

FIRST THINGS: Lawyers and The Rule of Law

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Introduction

You've probably all heard that famous line from Shakespeare's Henry VI, Part 2: "The first thing we do, let's kill all the lawyers."¹ Even back in the fifteenth Century, it seems some people had a low opinion of lawyers. That quote is often cited as if it represented Shakespeare's own opinion of lawyers. Whatever Shakespeare may have thought about lawyers (and there's sufficient law in Shakespeare to suggest that he knew quite a bit about law and lawyers) in the context of the play, the line is spoken by an over-zealous rebel, Dick the Butcher. Dick is a stalwart in Jack Cade's Fifteenth Century rebellion who believed that anyone who could speak Latin or French or could even read and write must be hanged or worse. Still, there it is among the thousands of lines castigating the profession. Lawyers jokes literally fill volumes. I googled "lawyer jokes" and came up with 571,000 entries, many of them anthologies. One could make a living as a stand-up comic telling nothing but lawyers jokes. (Incidentally, I was curious about some other professions: "Priest jokes"

brought up 650,000 entries; "dentist jokes," 1,700,000; "doctor jokes," 2,700,000; and "professor jokes," 3,500,000. In fact the single category of "law professor jokes" coughed up 269,000 citations.) So law is not the only profession to be the frequent butt of jokes. Yet, I would guess that far the greatest percentage of lawyer jokes are stingingly negative; never kindly or cuddly. It's been said that "The trouble with lawyers jokes is that lawyers don't think they're funny, and others don't think they are jokes." Lawyers (and I'm one of several belonging to this august club) for the most part take these jokes in stride, however tiresome they may become. In addition to jokes, we hear many serious, if somewhat facile, attacks upon lawyers. Some lump lawyers together with global warming and smoking as the causes of all ills. While many parents are happy enough to see their sons and daughters go to law school, their approval is as often rooted in the chance for riches as in the nobility of the calling or the chances it offers to do public good. Annual polls show that the American people's regard for lawyers is low and declining.² The advent of open advertising has not done anything positive for the profession's reputation.³ I'm not here, however, asking for pity. Rather I'd like to say a few words in defense of lawyers, to plead in response to Dick the Butcher's bloody threat.

My claim is that lawyers are critical to our nation's political and economic health; that, in fact, lawyers are, in a certain sense, the

quintessential American. But first, I'd like to talk about the law, specifically about that promiscuous phrase, the "Rule of Law."

Recall the presidential election of 2000 and the intense dispute that arose over the Florida vote. In that and other national dramas, each side is at pains frequently to invoke the Rule of Law as if it meant some particular legal rule that was on their side. Now in some senses, it was quite proper for all parties to invoke the Rule of Law for, In a real sense, it operated quite well in those disputes. We didn't have to worry that the U. S. Army would provide the solution. As has been noted, when other nations call out the troops, we call in the lawyers, and it's a good thing that we do. As I just said, the Rule of Law worked well in these situations, at least until the Supreme Court took the Bush v. Gore⁴ case. That decision was roundly attacked as political, as based on party more than principle. Perhaps it was, but for my present purposes, the very nature of this attack shows that we believe instinctively that there is a difference between law and politics, between what courts should do and what should be left to politics, a difference which I think is real and the maintenance of which is critical to the health of our governmental system. It is this difference between law and politics upon which the Rule of Law stands.

I am a believer in the Rule of Law. I believe in its genuine existence and in its great blessings. I believe that it may be our nation's grandest artifact. I believe the Rule of Law to be a coherent concept. I don't know

that I will provide you with any new ideas tonight, but I do hope to state some old truths, some of which you might recall from your high school civics class. So let me try to describe what I take to be the nature of the Rule of Law, and then mention two problems it presents: one is a kind of built-in pathology; the other is an unavoidable paradox. I will then close with a brief plea for the lawyer.

The Nature of the Rule of Law

There have been many efforts to describe the Rule of Law. Among the best known is that of the legal scholar, Lon Fuller. Fuller presents what might be called the formal aspects of the Rule of Law.⁵ For example, law must be public. It must be clear and stable, and compliance with the law must be practicable.

These are useful aspirations for any lawmaker. No legal system failing to observe these virtues can be said to be a rule of law regime. I daresay, we take them for granted. By themselves, however, they are a bit thin and abstract. They lack meat. A most cruel regime could honor these tenets and still be a cruel regime, so they are necessary but not sufficient conditions for the Rule of Law. The Rule of Law is more than just rule by law.

