Indiana Law Review

Volume 34 **2001** **Number 4**

LECTURES

WHAT IS THIS THING CALLED THE RULE OF LAW?

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The rule of law bakes no bread, is unable to distribute loaves or fish (it has none), and it cannot protect itself against external assault, but it remains the most civilized and least burdensome conception of a state yet to be devised.[1]

INTRODUCTION

As Ronald Dworkin has reminded us, we are all "subjects of law's empire, liegemen to its methods and ideals; law is our "sword, shield, and menace."[2] Within this empire of law, it is our frequent boast that we live under the rule of law. The presidential election we just passed through—or rather just survived—was one of those frequent occasions for political figures to remind us of the rule of law. Whether it was William Daley or James Baker, Ted Olson or David Boies, it seemed as if each had the rule of law on his side. Looking back a couple of years to the Clinton impeachment, it was Henry Hyde or Ken Starr, Charles Ruff or David Kendall, reminding us of this thing called the rule of law, and how it, along with God, was on his side. Well, what is this thing called the rule of law?[3]

In one sense, these recalled forensic flourishes reveal more about political commonplaces than about law. Such references to the rule of law usually involve the invocation of a particular rule, statute or decision that points in the invoker's favor, as in the rule of law demands that the ballots be recounted or not recounted, or that the President must be impeached and convicted or not, as the case may have been. Here, the rule of law is used to add a pretense of weight to legal or political argument.

Yet, in another sense, these invocations were quite appropriate, for we did see the rule of law, in its real sense, operate in both of these cases. As was observed by many at the time, when other nations call out the troops, we call in the lawyers. In other words, we resort to the rule of law, and it is a good thing

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1. MICHAEL JOSEPH OAKESHOTT, ON HISTORY AND OTHER ESSAYS 178 (1999).

2. RONALD DWORKIN, LAW'S EMPIRE, at vii (1986).

3. A search of Lexis-Nexis on February 18, 2001 for newspaper references during the last ninety days to "the rule of law" produced over 1000 documents.

that we do.

Probably the most famous reference to the rule of law is John Marshall's statement in *Marbury v. Madison*,[4] that our government is "a government of laws, and not of men."[5] Marshall's dictum was certainly not the first such boast. A comparable phrase appears in the world's oldest standing constitution, the 1780 Constitution of the State of Massachusetts.[6] Nor is ours the only nation that makes such a boast. The Canadian Constitution Act of 1982 proclaims that, "Canada is founded upon principles that recognize the supremacy of God and the rule of law."[7] Even the People's Republic of China has recently amended its constitution to express its adherence to the rule of law, though it does qualify its pledge as being to the socialist rule of law.[8]

I am a believer in the rule of law. I believe in its genuine existence and in its blessings. I believe that the rule of law is real, and that it is a coherent ideal. So, in some respects, what I have to say is a statement of faith—with some cautions appended.

Of course, this Article can only serve as something of an outline or agenda for further discussion. I am not sure that I have many original ideas, but I do want to state some old truths. The rule of law is a reality and a blessing, but it is beset by at least two problems: one, a kind of pathology; the other, something of a paradox. First, the reality; then the pathology and the paradox.

I. THE RULE OF LAW: ITS NATURE, VALUE, AND REALITY

There have been many efforts to describe the rule of law. Among the best known is Lon Fuller's list of the moral virtues inherent in any system calling itself a system of law.[9] Fuller specifies eight essential elements of law: that law be general in its application; that it be public; that it operate prospectively; that it have reasonable clarity; that it be internally consistent; that it be practicable to comply with, that is, that there be a genuine congruence between the *ought* of law and the *can*; that it be relatively stable; and that there exist a congruency between the word of law and its enforcement.[10] These are useful aspirations for any lawmaker and are certainly critical goals of the rule of law, especially as it is addressed to *lawmakers*. However, this is a very thin and abstract version of the rule of law. The rule *of* law is much more than rule *by* law.

The rule of law may be more fully understood by looking at some of the promises it makes, its premises and characteristics, its components, and finally how it operates.

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4. 5 U. S. (1 Cranch) 137 (1803).
5. *Id.* at 163.
6. *See* MASS. CONST., pt. 1, art. XXX.
7. CAN. CONST., Act, 1982, pt. 1, pmbl. (Preamble to the Canadian Bill of Rights).
8. *See* CONST. OF THE PEOPLE'S REPUBLIC OF CHINA, art. 5 (1993).
9. *See* LON L. FULLER, THE MORALITY OF LAW (rev. ed. 1969).
10. *See id.* at 33-41.

