

World Justice Project
Texas Rule of Law Conference

Keynote Address

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Good afternoon. In my time with you, I'm going to address the definition of the rule of law; briefly highlight its importance and some issues we're still having with it; and suggest some ways you can support it in your varied daily lives.

Let's start with the definition proposed by the World Justice Project and its sponsors, including the American Bar Association. The Rule of Law is seen as having four elements:

1. A system of self-government in which all persons, including the government, are accountable under the law;
2. A system based on fair, publicized, broadly understood and stable laws;
3. A robust and accessible process in which rights and responsibilities based in law are enforced impartially; and
4. Diverse, competent, independent and ethical lawyers and judges.

In sum: (i) responsive accountability, (ii) substantively fair, objective, and transparent laws including protection for fundamental rights, (iii) procedural fairness and due process including access and impartial enforcement, and (iv) independent and ethical judges and lawyers. Not a bad definition.

Some people think that it's enough to have only the third element: published laws of general applicability and formally fair procedures usually offering somewhat impartial enforcement. They wouldn't insist on self-government – which is so clearly lacking in countries like China – or human rights. My argument today is that such a narrow conception of the rule of law is inadequate: that systems worthy of the name must have the substance as well as form of justice.

Does a country like Libya, for example, really honor the rule of law? After all, Qaddafi promulgates laws, even if he does so at his sole whim, without an independent legislature or judiciary. His recent speech at the UN, in which he ripped up the UN Charter and proposed that Obama be president "forever," was

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merely the latest confirmation – if any is needed – that the unelected leader for 40 years who routinely imprisons and tortures opponents has no concept of the rule of law. The rule of law is not mere “law and order” without justice and rights. Qaddafi illustrates what I would call the arbitrary “law of rulers” rather than the rule of law.

The first element of the rule of law, responsive accountability, has been part of our law ever since King John was forced to accept Magna Carta in 1215. The King acknowledged that the ruler was subject to, and not above the law. Magna Carta helped establish basic notions of due process, habeas corpus (showing good legal cause for detention), and equality before the law of at least free men (as defined at the time).

Nevertheless, preserving the rule of law has not been easy. In the middle of the 17th century, when King Charles the First was brought before Parliament for trial for tyranny and torture, he continued to assert the divine right of Kings -- a theory that apparently lives on in some Wall Street firms today.

When Solicitor-General John Cooke read the charges against him, King Charles at first tapped Cooke on the shoulder three times with his cane, asking him to “Hold” since no lawful authority could try a King. The third time, the ornate silver tip of the King’s cane fell off. The King motioned for Cooke to pick it up. When Cooke failed to budge, the King stooped down before Parliament to pick it up himself. Those in the chamber gasped at the symbolic importance of the King bowing before the majesty of human law, and the moment echoes throughout history, highlighting accountability for rights violations like Charles’ arbitrary imprisonment and torture of opponents, and interference in personal lives. Not surprisingly, the social contract theories of John Locke reinforcing parliamentary supremacy over the divine right of kings were shaped at this time, as were the Habeas Corpus Acts of 1640 and 1679 and the 1689 English Bill of Rights.

The founders of our country had all this history very much in mind when they established the second element of our definition: what John Adams famously called a “government of laws, and not of men.” Now Adams certainly should have included not just men, but women and the others excluded at the time. And in some ways we have a government of “lawyers, not men.” But it was the “government of laws, not men” phrase that found its way into the 1803 *Marbury vs Madison* decision confirming judicial review. From then on, *even laws passed by the majority* had to be tested for conformity with the fundamental rights guaranteed by the Constitution.

The rule in much of the world, and sometimes even in the United States, remains the contrary: governments of men and not laws. The international lawyers and businesspeople in the room are familiar with places like Russia, China, and other countries in Asia, Latin America, and Africa where bribery and even force can determine outcomes – where officials think they are being honest if they take bribes merely to DO their jobs instead of changing their decisions. And these problems occur in developed as well as developing countries: When Italian Prime Minister Berlusconi heard recently that his immunity from corruption prosecution had been overturned, he said that he was astonished, because he had “spent 200 million euros on judges... excuse me, on lawyers.” Congressman Charlie Rangel, evidently feeling that he need not pay his taxes, even while chairing an important tax

committee, is a similar example that springs to mind. Another is the politicization of the Justice Department and the firing of US attorneys for political reasons.

