AMERICAN SOCIETY AND THE RULE OF LAW

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INTRODUCTION

Although I have been in Asia a number of times, and was an American soldier in the Philippines during World War II, this is my first visit to China. I am very pleased and excited at the prospect of seeing more of this great country, its people, and especially the students. At home I have visited museums many times to admire Chinese art, and I have been especially interested in Chinese gardens. In New York there is a fairly new and very impressive Chinese "scholars garden"; and in Vancouver, Canada, we much enjoyed the "Dr. Sun Yat Sen classical Chinese garden." So my wife and I are looking forward to a glimpse of modern China and its cultural treasures.

Of course I am here at Beida not to talk about China, but to bring some thoughts about my own country's experience in trying to understand the meaning of the rule of law and to make good on its promise. I will have to take up some issues in jurisprudence, and also some aspects of American legal history. I do not apologize for combining jurisprudence and sociology of law, for that combination faithfully reflects what we are trying to achieve in the Jurisprudence and Social Policy Program (JSP) in the Boalt School of Law at the University of California, Berkeley. The JSP baby is growing up, but for me it is still lovable, and we are proud of it.

I was asked to give an "informal" lecture, so I will try to deal with my subject in a relaxed way. I invite you to follow me as, painting with broad strokes, I pay special attention to the mountains and the valleys, leaving more subtle details to another time, and a better artist.

I begin with some comments on the meaning of the rule of law, then go on to consider some important lessons of American history, including problems we face today in what is called, in a patriotic song, "the land of the free and the home of the brave."[1]

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1. National Anthem, 36 U.S.C. § 301 (2004) (commonly referred to as the Star Spangled Banner).

I. TWO CONCEPTS OF THE RULE OF LAW

The first thing we must say is that the phrase "rule of law" refers to an ideal, something that we look to as a criterion or standard of good conduct, especially but not exclusively official conduct. "Rule of law" is a way of saying that the rules and procedures of a legal system must meet—or at least strive to meet—tests or standards, which are drawn from fairness and justice. Therefore we must say that the rule of law is law plus standards. These standards tell us which official acts are truly lawful, and which may be criticized as illegitimate, unjustified, or as abuse of power. In a system governed by the rule of law no official, however mighty, is above the law. Every official is accountable; every rule, every decision, must be justified by some grant of authority. Whatever is opened to justification invites criticism. We take it for granted that, under the rule of law, individuals and groups, with the help of lawyers, can raise questions like: by what authority do you hold office, or act as you do? How far does your authority extend and how is it limited? The result is a system in which official discretion—what officials can do using their own judgment—is restrained. For example, we have strict rules regarding the use of firearms by the police; or we say government agencies must hold hearings before issuing certain rules. Limiting discretion is a way of avoiding potentially arbitrary, self-seeking decisions. This ideal is never fully achieved. We can never have a system which is only or completely "a government of laws and not of men."[2] This maxim is not meant to be taken literally, as if the passions and interests, the choices and strategies of human beings could be eliminated from the legal process. Rather, the decisions made by legal actors—judges, legislators, police, prosecutors, administrative officials—should be governed by certain standards of the official propriety. To devise the standards, doing the best we can, we need close study of how rules and decisions are made. This study is complicated in part because different standards are needed for different kinds of rules and decisions. We don't worry too much about small matters, like fines for illegal parking. We have much greater concerns, and, therefore, demand more protections, when great injustice can be done. For example, when a person might be punished severely, perhaps sent to prison or even killed. Furthermore, official discretion is not necessarily an evil, to be stamped out. It is often defensible and even necessary. We don't want so many rules about rules, or such strict standards, that the

2. John Adams, Novanglus Papers, No. 7, *in* 4 THE WORKS OF JOHN ADAMS 106 (Charles Francis Adams ed., 1851).

work of government (or other officials) cannot get done. The rule of law is not meant to eliminate discretion. It is not an anarchist strategy for making government unnecessary or impossible. Instead, we impose restraints that are needed and appropriate, given what we know about, for example, what the police might do if they could act as they see fit. The standards we apply for the control of police discretion are not the same as those we apply to other officials, such as judges, juries, and administrators. Therefore, we need close study of different kinds of officials, including the work they do, the resources they have, and the conditions in which they operate. All this makes a lot of work for sociology of law.