Let me describe the nature of the American Rule of Law in its fullness.

Some general aspects of the Rule of Law are these: it is mostly backward looking for it keeps promises earlier made. It is more narrative than logic. Thus were we to trace the evolution of free speech doctrine from the early dictum that one may not shout "Fire" in a crowded theater,⁶ to the 1989 holding that the government may not prohibit burning the American flag,⁷ it would be more like reading the chapters in a novel than following a series of logically connected propositions.

The Rule of Law is founded on a wary view of human beings for it recognizes the great human capacity for bias, stupidity, and self-love. It is anti-utopian, and prefers the good to the perfect: it works best when it is modest and avoids the exposure of moral bedrock and cultural axioms. In her Senate hearings, Elena Kagan referred to a piece of lore about an old woman who goes to a guru and asks what the world rests upon. He answers, "on the back of a tiger." She asks what the tiger stands upon, and he answers, "on an elephant." She persists: "What does the elephant stand upon?" "On the back of a turtle." "And what supports the turtle?" "From there," answers the guru, "it's turtles all the way down." Courts should avoid going "all the way down." Certain axioms are incontestable, beyond the judiciary's proper reach. One case at a time is enough.

In its parts, the Rule of Law has to do with more than ordinary "law stuff" such as constitutions, statutes, regulations, and judicial decisions. Think of the Rule of Law as a pyramid: the bottom third is made of this

ordinary "law stuff:" that is, the rules meant to govern our daily activity: traffic laws, the criminal law, the law governing sales.

The middle third comprises institutions at the center of which is constitutionalism: law must contain limits upon sovereign power: government officials must be subject to known constraints. This is the essence of constitutionalism which regards the Constitution as positive law applicable in courts and not simply a wish list. The complementary institution of judicial review through which the constraints are applied by courts is something we may take for granted but which was invented hardly more than two hundred years ago. For many years it was peculiar to the American legal system, but in this modern age of constitution-making, more and more it is becoming the international norm. Sovereign power itself must be divided both horizontally—between the branches—and vertically—between the national and state governments. Beyond the limits of sovereign power there must exist a broad area of personal choice—particularly freedom of speech and press—a well-recognized zone of individual sovereignty, if you will. The Rule of Law further promises that only rules authoritatively promulgated are obligatory and that all are due a fair and rational process in which the law is applied. Thus, in place of sovereign will, it requires a reasoned process and known reasons. So, constraint, legitimacy, fair process, and personal autonomy are promised.

The top third of our pyramid, its apex and most crucial part, is what we might call the Rule of Law culture. The Rule of Law is our central cultural artifact, the ruling myth of our civic faith. We accept law, and, however hazy the border, we distinguish it from political will. I am aware that many in this postmodern age deride this distinction as naïve and wishful thinking. Unfortunately, such easy skepticism seeps into our popular culture where it passes for sophistication. The fact is I've heard few such cynics who don't suppose that they themselves are fair and they themselves can see and act objectively; It's everyone else who has the problem. I think a good antidote for cynicism about judicial decision making is to ask yourself how, if you were charged with the judge's task, you would go about trying to answer the question.

Law is our habit and custom. The depth of its imprint is shown in the extent to which, somewhat as hypocrisy is vice's tribute to virtue, so too, lawlessness often seeks to impersonate the lawful.

At ground level, how does the Rule of Law operate? First, it is well to keep in mind how much of our law is quite clear. Most disputes are what lawyers call "easy cases." For all of our litigation, there are multiples of disputes that never go to court or cases in which the dispute is not over law so much as over fact—what happened, or what is an appropriate remedy: how much the defendant should pay.

It is in its more troublesome reaches, where the law is not clear, that we best can see how the Rule of Law operates. Here the crucial divide between law and politics is tested. These are the disputes that receive the most public attention, the kind of disputes that make up most of the U. S. Supreme Court's docket. This is an area where people of good faith will see differently. Only the naïve and uninformed (or the engaged advocate) suppose or pretend that the law is always clear, as if law were just one great syllogism from which answers can be deduced. Of course it isn't. We spend the first year of legal study trying to rid students of this sort of formalistic view of the law. You don't go to law school to learn laws so much as to learn law.