Thus, it's not only in places like China and Afghanistan where our third element -- impartial enforcement -- is lacking. Even in the United States, and as a matter of degree, there are pockets in our inner cities where relatively lawless realms exist and violence and drug cartels and youth gangs roam freely. In a sense, the use and abuse of derivatives that helped to generate the financial crisis of the last couple of years could be considered its own lawless realm. Excessive deregulation has widely been considered a factor in the recent economic turmoil, with even former Fed Chairman Alan Greenspan seeing a "flaw" in the way he thought "the world worked" -- expecting banker self-regulation to be sufficient. There's a new appreciation for how smart regulation, as a way of ensuring transparency and fairness, is indispensable to functioning markets and businesses.

Even ancient laws like the Code of Hammurabi, hundreds of years before Moses and the Ten Commandments, stressed the need to seek justice and prevent the strong from oppressing the weak. Like St. Augustine before him, Martin Luther King eloquently distinguished between just and unjust laws while representing civil disobedience in his Letter from a Birmingham Jail. Yet the reality is that nominally objective and fair laws have often reflected the interests of the powerful, either as written or as applied. Hammurabi's code allowed men to sell their wives to pay off debts. And as Anatole France noted:

The law, in its majestic equality, forbids the RICH, as well as the POOR, [from sleeping] under bridges, [begging] in the streets, and [stealing] bread.

Problems of unjust laws and unequal enforcement are not new issues. An English folk poem, circa 1764 put it:

They hang the man and flog the woman
that steal the goose from off the common.
But let the greater villian loose
that steals the common from the goose.

After the recent bailouts, many of us would agree with this sentiment. This is why you also need the fourth element of our definition: institutions including an ethical and independent judiciary, lawyers, and legislators to ensure objectivity and transparency so that these institutions, the press, civil society, and the people themselves can perform checking functions.

Even in today's United States we see the bias toward private power in the run-of-the-mill legislative process when, for example, BIG PHARMA's contributions to Congress achieve a law from Congress that says Congress can't negotiate prescription drug prices. Some Supreme Court decisions also reflect a bias toward powerful corporate special interests. The Supreme Court's close *Kelo* decision was staunchly criticized for justifying the taking, under the Fifth Amendment, of property from one private owner to another private owner in the name of promoting economic development. After the *Kelo* case, most states amended their laws to prevent such an outcome.

And of course history is replete with unjust laws, ranging from those against the Jews and others in Nazi Germany, to those in the Soviet Union, China, and South Africa. In my first legal job, working against apartheid in South Africa, I helped members of the black African majority cope, resist, and deal with the consequences of these laws. The laws enshrined inequality under which your ability to move from place to place, hold certain jobs, and get compensation for harms was determined by the color of your skin. Our death penalty also reflects systemic injustice: the racial and class disparities in administration of the ultimate penalty indict arguments that the system works or is or can be fair. That's reason enough to oppose the death penalty, in my view and that of an increasing number of people in this country, but the recent Todd Willingham case right here in Texas, and the many other cases where clearly innocent people have been executed or nearly killed should give pause to anyone.

How many of you are familiar with the Willingham case? It appears beyond reasonable doubt that Todd Willingham -- executed by Texas in 2004 -- was innocent. Outdated analysis led investigators to call the house fire that killed his three young children arson. If a father's grief was not enough, Todd Willingham was convicted of arson and sentenced to die for his children's deaths. Shortly before his execution in early 2004 a noted Texas arson investigator wrote the governor, telling him that the evidence of arson was discredited and invalid. Todd Willingham's attorney and the arson investigator Gerald Hurst appealed to the governor of Texas. Rick Perry chose not to intervene. He did not issue a reprieve for any review, and the Board of Pardons and Paroles chose not to hold a hearing and not to recommend any reprieve or commutation. Since then, at least three separate examinations by respected scientists have all found no scientific basis to call that house fire arson.

In 2005, Texas created a Forensic Science Commission, in part because of questions raised by the Willingham case and problems in the Houston Police Department DNA Lab. A month ago a report prepared for the Commission once again found no scientific basis for arson in the Willingham house fire.

Just as the Commission was set to meet, Governor Perry hastily replaced members, a meeting was pulled down, and the new Chair has not determined when it will meet next or what its next step will be. The rule of law in the Willingham case appears, right now, to be on a long, slow side trip. But the good news is that the world is watching. Every major newspaper in this state has editorialized its concerns in this case. The rule of law has the force of integrity and power of time on its side. I believe that in the end the rule of law will prevail, and we will all be better informed, and perhaps a bit safer, when that happens.

By contrast, your District Attorney here in Dallas, Craig Watkins, has chosen to respect the rule of law and honor his oath to do justice. When it became apparent that innocent men had been convicted in Dallas County, Craig Watkins established an office of conviction integrity, and he worked cooperatively with the Innocence Project to review questionable cases. Dallas County now holds the distinction of having more DNA exonerations than any other county in America. That may be because Dallas had properly stored evidence, and DNA could be tested years after the original conviction. Craig Watkins knows that this is not simply about freeing an innocent person. It is also about apprehending the guilty.