A. Promises

First, the rule of law offers a palliative for the state's exercise of coercive power.[11] The rule of law offers the promise that only legal commands, that is, rules authoritatively promulgated, are obligatory, that government officials are subject to known, public laws and that there exists a fair, rational process through which one can protect one's interests. It offers protection against the caprice and cruelty of arbitrary will.[12] In place of arbitrary will, it requires reason—*and reasons*. Second, it promises individual freedom to pursue, within relatively clear limits, one's own ends rather than reducing its subjects to serve as means for the purposes of others.[13] It thus promises prosperity or happiness.[14] Legitimacy, constraint, autonomy, and ample room for the pursuit of happiness—these are its promises.

B. Characteristics and Premises

What are some of its characteristics and premises? The rule of law is mostly backward-looking, for it prefers the keeping of promises to the promotion of ends. As Lon Fuller wrote, it is "joined fore and aft with history."[15] It is more narrative than logic. It is not scientific or philosophical, but it is not anti-science or anti-philosophy.[16] It is neither a creation of nature nor a creature of God. It is modest in the sense that it goes only so far as it must and avoids, where possible, exposure of moral bedrock.[17] It is founded in mistrust—in a recognition of the capacious bias, stupidity, and self-love of human beings; yet, it depends on the good faith of human beings. It is anti-utopian. It is a trade-off that prefers the good to the perfect.

C. Components

If we look at its components, we will see that the rule of law has to do with

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11. *See* DWORKIN, *supra* note 2, at 93, 190.

12. For a useful discussion, see JUDITH N. SHKLAR, LEGALISM: LAW, MORALS AND POLITICAL TRIALS 1-28 (1986); JUDITH N. SHKLAR, *Political Theory and the Rule of Law*, *in* THE RULE OF LAW: IDEAL OR IDEOLOGY 1 (Allan C. Hutchinson & Patrick Monahan eds., 1987).

13. *See, e.g.*, FRIEDRICH A. HAYEK, THE CONSTITUTION OF LIBERTY 133-47 (1960).

14. *See id.* at 22-38; *see also* DOUGLASS C. NORTH, INSTITUTIONS, INSTITUTIONAL CHANGE, AND ECONOMIC PERFORMANCE (1990); FRIEDRICH A. HAYEK, THE ROAD TO SERFDOM 72-88 (1944); DOUGLASS C. NORTH & ROBERT PAUL THOMAS, THE RISE OF THE WESTERN WORLD: A NEW ECONOMIC HISTORY (1973); Douglass C. North, *The Historical Evolution of Polities*, 14 INT'L REV. L. & ECON. 381 (1994).

15. Lon L. Fuller, *Reason and Fiat in Case Law*, 59 HARV. L. REV. 376, 380 (1946).

16. *See generally id.* at 391; Anthony T. Kronman, *Precedent and Tradition*, 99 YALE L.J. 1029 (1990).

17. For a useful discussion of how the law relies upon "incompletely theorized agreements," see CASS R. SUNSTEIN, LEGAL REASONING AND POLITICAL CONFLICT 35-61 (1996); CASS R. SUNSTEIN, ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT (1999).

much more than *rules* of law, or ordinary "law stuff." The rule of law comprises formal constraints, institutional constraints, and informal constraints, so it operates at three levels. To imagine the rule of law, think of a pyramid, the top third of which consists of the ordinary "stuff" of law—constitutions, statutes, rules, regulations, doctrines, principles, decisions, and the like. In part, the rule of law is a law of rules and texts.[18] These are law's formal constraints. The middle third consists of institutions—constitutionalism, dispersal of power, judicial review by independent courts, open governmental processes, as well as a free press, decentralized law publishers, and widespread and varied access to legal education leading to an independent legal profession.[19] These are law's institutional constraints. The bottom and broadest third, upon which the pyramid rests, is the rule of law culture. The rule of law is our central cultural artifact, the ruling myth of our civic faith.[20] We are united as subjects of law's empire, in liege to law. As de Tocqueville observed over a century ago, Americans turn unthinkingly to law, as if by instinct, to settle our disputes.[21] We accept law as monarch and, in its proper sphere, as definitive. These are law's informal constraints. The depth to which the rule of law is impressed upon our culture may be seen in the extent to which, somewhat as hypocrisy is vice's tribute to virtue, so "lawlessness seeks to impersonate [i.e. to appear to be] the rule of law."[22] Justice Stephen Breyer, in a recent comment on the tragic case of the Cherokee Indians who in the 1830s were driven from their Georgia homelands despite a Supreme Court decision in their favor,[23] observed:

