trumps-rich-pickings-president-elects-team-could-be-wealthiest-ever>> accessed 23 January 2020; Camilo Maldonado, 'Trump Tax Cuts Helped Billionaires Pay Less Taxes Than the Working Class in 2018' (*Forbes*, 10 October 2019) <<https://www.forbes.com/sites/camilomaldonado/2019/10/10/trump-tax-cuts-helped-billionaires-pay-less-taxes-than-the-working-class-in-2018/#39c002bb3128>> accessed 23 January 2020.

⁵⁶ Politico Staff, 'Full Text: Donald Trump 2016 RNC Draft Speech Transcript,' (*Politico*, 2016) <<https://www.politico.com/story/2016/07/full-transcript-donald-trump-nomination-acceptance-speech-at-rnc-225974>> accessed 24 April 2020.

⁵⁷ Peter Baker, 'Trump Renews Attack on Justice System, Again Disregarding Barr's Pleas' (*The New York Times*, 20 February 2020) <<https://www.nytimes.com/2020/02/20/us/politics/trump-attacks-justice-system.html>> accessed 24 April 2020; Paul Rosenzweig, 'Trump's Defiance of the Rule of Law' (*The Atlantic*, 3 June 2019) <<https://www.theatlantic.com/ideas/archive/2019/06/trumps-unique-assault-rule-law/590875/>> accessed 24 April 2020; Robert Reich, 'Trump's Assault on the Rule of Law' (*The American Prospect*, 27 November 2018) <<https://prospect.org/power/trump-s-assault-rule-law/>> accessed 24 April 2020. See also Cary Coglianese, 'Legitimacy, Not Force, Is Key to Presidential Power' (*The Regulatory Review*, 8 June 2020) <<https://www.theregview.org/2020/06/08/coglianese-legitimacy-not-force-key-presidential-power/>> accessed 10 June 2020.

⁵⁸ J. Brian Charles, 'Transcript of Donald Trump's Economic Policy Speech to Detroit Economic Club' (*The Hill*, 8 August 2016) <<https://thehill.com/blogs/pundits-blog/campaign/290777-transcript-of-donald-trumps-economic-policy-speech-to-detroit>> accessed 15 April 2020.

economy as much as \$2 trillion dollars a year—that’s money taken straight out of cities like yours’.⁵⁹ The \$2 trillion figure has been widely discredited, and no serious economist vouches for it.⁶⁰ The former head of the U.S. Office of Information and Regulatory Affairs, Cass Sunstein, has even called it an ‘urban legend’.⁶¹

Trump has often singled out environmental regulation for scapegoating. He declared, for example, that the U.S. Environmental Protection Agency, under the Obama Administration, had waged a ‘war on coal’ that was destroying the coal industry in the United States.⁶² But multiple studies have shown what has long been obvious to investors and other financial analysts: the coal industry’s decline has come from decreased costs of natural gas—a competitive fuel source—and not from regulation.⁶³

Misleading the public about the impact of environmental regulations may seem like small potatoes compared to the inflammatory rhetoric Trump has used to attack other aspects of the law. He has called law enforcement officials ‘human scum’.⁶⁴ He has accused federal judges of bias and racial

⁵⁹ Ibid.

⁶⁰ Richard W. Parker, ‘Hyping the Cost of Regulation’ (*The Regulatory Review*, 25 June 2018) <<https://www.theregreview.org/2018/06/25/parker-hyping-the-cost-of-regulation/>> accessed 20 April 2020; Jodi L. Short, ‘Cutting Through the Rhetoric of Cutting Red Tape’ (*The Regulatory Review*, 31 July 2018) <<https://www.theregreview.org/2018/07/31/short-cutting-rhetoric-cutting-red-tape/>> accessed 20 April 2020. For further discussion of this discredited figure, see Maeve P. Carey, ‘Methods of Estimating the Total Cost of Federal Regulations’ (*Congressional Research Service*, 21 January 2016) <<https://fas.org/sgp/crs/misc/R44348.pdf>> accessed 21 April 2020.

⁶¹ ‘Regulatory Policy Assessment, Sunstein, Part 1’ (*C-SPAN*, 3 June 2011) <<https://www.c-span.org/video/?299863-1/regulatory-policy-assessment-sunstein-part-1>> accessed 21 April 2020.

⁶² Cary Coglianese and Daniel Walters, ‘Whither the Regulatory ‘War on Coal’? Scapegoats, Saviors, and Stock Market Reactions’ (2020) *Ecology Law Quarterly* (forthcoming) <<https://kleinmanenergy.upenn.edu/paper/working-paper-whither-regulatory-war-coal>> accessed 9 February 2020.