Another complication—another challenge for sociology of law—is that there is no single model for the rule of law. Within and among rule-of-law communities, there is much debate as to whether specific practices, rules, and institutions further the ideal, or undermine it. Some judges are elected, others are appointed by elected officials. Which way is best? Americans have great confidence in juries, but they get less confidence in Britain and on the European continent. Indeed, although the differences between common-law and civil-law legal systems are considerable, there is no lively debate as to which is better from the standpoint of the rule of law. For the most part the systems are taken to be roughly equal alternatives, each successful and deficient in different ways. Nor can we ignore the special claims of history. There may be many arguments against the U.S. Supreme Court as part of a democratic government, especially when we consider how often momentous decisions are made by a bare majority of the Court. But Americans are comfortable with the Supreme Court as an institution, and are not likely to change it or pay much attention to arguments against it. This variation in what can be accepted as meeting rule-of-law standards raises many questions. What is essential? What different practices can be accepted as different but reasonable ways of making good the promise of the rule of law?

To answer the question, we must distinguish general principles from particular rules or procedures. Justice requires impartial and independent judge, and the opportunity to be heard in his cause, offering relevant proofs and arguments. Just how this is done can vary, reflecting different culture and histories.

One more point about the meaning of the rule of law. I cannot leave it out because it is so important. I have in mind the difference between a negative, low-risk, understanding of the rule of the law and a more affirmative, more demanding, and in some ways a more risky point of view. Narrowly conceived, the rule of law is a set of safeguards

against the abuse of power. Officials are to be chained down by constitutional restraints, procedural rules, including rules of evidence, and institutional arrangements, such as a hierarchy of courts. This narrow or negative conception has great appeal. It concentrates attention on the most serious wrongs officials can do; it's a conception well supported by historical achievements and widely recognized principles, such as the independence of the judiciary. Nevertheless, this is by no means a wholly satisfactory point of view. In contemporary discussions of the rule of law, we find much that goes beyond the negative virtue of restraining official misconduct. The rule of law, it is said, and not only very recently, is a regime that protects the weak against the strong; provides for peaceful settlement of disputes; facilitates economic transactions; and creates an effective framework within which private life and enterprise can go forward. This thicker, more positive vision speaks to more than the abuse of power. It speaks to values that can be realized, not only protected, within a legal process. These values include respect for the dignity and moral equality of persons and groups. This understood, the rule of law enlarges horizons even as it conveys a message of restraint.

II. THE AMERICAN CONSTITUTION AND THE RULE OF LAW

In the United States, the most visible bulwark of the rule of law is the Constitution, which was drafted by a special convention in 1787. This framework for effective and limited government is the centerpiece of American legal culture. All government officials are sworn to uphold the Constitution, which is interpreted and enforced by the Supreme Court. The Constitution is "the supreme law of the land"[3] and the Supreme Court has authority to say what the Constitution means, and to do so with finality. In accordance with the institution of "judicial review," the Court can declare that a law passed by Congress, or by a state legislature, or an administrative decision, is unconstitutional and therefore void, that is, without legal effect.

The Constitution has a number of specific provisions, for example, each state has two senators, and the President's term of office is four years.[4] On the other hand, the Constitution includes many more general ideas and concepts, which require thoughtful and creative interpretation. Thus, the Constitution gives Congress authority to regulate "commerce" among the states (usually referred to as "interstate commerce"), but just

3. U.S. CONST. art. VI, cl. 2.

4. *Id.* arts. I, § 3, cl. 1 and II § 1, cl. 1.

what this means is not spelled out. The Bill of Rights, adopted soon after the Republic was founded—they are the first ten amendments to the Constitution—speaks grandly of "the freedom of speech," "due process of law," "cruel and unusual punishment."[5] The Fourteenth Amendment, adopted in 1866 after a bloody Civil War, declares that all "persons" are entitled to "equal protection of the laws."[6] These and other general concepts have received varying interpretations and have been, to a large extent, the substance of American constitutional history.