> The outcome of this sad, premonitory tale [of the Cherokees] may . . . [seem to] provide support for those who believe that politics and force, not law, determine the facts of history. But I would draw a different lesson: a lesson about the insufficiency of a judicial decision alone to bring about the rule of law. This lesson helps us to understand John Marshall's comment that "the people made the Constitution and the people can unmake it." For our constitutional system does not consist only of legal writings. It consists of habits, customs, expectations, settled modes of behavior engaged in by lawyers, by judges, and by citizens, all developed gradually over time. It is that system, as actually practiced by

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18. *See, e.g.*, Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175 (1989).

19. *See, e.g.*, Robert S. Summers, *A Formal Theory of the Rule of Law*, 6 RATIO JURIS 127, 130 (1993).

20. For a trenchant discussion of the rule of law as a central part of our ethos, see PAUL W. KAHN, THE REIGN OF LAW: *MARBURY V. MADISON* AND THE CONSTRUCTION OF AMERICA (1997).

21. *See* ALEXIS DE TOCQUEVILLE, 1 DEMOCRACY IN AMERICA 283-290 (Vintage Books ed. 1945).

22. Louis J. Sirico, Jr., *The Trial of Charles I: A Sesquitricentennial Reflection*, 16 CONST. COMMENT. 51, 52 (1999).

23. Worcester v. Georgia, 31 U.S. 515 (1832).

millions of Americans, that protects our liberty.[24]

Now how do these components—law stuff, institutions, and culture—work at ground level? How do they constitute the rule of law? What, for example, is the nature of a correct decision in law? What is a true statement of law?

D. Operation

There is much in law that is relatively clear, stable, and predictable where Fuller's eight virtues are realized to a high degree. There are rules which, as rules strive to do, pre-ordain a result. There are a lot of easy cases, that is, cases that come within the focal meaning of a rule. To some extent the clarity of law may be judged by the disputes that do not go to court,[25] of which there are surely millions.

But in its interesting and troublesome reaches, such as the recent presidential election, law does not seem very clear, let alone determinate. As has been said, "we are all realists now,"[26] at least in the sense that we have long been disabused of a strictly formalist view of law, a kind of legal fundamentalism. Indeed, we spend much of the first year of law school ridding students of a naive formalism that imagines law as a neat set of syllogisms, and of the belief that legal dispute resolution is causal, that is, that ready-to-hand legal materials *compel* a result somewhat as an answer in mathematics or formal logic is compelled. Yet once we abandon this formalistic view, is the rule of law, with its promise of relative stability and predictability, left as only platitude, nothing but patriotic sententiousness? What saves us from a rampant subjectivity?

We should not underestimate the amount of law that is relatively clear. Law teachers especially, often working on the frontiers of law, tend to exaggerate the extent to which law is up for grabs. Nevertheless, much of the challenge of law—and the presidential election again comes to mind—involves uncertainties that people acting in good faith will see differently. What does the rule of law do for us in these settings in which it is most severely tested?

First, we approach legal disputes as if there *are* right answers[27] – we indulge a kind of quasi-formalist presumption -- and that the job of the advocates and decision-makers is to find them. We suppose that, in a sense, the solutions will be found in our past, for the rule of law mostly looks backwards or sideways, and only surreptitiously forward. We find, by seeking in our past, reasons that do not so much cause, as they do justify. These reasons provide normative, not causal force. They operate not as links in a chain[28] but more as the legs of a chair.

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24. Stephen Breyer, *"For Their Own Good": The Cherokees, the Supreme Court, and the Early History of American Conscience*, NEW REPUBLIC, Aug. 7, 2000, at 32, 39.

25. *See* HAYEK, *supra* note 14, at 208.

26. WILLIAM TWINING, KARL LLEWELLYN AND THE REALIST MOVEMENT, *quoted in* BRIAN BIX, JURISPRUDENCE: THEORY AND CONTEXT 165 (1999).

27. For a discussion of Dworkin's "one right answer" thesis, see, e.g., RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 331-38 (1978); STEPHEN GUEST, RONALD DWORKIN 137-43 (1991).