⁶³ Ibid. See also Trevor Houser, Jason Bordoff, and Peter Marsters, ‘Can Coal Make a Comeback?’ (*Columbia Center on Global Energy Policy*, April 2017) <<https://energypolicy.columbia.edu/sites/default/files/Center%20on%20Global%20Energy%20Policy%20Can%20Coal%20Make%20a%20Comeback%20April%202017.pdf>> accessed 27 April 2020; John Coglianese, Todd D. Gerarden, and James H. Stock, ‘The Effects of Fuel Prices, Environmental Regulations, and Other Factors on U.S. Coal Production, 2008-2016’ (2020) 41(1) *The Energy Journal* <https://scholar.harvard.edu/files/stock/files/the_effect_of_fuel_prices_environmental_regulations_and_other_factors_on_u.s._coal_productions_2008-2016.pdf> accessed 27 April 2020.

⁶⁴ Justin Wise, ‘Trump Calls FBI Investigators in Russia Probe ‘Human Scum’’ (*The Hill*, 20 April 2020) <<https://thehill.com/homenews/administration/493631-trump-calls-fbi-investigators-in-russia-probe-human-scum>> accessed 29 April 2020.

prejudice—with some of these accusations being so outlandish that they have prompted the Chief Justice of the U.S. Supreme Court to issue a public rebuke of the President.⁶⁵ Trump’s aides proclaim that conspiracy theories about a ‘deep state’—that is, a government that plots against its own public—‘is 100% true’.⁶⁶ One of his early aides openly called for ‘dismantling the administrative state’.⁶⁷

Immediately after his inauguration, Trump pledged to reduce regulations in the United States by 75 percent.⁶⁸ Not only did he appoint individuals as heads of regulatory agencies who share an anti-regulatory perspective, Trump also imposed by executive order a government-wide regulatory budgeting—or ‘one in, two out’—regimen.⁶⁹ In 2017, Trump bragged that his administration would take the volume of federal regulation ‘back below the 1960 level... fairly quickly’.⁷⁰ With the 1960 regulatory code reportedly containing nearly 90 percent fewer pages of regulations than today’s code, the kind of deregulation that Trump was proposing would amount to a monumental shift in U.S. law.⁷¹ It also could not be done by Trump alone, as it would necessitate congressional action.

⁶⁵ Brent Kendall, ‘Trump Says Judge’s Mexican Heritage Presents ‘Absolute Conflict’ (*The Wall Street Journal*, 3 June 2016) <<https://www.wsj.com/articles/donald-trump-keeps-up-attacks-on-judge-gonzalo-curiel-1464911442>> accessed 25 April 2020; William Cummings, ‘US Does Have ‘Obama Judges’: Trump Responds to Supreme Court Justice John Roberts’ Rebuke’ (*USA Today*, 21 November 2018) <<https://www.usatoday.com/story/news/politics/2018/11/21/john-roberts-trump-statement/2080266002/>> accessed 25 April 2020.

⁶⁶ Tom Porter, ‘The Deep State is 100% True’: Trump is Launching an All-Out Assault on the US Intelligence Community’ (*Business Insider*, 21 February 2020) <<https://www.businessinsider.com/trump-all-out-assault-on-us-intelligence-community-apparent-revenge-2020-2>> accessed 24 April 2020.

⁶⁷ Jon Michaels, ‘How Trump is Dismantling a Pillar of the American State’ (*The Guardian*, 7 November 2017) <<https://www.theguardian.com/commentisfree/2017/nov/07/donald-trump-dismantling-american-administrative-state>> accessed 27 April 2020.

⁶⁸ Chris Arnold, ‘President Trump to Cut Regulations by ‘75 Percent’ – How Real Is That?’ (*NPR*, 24 January 2017) <<https://www.npr.org/2017/01/24/511341779/president-trump-to-cut-regulations-by-75-percent-how-real-is-that>> accessed 19 January 2020.

⁶⁹ Bourree Lam, ‘Trump’s ‘Two-For-One’ Regulation Executive Order’ (*The Atlantic*, 30 January 2017) <<https://www.theatlantic.com/business/archive/2017/01/trumps-regulation-eo/515007/>> accessed 25 January 2020.

⁷⁰ Juliet Eilperin, ‘Trump Pledges to Cut Regulations Down to 1960 Levels – But That May Be Impossible’ (*The Washington Post*, 14 December 2017) https://www.washingtonpost.com/politics/trump-pledges-to-whittle-federal-regulations-down-to-1960-levels/2017/12/14/17de13a4-e119-11e7-bbd0-9dfb2e37492a_story.html accessed 28 March 2020.