The history shows that American effort to make good the promise of the rule of law has been difficult, and sometimes very bloody, sometimes very turbulent, as during the great conflicts between capital and labor in the nineteenth and twentieth centuries, or the civil rights movement during the 1960s. Much struggle marked the effort to create a legal system that would include and benefit all the people.

When the Constitution was written and adopted, the problem of slavery was not faced, despite the principle, enshrined in the Declaration of Independence, that "all men are created equal."[7] A very large number of Americans, whose skin color was black, were subjected to cruel but lawful oppression. Nor was slavery the only problem. In the nineteenth century the rights of women to be treated equally were ignored and denied; behind an ideological screen of "freedom of contract," employers were allowed near absolute power in the workplace.

Most of this law was changed, especially in the twentieth century, as the Supreme Court took account of new learning and new conditions, especially new expectations for social justice. There was a great movement from formal to substantive justice. This change required a broadened meaning of legal equality, that is, what it means to be equal before the law. The general idea was not new. Even a narrow, more limited interpretation of the rule of law accepts and even celebrates the principle that all who are governed in a political community are entitled to equal protection of the laws. However, the standard, narrowly interpreted, requires only consistent application of established rules. The rules and categories can be taken as given; without critical scrutiny by the courts. Thus the law may consist of general rules, applied with impeccable regularity; yet it may be based on attitudes of bigotry and prejudice against women, racial groups, immigrants, or ordinary workers. This was a flaw in American constitutional history.

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5. *Id.* amends. I, V, VIII.
6. *Id.* amend. XIV, § 1.
7. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

In the decades following the Civil War, the Supreme Court was called on to interpret the Equal Protection Clause of the Fourteenth Amendment. For about fifty years this interpretation was narrow and formalistic. In 1883, for example, the justices upheld a law forbidding sexual intercourse and marriage between blacks and whites.[8] They said the law was constitutional because the statute applied equally to both races and to all members of each race.[9] Thirteen years later the Court decided that "separate but equal" facilities for blacks and whites in public transportation and other facilities, including public education, met the standard of equal protection.[10]

By the middle of the twentieth century, this conception of equal protection was radically revised. Propelled by a deepened concern for civil rights, the Supreme Court revisited its understanding of legal equality, rejecting as unconstitutional legislation whose premise it was that, due to race, sex, or ethnicity, some people are intrinsically more worthy than others. The justices sought a new understanding of legal equality, one that took account of blocked opportunities and other aspects of social justice. They began to see that people are not equal before the law if the law itself is oppressive, or fails to take account of oppression.

The most important constitutional decision of this era was made in 1954, in the famous case of *Brown vs. Board of Education*.[11] In that decision the Supreme Court abandoned the idea that racial segregation in public schools and other facilities could offer equal protection of the laws. During the same era the Court did much to protect the rights of women, minorities, and defendants in criminal cases. In this work the Court saw itself as an active force in moving the community toward a fuller realization of its basic principles.

Now let us consider what all this means for American legal culture lessons that might well be considered by other countries trying to find their own path toward the rule of law.

First is the lesson that American Constitution binds in some way and loosens in others. In effect, the generations of Americans alive today have agreed to live by rules and concepts that were conceived and adopted by their ancestors. This is part of what it means to accept a Constitution. Furthermore, the Constitution binds down those who are entrusted with power, and this applies to all officials, including the

8. Pace v. Alabama, 106 U.S. 583, 584 (1883).
9. *Id.* at 585.
10. Plessy v. Ferguson, 163 U.S. 537, 552 (1896) (Harlan, J., dissenting).
11. Brown v. Board of Educ., 347 U.S. 483 (1954).

elected representatives of the people. Therefore in a constitutional system democracy is limited—is held in check by the Constitution. Although we honor the will of the people, we also ask: how is the will of the people to be governed? Constitutional democracy answers this question by forging what Thomas Jefferson once called "the chain of Constitution."[12]

On the other hand, the Constitution loosens because it leaves a great deal for future generations to decide. The Constitution is meant to be a framework within which self-government may go forward. This means each generation can decide for itself what policies to pursue, on most issues, so long as they do not violate constitutional rules and principles.