28. *See* J. WISDOM, PHILOSOPHY AND PSYCHOANALYSIS, *in* LLOYD'S INTRODUCTION TO

However, these reasons (the legs of our chair) are not just *any* reasons.

The rule of law does not promise results so much as it promises an approach, a process, a practice of reason-giving, a set of argumentative conventions. The rule of law sets bounds to its discourse. Insofar as the rule of law is itself a rule, it is a rule of inclusion and exclusion of reasons, a rule of pedigree. The law provides a grammar and, just as the use of language or moves on a chessboard are correct or incorrect only insofar as they are within the grammar or the rules, so statements of law are correct only insofar as they observe the pedigree of law. In that sense at least, the law *is* an autonomous practice. And it is this that we try to teach our students—to think, see, and talk like lawyers; to operate sure-footedly within the understood conventions.[29] It is observance of this constraint which we expect from our judges: a good faith effort to resolve a dispute by drawing on *legal* reasons, and not other reasons, such as personal reasons or free-standing social, political, or moral purposes. As Justice Stevens so recently observed in his dissent in *Bush v. Gore*, "[i]t is confidence in the men and women who administer the judicial system that is the true backbone of the rule of law."[30] It is this boundedness that importantly distinguishes law from politics, science, and philosophy. The good faith judge's morality is a *role* morality, dependent not so much on general virtue as upon faithfulness to the rule of law.

Now, of course, we are imperfect beings, and our knowledge and reason fall short. None of us is Dworkin's Hercules.[31] And so we often come to opposed conclusions—split decisions—one of which must control so that we can get on with life. The decision may be subject to revision. It certainly may be subject to criticism as unjust, unprincipled, or as masking improper reasons. New factors and considerations—instrumental concerns—may enter law from the outside, but they must be mediated and translated into the discourse of the law.

When we look back at the presidential election battle, it is a serious mistake to suppose that the rule of law broke down because the answers were not immediately apparent. The issues raised were new, and the answers had to be wrestled from the past, and debated. The indeterminacy we found arose from our eternal short-sightedness and from the inescapable tensions between principles, for that is the way principles operate—in opposition to each other, pulling us this way and that as we seek a kind of reflective equilibrium. The law may thus appear to have gaps, but it is equal to filling them. And it is a mighty good way to solve problems, especially when the alternatives are considered.

We witnessed good lawyering in and around the Florida cases. Certainly

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JURISPRUDENCE 1353 (M.D.A. Freeman ed., 6th ed. 1994).

29. On the nature of the conventions within American constitutional law, see DENNIS PATTERSON, LAW & TRUTH 136-37 (1996) (contending that constitutional argument rests upon six "modalities": history, text, structure, doctrine, ethics, and prudence). *See also* Richard H. Fallon, Jr., *"The Rule of Law" as a Concept in Constitutional Discourse*, 97 COLUM. L. REV. 1, 10-24 (1997) (dividing constitutional interpretation into four "ideal" types: historicist, formalist, legal process, and substantive).

30. Bush v. Gore, 121 S. Ct. 525, 542 (2001) (Stevens, J., dissenting).

31. On the character of Hercules, see DWORKIN, *supra* note 27, at 105-23.

some serious flaws in our electoral system were revealed. At times, unruly demonstrations threatened the operation of law. Perhaps the Court ignored its passive virtues. In the end, many, including Justice Stevens, felt that "the Nation's confidence in the judge as an impartial guardian of the rule of law"[32] was shaken. But on the whole, we had a peaceful transition of power, thanks in large part to our legal traditions.[33]

The rule of law, properly understood, is a glory of civilization and a real, wonderful, and complex thing. However, it is not the only thing, and sometimes we can have too much of a good thing.

II. TWO CAUTIONS ABOUT THE RULE OF LAW

A. Law's Pathology

I noted earlier some cautions about the rule of law. The first of them may be considered a pathology of law. In his book, *The Ages of American Law*, Grant Gilmore wrote: "In Hell there will be nothing but law, and due process will be meticulously observed."[34] This is one of my favorite legal quotes, for I think it points to a real danger in too much of a good thing. Do we have too much law? Well, it is hard to say, but we sure have a lot of it. In just the thirty-some years I have been professionally involved in law, at times it has seemed that the law has become smothering. At times, I feel law more as menace than as sword or shield; I feel claustrophobic amidst its ever-growing baggage and clutter—and I am supposed to be an expert, to know my way around. I would guess that many Americans, as they stand at the counter of a license branch, have felt the sort of dread–an utter helplessness–of which Kafka wrote. This condition of too much law has been called "jurismania"[35] or "hyperlexis,"[36] but however we name it, it seems to many that the law has become overweening—that "the river of law has

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32. *Bush*, 121 S. Ct. at 542 (Stevens, J., dissenting.)