⁷¹ As one reporter put it, ‘[e]ventually, Trump promised, the administration plans to do away with some 165,000 pages of the more than 185,000 in the Code of Federal Regulations’. Denis

Several years into his tenure as President, Trump's supporters have typically credited him with three main domestic policy accomplishments: tax legislation (which reduced tax rates primarily for wealthy people); the appointment of two justices of the Supreme Court and other federal judges; and deregulation. Trump has bragged that his administration 'has cut more regulations in a short period of time than any other administration during its entire tenure'.⁷² But of course, he has not done so, nor has he come anywhere close to reducing regulations by 75 percent. In fact, the number of repeals of regulations has been extremely modest compared with his pledge.⁷³ The biggest impact the Trump Administration has had on federal regulation has come from the slowing down of the issuance of new major regulations: as of January 2020, Trump had finalized 98 economically significant regulations, compared with Obama's 175 in the same period of time and an average of 118 across all Presidents since 1980.⁷⁴ It is a gross exaggeration to claim that the direction the U.S. economy has taken over the last several years has had much if anything to do with what the Trump Administration has done in terms of 'deregulation'.⁷⁵

Not only has President Trump exaggerated what he has achieved, but he has not ceased to scapegoat the law when it seems to suit his interests. In 2020, in the face of criticism of his administration's slow response to the spread

Slattery, 'Trump's promise to cut 'red tape' and loosen regulations not as easy as he says' (*New York Daily News*, 1 January 2018) <<https://www.nydailynews.com/news/politics/trump-promises-roll-back-government-oversight-1960-level-article-1.3731239>> accessed 4 May 2020.

⁷² Jacob Pramuk, 'Trump's Bold Claims About Cutting Red Tape Give Democrats a Possible Weapon in 2020 Election' (*CNBC*, 24 March 2019) < <https://www.cnn.com/2019/03/24/trump-claims-about-cutting-regulations-give-dems-2020-election-opening.html>> accessed 9 February 2020. His budget director recently bragged that the Administration has engaged in the 'largest deregulation effort in modern history.' Philip Wegmann, 'WH Agenda Will Advance 'Largest Deregulation Effort in History'' (*Real Clear Politics*, 30 June 2020) <https://www.realclearpolitics.com/articles/2020/06/30/wh_agenda_will_advance_largest_deregulation_effort_in_history_143576.html> accessed 30 June 2020. This claim is also patently false if by 'modern history' one reasonably includes the Carter Administration from 1977-1981, during which time the federal government made major moves to eliminate economic regulation of airlines, truck transportation, and certain energy markets.

⁷³ Brookings, 'Tracking Deregulation in the Trump Era' (*Brookings*, 22 January 2020) <<https://www.brookings.edu/interactives/tracking-deregulation-in-the-trump-era/>> accessed 28 January 2020.

⁷⁴ Andrew Hunter, 'Deregulation Doing Little to Boost Economy' (*Capital Economics*, 9 January 2020) <<https://www.capitaleconomics.com/publications/us-economics/us-economics-focus/deregulation-doing-little-to-boost-economy/>> accessed 14 May 2020.

⁷⁵ Cary Coglianese, 'Let's Be Real About Trump's First Year in Regulation' (*The Regulatory Review*, 29 January 2018) <<https://www.theregview.org/2018/01/29/lets-be-real-trumps-first-year-regulation/>> accessed 17 May 2020.

of a deadly coronavirus—including of his own repeated statements downplaying the risks—Trump tried to shift the blame. His target: the law. ‘I don’t take responsibility at all’, he declared, ‘because we were given a set of circumstances and we were given rules, regulations, and specifications from a different time’.⁷⁶ But this claim, perhaps not surprisingly, was also false. If the President or others in his administration had exercised responsible leadership, there was nothing in the law or in regulations that prevented quick action to start testing for the virus and acting to contain its spread.⁷⁷

The Political Economy of Legal Scapegoating

Contemporary events in Britain, Brazil, and the United States reveal how law can be vilified and used as a scapegoat by populist leaders to advance their drive for public support. The political economy behind such scapegoating is similar to that underlying any scapegoating: some leaders see it to their advantage to blame something or someone else for a society’s problems. The alternative for these leaders might well mean having to help mass publics understand and accept the difficulties and tradeoffs at stake in addressing underlying social and economic problems, which might then also imply putting forward policy solutions that could be unpopular, such as raising taxes or cutting budgets. Scapegoating the law is simply easier than building coalitions around unpopular actions.

Furthermore, legal scapegoating combines what appears on the surface to be a public-interested diagnosis of a problem—such as we are all ‘suffocating’ due to regulation—with a set of solutions that appeals to the private interests that align themselves with populist leaders.⁷⁸ When regulatory costs are disproportionately borne by a concentrated set of business actors, and regulatory benefits are diffused throughout society, solutions that relax regulatory protections are likely to deliver disproportionate private benefits in the form of cost-savings to politicians’ wealthy benefactors.⁷⁹

⁷⁶ Linda Qiu, ‘Trump’s False Claims About His Response to Coronavirus’ (*The New York Times*, 15 March 2020) <<https://www.nytimes.com/2020/03/13/us/politics/fact-check-trump-coronavirus.html>> accessed 14 May 2020.