The Constitution loosens in yet another way. Its abstract clauses must be read in the light of new circumstances and fresh understandings. Some of us say, therefore, that the Constitution is a "living" or "evolving" or "responsive" institution. We cannot know what is "cruel and unusual punishment" without taking account of changing values and ways of thinking about punishment; we cannot know what "due process" requires without knowing what a government can afford to do, or know how to do, for example in providing legal help for defendants who can't afford a lawyer; we can't interpret the meaning of "commerce" without taking "judicial notice" of how a modern economy is organized. The Supreme Court's decisions on racial segregation reflected modern scientific knowledge about the superficiality and irrelevance of race differences.

Another lesson is that the Constitution conveys a dual message of skepticism and of optimism. The American legal order holds these two attitudes in tension. Skepticism underpins what is most apparent in the law—an array of devices to hold men in check. Confidence is more subtle, but no less pervasive. It is evident whenever the law hinges on trust, cooperation, good-will, and self interest. The themes of skepticism and confidence evoke contrasting views of law and justice. One view, founded in moral skepticism, takes the law to be a system of restraining rules. Law exists because without it there would be chaos or repression, or both. Its main work is to keep the peace and limit the abuse of power. The alternative is to think of law as a vehicle of human aspiration. On this view, legal experience points to a kind of order and a kind of social control. Where there is fidelity to law, order is not to be purchased at any price. It imposes costs and generates expectations. People think

12. Thomas Jefferson, *Draft Kentucky Resolutions* para. 8 (1798).

order should be maintained, but without police brutality, and with respect for the requirement of ordinary life. The outcome is a vision of law as a realm of value, based on fairness, justice, and civic participation, not on coercion, or not only coercion.

Every legal system is a unique blend of skepticism and confidence. In the United States there has been an irrepressible tendency to make confidence the keynote of the legal order. Although the Constitution conveyed a message of restraint, including checks and balances within the government, it also encouraged great confidence in self-government—in what democracy could do to create a greater nation by mobilizing collective will and collective intelligence. The Constitution did not produce an austere or disciplined policy, although some of the founders would have liked that outcome. In a setting of open frontiers and expanding industry, the work of judging, lawyering, and lawmaking was more disorderly, more exuberant, more democratic. The law had to catch up with the great changes in industry, commerce, immigration, and the growth of cities. This required a spirit of confidence, including openness to new legal ideas about contracts, corporations, and finance. We should also remember that, as children of the enlightenment, the founding fathers had almost boundless faith that human reason, embodied in effective institutions, could reign in self-interest and govern disorderly passions. One senses a confidence in institutions combined with much skepticism about the frailty and folly of individuals. Nor were they wholly skeptical about humankind. Their argument was not that everyone is sinful, it is rather that there is sufficient risk of sin to justify institutional restraints. Furthermore, political or economic power is not necessarily evil. Power can enable as well as corrupt. However, we cannot rely on goodwill, still less on claims to moral wisdom or perfection. Therefore, in the design of institutions we must know what to guard against, and what we can rely upon. These are skeptical premises; but they are also foundations on which confidence can be built.

This appreciation of what we might call the yin of skepticism and yang of optimism—polarities always in tension but also involve each other—has been a source of much controversy in American jurisprudence. Conservative juries have focused attention on skepticism and a philosophy of restraint. This comes out in the fight over "judicial activism." Liberal judges have been more willing to see the Constitution as subject to evolution, especially in interpreting general clauses and constitutional principles. Conservatives claim they are following the text of the Constitution, that they are "interpreting" law, not "making" law. They are right to maintain that judicial creativity must be limited

by respect for what legislators have said and intended, and by regard for precedent, but the reality of judicial creativity cannot be denied. In fact, the line between "making" and "interpreting" is not neat and clean, nor can it be. There is much hypocrisy here, because conservative judges have often been activist, and not much concerned with precedent. They would like to read into the Constitution their own views about crime, abortion, and the powers of the national government. Nevertheless, there has been controversy about the meaning of the Constitution.