During his Senate hearings, current Chief Justice Roberts suggested that his job is somewhat like that of an umpire. He said that "there are balls and there are strikes, and I call 'em as they are." But that's only one part of the Parable of the Umpires. Imagine you are eavesdropping at an umpires' convention. One umpire, standing with Chief Justice Roberts, says "There's balls and there's strike and I call 'em as they are." The second umpire says, "There's balls and there's strikes and I call 'em as I see 'em." The third responds, "There's balls and there's strikes, but they ain't nothing till I call 'em." In reality, there's a blend of all three approaches operating in our courts. How do we then maintain the Rule of Law in the face of such uncertainty so that it is, as far as possible, fair,

clear, and consistent? How do we avoid turning hard cases into mere political struggles or crap shoots? How do we find the optimal point between cynicism and naivete?

First, we must approach disputes as if there is a right answer and that it is the job of courts, guided by advocates, to find it. In looking for that answer, they are bound to a limited set of resources from which we seek reasons for the result. These reasons operate normatively, not as links in a causal chain, but more as the legs of a chair.

Here the Rule of Law promises not so much results as it promises a reasoned process. The Rule of Law sets bounds to the legal discourse, provides, as it were, a grammar of reasons. Not just any old reason will do. Reasons must have a proper pedigree. Somewhat as grammar or moves on a chess board are appropriate only insofar as the rules of language or the rules of the chess permit, so too, interests and concerns beyond the boundaries of appropriate legal reasons should not count. It is these boundaries which we seek to imprint upon law students. It's what we mean when we say they must learn to see, talk, and think like a lawyer.

Let me sketch some examples. In approaching a constitutional problem, it is appropriate to consider, somewhat in this order: First, is the question proper for the judicial power? Suppose, as in fact happened in the Civil War and Vietnam War eras, the challenge is to the president's tactical decision in a theater of war. Does it make sense that judges

should be making such decisions? Many regard the great mistake in the Bush v. Gore case to have been the Court's taking of the case at all for it is a political matter. Indeed there was precedent for letting Congress decide such intensely political disputes.⁸ Looking at the present, we have had much contention over the Senate's use of the filibuster. Should such a rule of the Senate, whatever its wisdom, be subject to judicial review, or is the Senate supreme in its own chamber?

Second: assuming we have a case fit for a court, certainly we will consult the text of the Constitution. And, lo, sometimes there is an answer. Only a natural born citizen who is thirty-five years old "shall be eligible to the office of President."⁹ Three quarters of the states—through their legislatures or in convention—are necessary to amend the Constitution.¹⁰ But whether a given practice constitutes Due Process is not so clear from the mere text. So we must go beyond the text. Third: what did those who adopted the Fifth or Fourteenth Amendment originally intend? One may find some prevailing understandings, but it is well to keep in mind that the adoption of a constitutional provision is a collective decision. Whose intention shall count? Yet we may take away some guidance. Fourth: is there a judicial decision that fits the case? There are over six hundred volumes of Supreme Court opinions, but rarely are they, as lawyers say, "on all fours" with the case at hand. And what exactly is the meaning of an opinion of fifty pages, with three concurrences and two dissents? Still,

we learn something: in many ways our constitutional law is a common law system and always has been. Where shall we go next? What has been the common understanding or practice? Especially with respect to the executive branch, Article II being so spare in its prescriptions, it may be well to know what the historical practice has been, what every president since John Adams understood and did. Finally, of course, we sometimes are thrown back upon the broad constitutional purposes and principles that apply. Why do we have a federal system? What is the purpose of protecting free speech? When does the demand for order trump robust debate? Equality, yes, but with respect to what? What in 2011 constitutes or affects "commerce among the several States?"¹¹ What did our great thinkers believe? What do we know now that they didn't know then?

We can see what a complex process constitutional decision making inevitably is. But this much we know: your freestanding preferences or prejudices, your singular advantage, your policy preferences, are not welcome. We expect from our judges—and our lawyers—a good faith effort to work within those bounds. We demand a role morality. We believe in the human capacity for objectivity and demand genuine effort to reach it.

Now, of course, we are not perfect, not always honest, and are sometimes sneaky, but the guiding faith must remain. And it is this guiding faith or commitment that is held in trust by our lawyers and judges. Plenty

go astray, but it is a disservice to suppose that it's all politics, that anything goes, that it's just a roll of the dice, that all that really counts is Judge A's peculiar predilections or what Judge B ate for breakfast.