⁷⁷ Ibid. See also James Fallows, ‘The 3 Weeks That Changed Everything’ (*The Atlantic*, 29 June 2020) < <https://www.theatlantic.com/politics/archive/2020/06/how-white-house-coronavirus-response-went-wrong/613591/>> accessed 30 June 2020.

⁷⁸ Bruce Yandle, ‘Bootleggers and Baptists—The Education of a Regulatory Economist’ (1983) AEI Journal on Government and Society <<http://pirate.shu.edu/~rotthoku/Liberty/On%20Bootleggers%20&%20Baptists.pdf>> accessed 30 January 2020.

⁷⁹ On the political implications of how regulatory costs and benefits are distributed, see James Q. Wilson, *Politics of Regulation* (Basic Books 1980).

It is surely no accident, for example, that Bolsonaro's efforts to gut regulatory protections for the Amazon has served the interests of his wealthy political supporters in agriculture and ranching. Nor does it seem happenstance that coal industry executives in the United States and the politicians who seek their support have embraced the rhetoric of a regulatory 'war on coal'. Such rhetoric is easier for the coal industry to embrace than to have to admit to employees and shareholders that they have been defeated in the marketplace by an alternative source of energy. Moreover, blaming regulation provides a basis for asking policymakers not merely for regulatory relief but, still better, for government subsidies that can deliver short-term financial gains to firms but can do little to address the underlying cause of an industry's decline.⁸⁰

For politicians, legal scapegoating allows them to look like 'saviors' coming to the rescue of the economy.⁸¹ It is relatively easy, after all, to do something about regulation compared with the kinds of major structural or fiscal policies that might deliver meaningful macroeconomic returns.⁸² It has proven relatively easy, for example, for President Trump to project himself as a savior to energy industries by repealing the Obama Administration's signature climate change regulation, claiming that this helped the economy, even though the Obama regulation had in fact never taken legal effect and could not yet have had any palpable effect on the economy.⁸³

The political advantages that populists perceive from making law a scapegoat—and particularly from scapegoating regulation—dovetail with the difficult economic conditions that can drive some politicians to scapegoat minorities and migrants. Difficult economic times have a tendency to generate

⁸⁰ Jeff Brady, 'Despite Bankruptcy and Illness, Bob Murray Remains a Loud Voice for Coal' (*NPR*, 7 November 2019) <<https://www.npr.org/2019/11/07/775764520/despite-bankruptcy-and-illness-bob-murray-remains-a-loud-voice-for-coal>> accessed 29 January 2020. For a discussion of the subsidies that have been proposed and offered to the coal industry in the United States, see Coglianese and Walters (n 61).

⁸¹ *Ibid.*

⁸² Christopher Carrigan and Cary Coglianese, 'Oversight in Hindsight: Assessing the US Regulatory System in the Wake of Calamity' in Cary Coglianese (ed), *Regulatory Breakdown: The Crisis of Confidence in US Regulation* (University of Pennsylvania Press 2012).

⁸³ In his 2018 State of the Union address to the nation, Trump declared that 'we have ended the war on beautiful, clean coal'. Umair Irfan, 'Trump's Perennial 'War on Coal' Claim, Fact-Checked' (*Vox*, 31 January 2018) <<https://www.vox.com/2018/1/30/16953292/trump-war-on-coal-claim-fact-checked>> accessed 16 April 2020. For further background, see Lisa Friedman and Brad Plumer, 'EPA Announces Repeal of Major Obama-Era Carbon Emissions Rule' (*The New York Times*, 9 October 2017) <<https://www.nytimes.com/2017/10/09/climate/clean-power-plan.html>> accessed 28 January 2020.

antipathy toward regulation.⁸⁴ In the United States, the proportion of citizens who believed that there was ‘too much’ regulation spiked at the height of the Great Recession, in mid-2008. Likewise, ample social science research shows that scapegoating of ethnic minorities and migrants is more likely to occur in periods of declining economic conditions.⁸⁵ For example, one study found that, following the 2008 global financial crisis, European countries experiencing severe economic impact exhibited pessimistic public attitudes toward migrants.⁸⁶ It is also no accident that candidate Trump scarcely limited his scapegoating just to the law but made prominent in his campaign rallies his promise to build a border wall. Describing Latino migration ‘an invasion of our country’ and hurling other insults and dog whistles, Trump fueled an ‘us versus them’ mindset among his supporters.⁸⁷

How Laws Are Like Migrants

Although scapegoating the law is by no means normatively equivalent to scapegoating human beings based on their race or national origin, it is striking how law and regulation are, in important respects, a lot like migrants when it comes to the dynamics that lead to scapegoating. To understand the appeal that legal scapegoating can have to populist politicians, it helps to keep in mind at least five features that laws and migrants have in common that contribute to both of them being made scapegoats.