III. PRIVATE GOVERNMENT AND THE RULE OF LAW

Although the United States has done pretty well in restraining public government by the rule of law, we have had much less success in doing the same for private government. The phrase "private government" is sometimes used by students of law and society to refer to the management of large, complex organizations, which have become a very prominent feature of the social landscape. The leaders of these organizations, mostly great business corporations, but also trade unions, churches, universities, and other institutions, have great power over the lives of employees, the security of investments, the safety of products, and much else that goes on in the life of a large enterprise. The leaders are governors because they have responsibility for the enterprise as a unified whole, a living reality. They make rules by which ordinary people must live, and they make decisions that affect the public interest and safety, environmental protection, and fairness in the hiring and promotion of employees. If the leaders neglect or abuse those interests, we can say that the power thus exercised is arbitrary and oppressive. These practices cry out for control by the rule of law. This cannot happen unless our understanding of the rule of law extends to private as well as public government. Taking this step has been a major challenge for American jurisprudence.

We have met this challenge, to a limited extent, by recognizing that contracts between employers and trade unions—we call them collective bargaining contacts—can create systems of shared governance—a kind of constitutional order providing for justice in the workplace based on rules agreed upon by both labor and management, and providing for agreed-upon ways of handling disputes and grievances. This is a weaker, American version of the German institution of Mitbestimmung, which can be translated as shared governance.

These advances have been supported, to some extent, by the economic benefits, for a large business, of bureaucratic rationality including consistent personnel policy. In recent years, however, the

power of trade unions has weakened, and this has strengthened the hand of corporate managers.

This year much more has come out regarding the lawless conduct of American business leaders. You have probably heard of the Enron Corporation, and of the many other scandals and bankruptcies that have pummeled the stock market and shaken public confidence in corporate executives, directors, and their hired accountants. It's clear that many business leaders have greedily seized opportunities to enrich themselves. This unjust enrichment might not matter so much if everyone else also benefited, at least to some extent. In fact, however, many people without special privileges have lost their jobs as enterprises collapsed, or have lost much of what they thought were savings to be used for retirement or for the education of their children.

Much of this lawless is due to major weakness in our system of corporate governance, especially how corporate executives and directors are held accountable. There has been much evidence of self-dealing, collusion, and conflict of interest. The government agencies that should monitor and control this malfeasance have been week or timid; the rules for improving responsibility have been effectively resisted; and many of those who should be more assertive have kept quiet. For example, a great deal of corporate stock is held and traded by large mutual funds and pension systems, yet the managers of those funds have done little to take the initiative and use their influence to see that accounting is honest and that corporate earnings are fully accurately reported.

These failings show us how important it is to base the rule of law on openness and accountability; and they also show that rule-of-law standards require close scrutiny and detailed understanding of how decisions are made, how they may be corrupted, and how they may be controlled.

Here is where lawyers meet specialists in business practice and the science of administration. We cannot know how to make organizations accountable, we cannot know how to frame rule-of-law standards, without knowing what makes a rule workable, or what limits can be placed on managerial authority without imposing intolerable burdens on rational administration. In the United States, the business leaders and their political spokesmen are likely to say that any limitation is too much. They used to say, in opposing trade unions, that a unified command is essential, that control of the workplace cannot be shared. These objections must be met with skepticism, and with genuine understanding of what can be done and should be done. Professor Lon Fuller, who was one of the greatest twentieth century students of jurisprudence, rightly said that lawyers are architects of social

organization.[13] It is their high calling to design structure and draft rules that make sense from a business point of view and, at the same time, protect the rights and interests of everyone affected by the decisions of management.

This is a very big subject, and I am sorry I do not have time to go into it more fully. So I will close with a brief comment on the vocation of lawyering in the public interest. We serve the public good, not as preachers or politicians, although we do teach ethics and we do make trouble for political leaders. Rather, we serve the public interest by helping the community negotiate the distance between ideals of right conduct, including ideals of justice, and the legitimate goals and practical demands which pull us away from those ideals. The great task is to uphold moral principles, especially the right ordering of interests and powers, but to do so in a way that allows the society to function and flourish. The hard task is bound to give lawyering a shaky reputation, because we are always looking for acceptable tradeoffs and workable compromises, for ways of taming self-interest without frustrating initiative and without suffocating enterprise.

May the spirit of democracy, love for the people and dedication to ideals be with you, today and always.

13. LON L. FULLER, *The Lawyer as Architect of Social Structure*, *in* THE PRINCIPLES OF SOCIAL ORDER: SELECTED ESSAYS OF LON L. FULLER 264 (1981).