Yet another indictment of the US legal system is the fact² that our country leads the world in both the number and the percentage of residents incarcerated – with China a distant second. And Texas is right up there near the top of the country in terms of incarceration rates. In the United States, more than one in every 100 adults is in prison; one in every 32 adults if you include those on probation or parole.³ About half of those imprisoned are for nonviolent crimes, especially drug offenses. Black males have a 1 in 3 chance of doing prison time, and Latinos 1 in 5, versus 1 in 13 for white males – even though blacks and whites use and distribute drugs at comparable rates. One in nine black men ages 20 to 34 is behind bars. This is all very costly: Nobel prize-winning economist Joseph Stiglitz has pointed out that “a year in prison can cost more than a year at Harvard.”⁴

The unjust application of the laws was also apparent the week before last, when a Louisiana Justice of the Peace denied an interracial couple a marriage license on the grounds that if he did it for one couple, he’d have to do it for all couples, and he tries to “treat everyone equally.” The staggering illogic of this thinking is matched only by its constitutional flaws. George Washington reportedly told his troops at Valley Forge that the good news was they could change their underwear . . . but the bad news was that they would have to change it with each other. Well the good news here is that research showing the continued operation of implicit biases and stereotypes on the part of judges (like non-judges)⁵ also shows that stereotypes can be “unlearned” through training, education, and relationship building. But as decision-makers you must be aware of the existence and functioning of these biases.

So we know that a merely procedural and formal concept of the rule of law isn’t enough: in addition to the correct institutions, resources, and processes to enforce the laws – and this is my most important point today -- you need good laws *and* enforcement that strongly accords with human rights as well as justice. Without this substance to enhance its legitimacy and complement its form, the rule of law is a pretty empty vessel, hardly capable of sustaining the hopes, ideals, and practical benefits we expect it to achieve.

This concept of universal rule of law according with human rights received a huge boost in the 19th century when slavery was abolished. And it got another boost in the middle of last century when the United States led the world in adopting both the UN Charter and the Universal Declaration of Human Rights. The UDHR, in fact, states at the outset that:

[I]t is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law.

² According to the Pew Center and others: <http://www.washingtonpost.com/wp-dyn/content/story/2008/02/28/ST2008022803016.html>

³ <http://www.msnbc.msn.com/id/15960666/>

⁴ <http://www.guardian.co.uk/commentisfree/2008/aug/06/economicgrowth.useconomicgrowth>

⁵ E.g. by Jennifer Eberhardt, Cornell and Vanderbilt Law Schools, and US Magistrate Judge Andrew Wistrich.

US leadership was also critical in creating the International Criminal Court at the end of the century, which threatened even heads of state with prosecution for the worst crimes known to humankind: genocide, war crimes, and crimes against humanity.

A little acronym – LAW – helps me and might help you remember this framework. You need LAWS – objective rules versus the “law of rulers” – which is the “L”. But they must also be enforced and APPLIED impartially and effectively, including to the powerful as well as the weak -- and the rich as well as the poor. The “A”. And in all respects they must work WITH human rights and justice and not against them. The “W”.

Now why is the rule of law important? Well, in addition to reasons of morality and social stability, which should by now be obvious, there’s also extensive empirical work by economists, political scientists, and sociologists that highlights how the rule of law is crucial to economic development, democracy, and social progress. Conversely, societies without the rule of law are characterized by instability, predation, corruption, stagnation, the relative absence of innovation and productive activity, and general decline. Beyond the economic implications, these rule of law principles are the foundation for basic social trust – confidence in the fairness, integrity, legitimacy, and reliability of the institutions of society and the social interactions that take place within the edifice provided by the rule of law.

Yet our own country has been experiencing a decline in the rule of law just when we can least afford to expose ourselves to these risks. China, India, Brazil and other “second-world” powers are rising; they are already the major markets for global businesses and will be the source of both competition and increasing amounts of global economic growth in the future. Unless the rule of law is enhanced rather than diminished, one can imagine a decline of global standards and our nation and our businesses being subject to illegitimate, unfair, and dangerous forms of competition. Despite this, the United States under both Republican and now Democratic institutions has continued policies, especially those in the name of counter-terror and national security, that amount to shooting ourselves in the foot. We should reinforce the rule of law as the most potent weapon in the fight against bad actors who resort to corruption or terrorists who rely on the rule of force. Instead, we have damaged our brand and soft power by means of methods both ineffective and counterproductive to genuine security, long-term peace, prosperity, and sustainability.