Pathology and Paradox

I spoke earlier about problems which inhere in the Rule of Law. I have time for only a brief mention of two of these. One might be considered its Pathology. A legal scholar has written that, "In Hell there will be nothing but law, and due process will be meticulously observed."¹² I think that captures the sense that we are, in certain times and places, "over-lawed," beset by what has been called "jurismania," or "hyperlexis," the belief that law can do everything. At times we seem to be drowning in law. And so it has often been. In her recent novel, "Wolf Hall" author Hilary Mantel has the Fifteenth Century lawyer and Chancellor Thomas Cromwell say, "The law of who owns what—the law generally—has accreted a parasitic complexity: it is like a barnacled hull. A roof slimy with moss."¹³ Every few centuries it seems we need a housecleaning. Perhaps we are in such a time. Consider the current federal tax code or the sheer bulk of our federal regulatory code. As law becomes too thick and heavy, we are in danger of violating one of our fundamental Rule of Law standards, that the law must be clear and knowable. While I'm skeptical of the clear language movement in law¹⁴ (the idea that we can rewrite the law so as to be understandable to

anyone) clarity is an aspiration that must be kept in mind. Yet, because we are complex creatures, mostly self-interested, creative, imaginative mischief makers, the law over time will inevitably "complexify." Simplicity must always remain an aspiration. As principles tug us one way and the other, as principles always do, we must make endless compromises. Every episode is distinctive in some way. The question is, which of these distinctions shall matter? In the meantime, between periods of reform, we must rely on lawyers to lead us through the seemingly trackless swamp of law. But the law can't do everything. Sometimes it's too clumsy. I detest bullying, but I'm not sure we can cure it by more law.

The second problem is the Paradox of the Rule of Law. John Marshall famously wrote "we are a government of laws, not of men."¹⁵ But to remain a government of laws, we need good people, people committed to the Rule of Law. William Penn observed, "I know some say, let us have good laws, and no matter for the men that execute them: but let them consider, that though good laws do well, good men do better: for . . . good men will never want good laws, nor suffer ill ones."¹⁶ In particular, we need good people practicing and applying law. We need good people as lawyers. To remain honorable, the profession must be honored, must have a code of honor,. A lot rides on that hope. I boasted earlier that lawyers could in a true sense be considered the quintessential American. Recall, that our country was founded upon disputes in their

nature legal, that of the fifty-five framers, thirty-four were trained in the law (and that doesn't include James Madison who, if he wasn't a lawyer, should've been), that since de Tocqueville,¹⁷ many have noted the singular American penchant turning problems into litigation. We think that our rescue lies in court. So for all the crowding of our courts, consider the alternatives.

I think our well-being, political and economic, depends on the maintenance of the Rule of Law. Historians and economists have shown how dependant a people's well-being is on the Rule of Law. The philosopher Michael Oakeshott has written:

The rule of law bakes no bread, is unable to distribute loaves and fish . . . but it remains the most civilized and least burdensome conception of a state yet to be devised.¹⁸

I certainly agree with his last proposition, but I disagree with the proposition that the Rule of Law "bakes no bread." In a sense, I think it does. The economic historian, Douglass North¹⁹ has shown how the emergence of a "rule of law" was critical to the growth of European commercial success and dominance. It provided the sort of trust and assurance that permitted men to invest money in distant lands without face to face contact, knowing a law and a tribunal would be available should things go wrong. A recent discussion of the economic plight of Greece, reminds us that the World Bank's Doing Business Index, in

assessing relative investment risk, ranks countries in part upon their "rule of law" culture. (Greece, I'm sorry to say, ranks 109th, behind Ethiopia, Egypt, and Lebanon.) I also recommend a fascinating article in a recent issue of the ATLANTIC²⁰, which argues that foreign aid to third world countries might be better spent financing the creation of "commercial conclaves" or cities with strong commercial codes where individual commerce might flourish free of government greed. Other examples abound. Many peasants of Peru were in part wooed from the allure of the Maoist group, "The Shining Path" by the straightforward device of instituting a relatively modern system of deeds and registration recognizing something like fee ownership together with tribunals available to honor ownership and enforce agreements.²¹ Their standard of living improved markedly. So, in a true way, the Rule of Law does "bake bread" and does "distribute loaves or fish"

The bar and bench are the trustees of that heritage. It works just so long as they honor it. As I said earlier, to remain honorable and to attract honorable people, the profession must be honored. So next time you hear a lawyer's joke, laugh if you will, but remember William Penn's insight: good law needs good people.