First, laws, like migrants, are foreign to most people. Just as migrants come into a country from an outside location, laws and regulations often are created in a distant capital city by and through the interaction of various elites. In the United States, the nation’s capital, Washington, D.C., is both located far away from most people in the country’s heartland and a city with the

⁸⁴ Gallup, ‘Americans’ Views on Government Regulation of Business, Government Power (Trends)’ (Gallup, 2018) <<https://news.gallup.com/poll/243674/americans-views-government-regulation-business-government-power-trends.aspx>> accessed 12 February 2020.

⁸⁵ United States Department of Justice, ‘Hate Crime: The Violence of Intolerance’ <https://www.justice.gov/archive/crs/pubs/crs_pub_hate_crime_bulletin_1201.htm> accessed 8 February 2020.

⁸⁶ Joachim Vogt Isaksen, ‘The Impact of the Financial Crisis on European Attitudes Toward Immigration’ (2019) 7(24) *Comparative Migration Studies* <<https://link.springer.com/article/10.1186/s40878-019-0127-5>> accessed 9 February 2020.

⁸⁷ Philip Rucker, ‘How Do You Stop These People?: Trump’s Anti-Immigrant Rhetoric Looms Over El Paso Massacre’ (*The Washington Post*, 4 August 2019) <https://www.washingtonpost.com/politics/how-do-you-stop-these-people-trumps-anti-immigrant-rhetoric-looms-over-el-paso-massacre/2019/08/04/62d0435a-b6ce-11e9-a091-6a96e67d9cce_story.html> accessed 29 March 2020.

highest concentration of individuals with graduate degrees. In the United Kingdom, the target of legal scapegoating was literally a foreign entity: the European Union. In many Briton's minds, the distance between London and Brussels was vast—both geographically and culturally. In the week leading up to his election as Prime Minister, for example, Boris Johnson used E.U. migration regulation to further his campaign, claiming that Britons had ‘seen quite a large number of people coming in from the whole of the E.U.—580 million population—able to treat the U.K. as though it’s basically part of their own country’.⁸⁸ In Brazil, Bolsonaro’s attacks on regulations related to mining and development on lands set aside for indigenous peoples combined his disdain for regulation as an ‘other’ with his and his supporters’ treatment of indigenous people as an ‘other’ as well.

Second, laws, like migrants, can be characterized by populist leaders in terms of their ‘impurity.’ Populists tend to contrast the status quo with an idealized purity that would exist if only migrants or certain laws were removed. Anti-migrant fervor often derives from or involves appeals to repugnant notions of ethnic or racial purity. Consider that President Trump described Mexican migrants as ‘rapists’ and Haitian migrants as ‘hav[ing] AIDS’, but he lamented that the U.S. does not have more immigrants from Norway, a predominantly white country.⁸⁹ Trump has insisted that he will ‘always protect American families first’ against the influx of Somalian refugees, as if those migrants would have jeopardized the integrity of US households.⁹⁰ In a similar vein—albeit not in such a racist manner—populists’ anti-law fervor can similarly derive from an appeal to a purified world, as was reflected in Britain’s Jacob Rees-Mogg’s contrasting futures, one bright and one bleak. Populists can make it seem as if purity in terms of individual autonomy and liberty can be guaranteed only if citizens break free of a regulated nanny state. As the Republican Minority Leader of the U.S. House of Representatives Kevin McCarthy once stated, ‘[w]e’re going to take a fresh approach, we don’t want bureaucracy touching everything’.⁹¹

⁸⁸ Adam Payne, ‘Boris Johnson Says He Will Stop Immigrants from Treating Britain ‘As Their Own Country’ (*Business Insider*, 9 December 2019) <<https://www.businessinsider.com/boris-johnson-says-he-will-stop-immigrants-treating-uk-as-their-own-2019-12>> accessed 1 May 2020.

⁸⁹ Jayashri Srikantiah and Shirin Sinnar, ‘White Nationalism as Immigration Policy’ (2019) 71 *Stan. L. Rev.* <<https://www.stanfordlawreview.org/online/white-nationalism-as-immigration-policy/>> accessed 11 February 2020.

⁹⁰ Rebecca Solnit, ‘Trump’s Anti-Immigrant Rhetoric Shows the Danger of Mismatched Empathy’ (*The Guardian*, 25 October 2019) <<https://www.theguardian.com/global/commentisfree/2019/oct/25/donald-trump-elizabeth-warren-mismatched-empathy>> accessed 28 March 2020.