Instead of the “L” in my acronym -- respect and adherence to laws versus the rule of men—there have been many derogations from law recently that are worth reflection and debate. Important laws have been ignored, including the pre-surveillance warrant requirement in the Constitution and the Foreign Intelligence Surveillance Act, and the prohibitions on torture and ill-treatment in both our domestic laws and in binding international treaties to which the US is a party, such as the Geneva Conventions and the Convention Against Torture (signed by Ronald Reagan and considered the supreme law of the land under article 6 of our Constitution). Although President Obama has outlawed torture through Executive Order, that order is merely discretionary, so torture could resume under the “Jack Bauer exception” unless torture is again absolutely banned. If we condemn torture by countries such as Libya, we certainly cannot engage in it ourselves. Similarly, our nation backed away from its initial leadership on the International Criminal Court when we “unsigned” the treaty a few years ago on the dubious grounds

that somehow the many safeguards in the treaty would be overridden and politically motivated prosecutions could result. I join most international lawyers and the global legal academy in hoping that we'll once again sign this landmark for the rule of law globally.

Instead of the "A" in my acronym – application and enforcement of the laws impartially and effectively, to rich and poor, and powerful and weak alike – we've seen discretionary decisions to ignore higher ups in the chain of command and hold only a few low-level soldiers or officials accountable for legal violations. We've also seen continued disrespect for core principles arising from Magna Carta and beyond, including habeas corpus and speedy trial. US citizens and others have been detained without charge or trial, and indefinite detentions of hundreds if not thousands continue. Military commissions and other second-tier quasi-legal systems have been created instead of the regular courts. The executive branch continues to use its own discretion rather than objective rules of general applicability to control the entire process, and it invokes state secrecy and other methods in an attempt to preclude review of legal violations by regular, independent courts. Yet as *The Economist* recently said: "Legal process is not a luxury for good times, but a tool to rob terrorists of legitimacy and show that locking them up is justified."⁶ Nevertheless, the very institution of the jury trial is under serious pressure, both from this supposed "parallel track" of military tribunals as well as the trend toward compulsory arbitration in the securities and other realms.

Instead of the "W" in my acronym, these actions often work *against* rather than *with* human rights and justice. Human rights at risk include such basics as freedom of religion, privacy, due process of law, equal protection, the right to counsel, a speedy trial, confronting witnesses against you, and protection against cruel and unusual punishment. The failure to apply the laws in keeping with human rights principles of equal protection explains the horrendous torture memos from DoJ lawyer John Yoo. I take it that Mr. Yoo never heard statesman Elihu Root's advice that "About half the practice of a decent lawyer consists in telling would-be clients that they are damned fools and should stop." Another example of failure to complement intelligent counterterrorism with human rights principles was the North Texas Fusion Center's bulletin earlier this year that stated that it was "imperative for law enforcement to report" on the activities of anti-war and Muslim civil rights groups.⁷

Now how can you, in your various roles, help restore and shore up the rule of law at this time of special need? In a system of popular sovereignty, the law is in a very real sense *your* law. It is what you let it become. It is not for lawyers and judges alone to recognize the importance of these rights and values to all of society and the fabric of our daily lives; it is for *all of us* to defend these nonpartisan, American, and increasingly global values. Having fought for them over millennia, against Kings and Emperors alike, it would be a shame to let them go to waste right now just when we need them. Judge Learned Hand was correct that "liberty lies in the hearts of men and women; when it dies there, no constitution, no law, no court can save it."

⁶ http://www.economist.com/opinion/PrinterFriendly.cfm?story_id=14130644

⁷ <http://www.aclu.org/privacy/gen/38835prs20090225.html>

If you agree that our fundamental rights are an integral part of the rule of law, you must know -- and help ensure that your children, colleagues, friends and neighbors know -- of those rights, and use them before they lose them. Ronald Reagan was right: "[f]reedom is a fragile thing and is never more than one generation away from extinction . . . it must be fought for and defended constantly by each generation."

If you think that your future and that of your family, friends, and children is better served by violations of rights, repression of new ideas and dissent, well that's one path -- the path of the closed society. It didn't serve East Germany or the states of the former Soviet Union very well.

If, on the other hand, you think that stable, well-ordered, innovative, and successful societies in this more competitive world require a rule of law that helps people meet their everyday needs free from the rule of force, secure in their persons, papers and effects, with rights to privacy, free conscience and dissent, freedom from arbitrary discrimination, and due process of law . . . then the path of the open society remains the better one.

Ultimately, the health of our rule of law depends on how effective you are in using it and the related rights in your daily roles as leaders, professionals, citizens, parents, co-workers, friends, and participants in our deliberative democracy.