33. Much discussion of the "rule of law" may seem somewhat abstract, ethereal, gauzy, and difficult to verify, but the rule of law is a reality that gains some support from economic historians who, in answering the question of why some nations are better off than others, offer the answer of the emergence in late medieval times of the rule of law, especially in the commercial realm. Today, presumably hardheaded investors making foreign investment decisions consult the International Country Risk Guide, which measures and tries to quantify the extent to which a given nation lives by the rule of law. Indeed, studies have found a significant correlation between the rule of law and relative freedom and prosperity. *See, e.g.*, Philip Keefer & Stephen Knack, *Why Don't Poor Countries Catch Up: A Cross-National Test of an Institutional Explanation*, 35 ECON. INQUIRY 590-602 (1997).

34. GRANT GILMORE, THE AGES OF AMERICAN LAW 111 (1977).

35. PAUL F. CAMPOS, JURISMANIA: THE MADNESS OF AMERICAN LAW (1998).

36. Bayless Manning, *Hyperlexis: Our National Disease*, 71 NW. U. L. REV. 767 (1977). For further discussion of the proliferation of law, see LAWRENCE M. FRIEDMAN, TOTAL JUSTICE (1985); PHILIP K. HOWARD, THE DEATH OF COMMON SENSE: HOW LAW IS SUFFOCATING AMERICA (1994); PETER H. SCHUCK, THE LIMITS OF LAW: ESSAYS ON DEMOCRATIC GOVERNMENT (2000).

swollen, spilling over its banks, and flooding surrounding areas,"[37] and we are drowning in it. I cannot describe all the phenomena, nor relate statistics, but I take it as a given that law has grown in density, complexity, and technicality.[38]

There are many reasons why this has happened. I can only sketch a few. To some extent, such growth is inevitable as part of the natural tendency of social systems to grow in complexity. Such growth is fed by increases in population and advances in technology. As we have come to take a more instrumental view of law, we turn to it to solve almost every problem. Most law comes from the desire to do good.[39] As we come to see the interconnectedness of life, it is hard to find a stopping place. We are driven to order everything because everything matters. This tendency in turn breeds an increasing demand for security, the satisfaction of which feeds all too nicely the ambitions of those who seem to benefit from more law—politicians, bureaucrats, and, of course, lawyers. Some of the growth may even be in a sense aesthetic, as there is a certain beauty—to some lawyers at least—in getting it all accounted for, all contingencies anticipated. There is a kind of pleasure in closed-endedness and symmetry, such as attracts us to the well-devised, airtight rules of a game.

Thus the rule of law slides into the vice of legalism, a kind of *reductio ad absurdum* of the constitutional maxim that for every wrong there must be a remedy.[40] It all seems so fair, so enlightened, so sane. As an example of this tendency, consider the expansion of what constitutes criminal child abuse. Just a few months ago, I read of a prosecution of parents for the obesity of their child. More recently, I read of growing concern among child development experts about parents who impose diets upon their children. Next, I fear, will come more law, for here as everywhere, the public interest is at stake. I heard a story sparked by the Jon Benet Ramsay tragedy suggesting that entering children in beauty contests ought to constitute prosecutable child abuse.[41] The law of parenthood continues to grow apace. Last spring when Bob Knight was called on the carpet, a California psychologist (who had never met Bob Knight) was quoted as saying,

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37. SCHUCK, *supra* note 36, at 425.

38. A cursory glance at the shelves of a law library reveals the extent of increase. In 1926, six volumes of approximately 1000 pages per volume of the Federal Reporter were published. In 1997, twenty-seven volumes at 1600 pages per volume were issued. In 1947, Indiana Acts amounted to 1800 pages; in 1997, 4500 pages. The original Code of Federal Regulations (CFR) published in 1930 totaled 3450 pages. In 1999, the CFR occupied seven shelves.

39. But, as Justice Brandeis warned:

> Experience should teach us to be most on our guard to protect liberty when the Government's purposes are beneficent. Men born to freedom are naturally alert to repel invasion of their liberty by evil-minded rulers. The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding.