⁹¹ Alexia Fernández Campbell, ‘The End of Government Oversight?’ (*The Atlantic*, 2017) <<https://www.theatlantic.com/business/archive/2017/01/business-regulations/513116/>> accessed 25 April 2020.

Third, tropes against migrants and laws offer simplistic solutions for what ails the world: just get rid of the migrants and the rules. What could be simpler than building a wall to keep migrants out? We see similar black-and-white solutions when it comes to regulation too: regulations are bad, so the government should simply reduce them by 75 percent to boost the economy. One can forget all about the benefits those regulations might generate and simply focus on their costs. In reality, of course, regulations have both costs and benefits, and while some regulations surely need improvement, this does not mean that all regulations are bad. The problems facing any country's economy are by no means easy or straightforward, but blaming regulation makes it easy to provide simplistic answers to those who are challenged by complexity.

Fourth, regulations and laws, like migrants, are relatively powerless in the face of a rhetorical or political assault. Laws themselves do not stand up and object, and they do not actively fight back. It is true that the European Commission, for example, has created a blog on which staff members post occasional corrections to Euro-myths.⁹² But no blog on an E.U. website is any match for the influence that Boris Johnson's diatribes can have on the British public when these falsehoods are published in the *Telegraph* or the *Spectator*. In the same vein, it is hard to counteract the vitriolic rhetoric fed daily to the two-thirds of Americans who read Donald Trump's tweets.⁹³ And when Twitter flags some of his tweets as false or violative of the platform's policies, the company only risks giving them greater prominence.

Migrants, of course, face a personal retaliation if they speak out. In the United States, migrants who protest the conditions of migration detention centers may find themselves subject to deportation.⁹⁴ Although the consequences for the law are neither so personal nor profound, if regulatory agencies respond to misleading claims or campaigns against their rules, they may actually violate a law prohibiting government from engaging in certain kinds of propaganda. During the Obama Administration, the Environmental Protection Agency (EPA) faced an orchestrated campaign of falsehoods by those opposed to a water pollution regulation that the agency had been developing. The EPA pushed back by creating a social media campaign to counteract false claims made by the farming lobby. Yet in the end, the federal

⁹² European Commission, 'Euromyths' (EC, 2017) <<https://blogs.ec.europa.eu/ECintheUK/euromyths-a-z-index/>> accessed 26 January 2020.

⁹³ Frank Newport, 'Deconstructing Trump's Use of Twitter' (*Gallup*, 16 May 2018) <<https://news.gallup.com/poll/234509/deconstructing-trump-twitter.aspx>> accessed 27 January 2020.

⁹⁴ Miranda Faulkner, 'With ICE Sweeps Looming, Immigration Rhetoric Heats Up on Capitol Hill,' (*PBS Cronkite News*, 12 July 2019) <<https://cronkitenews.azpbs.org/2019/07/12/with-ice-sweeps-looming-immigration-rhetoric-heats-up-on-capitol-hill/>> accessed 10 May 2020.

government's auditing office concluded that the EPA had violated several laws, including one banning 'covert propaganda'.⁹⁵ Regulation, in effect, has one hand tied behind its back, unable to retaliate fully against attacks.

Fifth, and finally, just as anti-migrant rhetoric both demeans migrants and seeks to elevate non-migrants' sense of superiority, anti-regulation rhetoric commonly tries to reinforce the superiority of those who are listening to it. Boris Johnson's kipper outcry, and his criticisms of banana-shape rules, did more than just disparage regulation; they conveyed to the British public a sense of superiority over E.U. regulators. By pointing to absurd examples, Johnson tacitly communicated to his audience that E.U. regulators lacked common sense and that British citizens, who obviously know better, could get along just fine without such regulation.

The Consequences of Legal Scapegoating

These five similarities between laws and migrants do not imply a moral equivalence between vitriol directed at people versus attacks directed to the law. By pointing to the several similarities between law and migrants, though, I do hope to reveal the law's vulnerability to scapegoating. Give these similarities, it should hardly be surprising when we see populist leaders appropriating anti-regulatory rhetoric and seeking to denigrate the law. But it still should be deeply concerning. Legal scapegoating has the potential to undermine public confidence in the law overall, posing risks to democratic liberal society. At a time when public confidence already is on the decline in a number of countries around the world, attempts by political leaders to denigrate the law using falsehoods, exaggerations, or violent rhetoric create a potential for a downward spiral that would make governance still more challenging and contribute to still more fertile conditions for authoritarian rule.⁹⁶

⁹⁵ Eric Lipton and Michael D. Shear, 'EPA Broke Law with Social Media Push for Water Rule, Auditor Finds' (*The New York Times*, 14 December 2015) <<https://www.nytimes.com/2015/12/15/us/politics/epa-broke-the-law-by-using-social-media-to-push-water-rule-auditor-finds.html>> accessed March 28, 2020. 'B-326944: Environmental Protection Agency—Application of Publicity or Propaganda and Anti-Lobbying Provisions' (*US Government Accountability Office* 14 December 2015) <<https://www.gao.gov/assets/680/674163.pdf>> accessed 29 January 2020.

⁹⁶ When the law being denigrated derives from outside a country, as with the case of Brexit, it is not clear whether scapegoating the outside law will have the same consequences for domestic governance. Now that the United Kingdom has severed with the European Union, scapegoating of E.U. law may result in little impact on compliance with or public confidence in British law. Of course, in the future, any populist agitators in the United Kingdom will no longer have E.U. law to kick around. Perhaps someone will someday hold up a kipper and use it to denigrate *British* regulatory authority.

Governance depends greatly on public acceptance of and compliance with law. It is costly—indeed, impossible—for governments to monitor constantly the behavior of every individual and organization. Admittedly, some monitoring and sanctions are needed, but they have their limits. If punishment becomes excessive or is deployed indiscriminately, this can undermine public trust and provide would-be populists with fodder for regulatory scapegoating.⁹⁷ Consequently, the best way to maintain social order is to foster ‘the public’s confidence in the law and increas[e] people’s willingness to defer to legal authorities’.⁹⁸

Legal scapegoating seems likely to erode such confidence. It could also help lay groundwork for a retreat from democratic governance. Tom Ginsburg and Aziz Huq have noted that ‘institutions tasked with maintaining the rule of law, or that provide a foothold for oppositional politicians, are targeted quickly’ by aspiring authoritarian leaders.⁹⁹ Especially when legal scapegoating is combined with the scapegoating of elites, media, and other core institutions in society, it may contribute to an overall undermining of the legitimacy of elected leaders that is key to what Karen Stenner has called the ‘authoritarian dynamic’. As Stenner writes, ‘[i]n the extreme, authorities deemed illegitimate and norms deemed questionable can ultimately cause highly authoritarian [members of the public] to “withdraw” their consent from that normative order and to “reinvest” their inclinations elsewhere’.¹⁰⁰ Blaming the law, in other words, could be one way of engendering a sense of normative threat that leads individuals with an authoritarian disposition to gravitate toward leaders promising to unify and stabilize social order.

Implications for Action and Research

What is to be done? The best solution would seem to be to restore public trust in government and other institutions. Declining public trust, as noted at the outset, creates a climate that makes members of the public receptive to populist appeals of all kinds, including those that scapegoat the law. When members of the public have strong confidence in its legal system, scapegoating that system should become more difficult.

⁹⁷ For a discussion of potential backlash to regulatory punitiveness, see Eugene Bardach and Robert A. Kagan, *Going by the Book: The Problem of Regulatory Unreasonableness* (Temple University Press 1982).

⁹⁸ Tom Tyler and Yuen J. Huo, *Trust in Law: Encouraging Public Cooperation with the Police and Courts* (Russel Sage 2002), 213.

⁹⁹ Tom Ginsburg and Aziz Huq, ‘How We Lost Constitutional Democracy’ in Cass R. Sunstein (ed.), *Can It Happen Here?: Authoritarianism in America* (William Morrow 2018), ch., 147.

¹⁰⁰ Karen Stenner, *The Authoritarian Dynamic* (Cambridge University Press 2005), 19.

That said, identifying the need to increase trust is one thing, but it is another altogether to specify how to restore trust once it has declined. Various chapters of this book offer promising steps that legislatures and regulatory bodies could take, whether through improved public consultation or better regulatory analysis. Enhancing the robustness of regulatory impact assessment, for example, might not only make law more effective and efficient, but it could make it much less likely that government will adopt silly or nonsensical rules of the kind that would provide fodder for those who wish to scapegoat law.

As the examples in this concluding chapter should make clear, though, populists do not need facts or genuine fodder if they wish to scapegoat the law. If members of the public are already predisposed to view their government suspiciously, they can come to believe claims of legal scapegoating that have no grounding in reality. The challenge, then, is not merely to create better rules for the sake of avoiding blunders that could be held up by populists, but to create better rules simply because of a commitment to excellence in the delivery of public value.¹⁰¹ What ultimately is needed are legislative and regulatory processes that earn the public's confidence because of the quality outcomes they produce, the integrity of the government officials and institutions that produce those outcomes, and the openness and fairness of the processes by which laws are made and enforced.¹⁰²

Achieving such excellence in governance and winning back public trust—especially in the face of broader societal factors contributing to mistrust—is no small task. While awaiting the outcome of broader efforts at trust restoration, it can be important at least to recognize legal scapegoating as a tool for at least some would-be authoritarians. Until legal scapegoating is recognized and called out, little can be done to counteract it.

Recognizing the existence of legal scapegoating also opens up avenues for further scholarly research to understand why and when such scapegoating emerges, exactly how detrimental it can be, and what tactics responsible actors in government and the legal system can deploy to counteract it.¹⁰³ Although in

¹⁰¹ Mark Moore, *Creating Public Value: Strategic Management in Government* (Harvard University Press 1995).

¹⁰² Cary Coglianese (ed), *Achieving Regulatory Excellence* (Brookings 2016); Cary Coglianese, 'Listening, Learning, and Leading: A Framework of Regulatory Excellence' (*Penn Program on Regulation*, 2015) <<https://www.law.upenn.edu/live/files/4946-pprfinalconvenersreport.pdf>> accessed 20 January 2020.

¹⁰³ I have expressed concern throughout this chapter that legal scapegoating could exacerbate public distrust, but the extent to which it does so is obviously an empirical question. It is perhaps at least plausible that legal scapegoating could backfire, especially in countries with a strong rule-of-law tradition. In this regard, it is interesting to note that, according to Gallup polling, the level of public approval of the U.S. Supreme Court has steadily increased during the time that Donald Trump has been President, while overall 'public confidence' in the

this chapter I have highlighted three countries where populist leaders have scapegoated the law, other countries experiencing populism, such as Poland and Hungary, do not appear to have anti-regulatory fervor so immediately intertwined with their leaders' populist rhetoric. One avenue for research would be to understand better why countries differ in the degree of legal scapegoating they experience.

Although populist leaders in Poland and Hungary have deployed their own scapegoating against foreigners, they do not appear to place the same level of blame on law as have leaders in the United States, United Kingdom, and Brazil.¹⁰⁴ This may perhaps be due to varying levels of pre-existing public support across the different countries. Hungarian and Polish citizens appear to have at least somewhat greater confidence in their governments than do publics in Brazil, the United Kingdom, and the United States, and the former countries have seen a greater increase in confidence over the last ten-year period than have the latter.¹⁰⁵ Perhaps pre-existing frailty of trust is, in the end, the key factor explaining legal scapegoating. If so, then what is clearly the best solution—boosting overall public confidence—could also plausibly be the only meaningful way to prevent legal scapegoating.

Conclusion

Scapegoating the law is a real phenomenon. In an era of declining public trust in government, the reality is that populist leaders and aspiring authoritarians can turn law into a scapegoat in ways that may only accelerate their societies' overall declining confidence in law and government. As such, legal scapegoating is worrisome and deserves attention and study.

As much as lawyers, judges, and legal scholars might seem natural allies of the law to resist its scapegoating, they and members of the public more

Supreme Court has remained largely steady during this time. 'Supreme Court' (*Gallup*, 2019) <<https://news.gallup.com/poll/4732/supreme-court.aspx>> accessed 30 January 2020; 'Confidence in Institutions', (*Gallup*, 2019) <<https://news.gallup.com/poll/1597/confidence-institutions.aspx>> accessed 30 January 2020.

¹⁰⁴ Dalibor Rohac, 'Hungary and Poland Aren't Democratic. They're Authoritarian.' (*Foreign Affairs*, 5 February 2018) <<https://foreignpolicy.com/2018/02/05/hungary-and-poland-arent-democratic-theyre-authoritarian/>> accessed 24 January 2020; Bojan Pancevski, 'Hungary, Loudly Opposed to Immigration, Opens Doors to More Foreign Workers' (*The Wall Street Journal*, 8 September 2019) <<https://www.wsj.com/articles/hungary-loudly-opposed-to-immigration-opens-doors-to-more-foreign-workers-11567944008>> accessed 25 January 2020.

¹⁰⁵ 'Government at a Glance 2019: Poland' (*OECD*, 2019) <<https://www.oecd.org/gov/gov-at-a-glance-2019-poland.pdf>> accessed 26 January 2020; 'Government at a Glance 2015: Hungary' (*OECD*, 2015) <<https://www.oecd.org/gov/Hungary.pdf>> accessed 26 January 2020.

generally must first recognize legal scapegoating for what it is and how serious it may be. In the countries examined in this chapter, legal scapegoating has arisen from within a larger social context in which public trust has already been on the decline due to factors such as inequality, economic distress, and discord induced by social media. When social and economic conditions have already weakened public faith in their government, populist leaders have greater incentives to exploit law's vulnerability and seek to turn society further against the existing legal system.

The law, in this respect, can be an easy target for those seeking to use rhetorical sabotage to undermine public trust. Researchers have much work to do, but the first step is to identify the phenomenon of legal scapegoating as worthy of inclusion in a larger research agenda focused on understanding the crisis of public confidence in the law and legal institutions.