Olmstead v. United States, 277 U.S. 438, 479 (1928) (Brandeis, J., dissenting).

40. *See, e.g.*, IND. CONST. art. I, § 12.

41. Many new laws seem to spring from the efforts of parents whose children's' tragic deaths have seemed to impel them towards law reform as the only path to expiation.

in effect, that there ought to be a law against boors, nastiness, and bullies.[42] Wherever one stands on the Knight affair, it is hard to imagine advantage in a clutch of lawsuits by persons he has offended. Some may recall the old cartoon series, "There oughta be a law." Well, maybe we should reverse the presumption: there ought not to be a law. A couple of years ago, Daniel Patrick Moynihan lamented the scaling down of public morals, and he may have been right. Nevertheless, I wonder if a worse problem is the increase in crime stemming from too many criminal laws. Sometimes it is as much the legalizing of politics as the politicizing of law that we should fear.

Just within this University, growth in the number of hierarchies, processes, reviews, forms, and records makes one dizzy. Do I exaggerate? Perhaps a little; but the trend is clear. There is a cost in all this. Indeed, the rule of law itself is undermined when law spreads too far, for its promise includes that of substantial open spaces for personal choice. Moreover, too much law threatens to delegitimatize law, for too much law breeds indeterminacy, inconsistency, randomness of application, the very vices that the rule of law abhors.[43] Too much law engenders suspicion, disrespect, and cynicism. A brave new world of total justice ought to be approached with caution.[44]

Is there a cure? Perhaps not. Perhaps, like the plain language movement, any effort to simplify law is doomed to failure. There is, after all, an irreducible complexity in law.[45] We might, however, take more care to consider the costs of law, and the alternatives to law.

At a minimum, when the temptation to turn to law arises, we ought to undertake informal cost/benefit analyses, keeping in mind the law of unintended consequences. We ought to consider alternatives to law. Rather than top-down ordering, which is the way of law, we ought to consider the virtue of bottom-up controls, more or less informal substantive norms with no author and no identifiable date of origin.[46] As Robert Ellickson observed in his study of the informal norms governing cattle ranchers in the Shasta Valley of California: "[L]awmakers who are unappreciative of the social conditions that foster informal cooperation are likely to create a world in which there is both more law and less order."[47]

The state, after all, is only one source of social control. Alternative sources include intermediary associations, churches, private societies, and the like.

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42. *See* John Strauss, *Secretary Says Knight Berated Her*, INDIANAPOLIS STAR, May 11, 2000, at A2.

43. In the 1999 session of the Indiana legislature, sixty-five bills to toughen the criminal law were introduced.

44. *See* FRIEDMAN, *supra* note 36, at 147-52 (reserving judgment on whether the benefits from pursuit of "total justice" outweigh the costs).

45. *See* R. George Wright, *The Illusion of Simplicity: An Explanation of Why the Law Can't Just Be Less Complex*, 27 FLA. ST. U. L. REV. 715 (2000).

46. *See* ROBERT C. ELLICKSON, ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES 184 (1991).

47. *Id.* at 286.

Effective social bounds often depend most upon arational elements, common narratives, objects and symbols of affection, convictions and proverbs—things that the rule of law finds hard to comprehend. There are places law should not go. Law ought not enter certain areas where privacy, personality, politics, and power work well enough, and often better. As Aristotle observed, "[w]hen men are friends they have no need of justice."[48] So too, we have seen the extent to which in some areas efficiency and general prosperity are best promoted by minimally-regulated markets. In short, idolatry of law threatens to destroy the rule of law. That is the pathology of law, but the rule of law also involves a paradox.

B. The Paradox: The Need for Good People

1. The Paradox.—The rule of law is real, but somewhat fragile. As we have seen, it is made up of and depends upon the existence of certain institutions and a culture of legality and compliance. The paradox here is that to fully understand the operation of the rule of law, we must, in a sense, turn Marshall's dictum on its head: A government of laws cannot exist without good people. 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."[49] More to the present point, for the law to keep its promises, it must be in the hands of persons of good faith, or, as we noted earlier, good faith judges, executives, and legislators. One other group seems to be key to the maintenance of the rule of law, and that group is lawyers.

2. The Central Role of Lawyers.—In our look at the recent presidential election imbroglio, we took comfort in the fact that in times of crisis we usually call out the lawyers and not the troops. De Tocqueville said that lawyers were the American aristocracy.[50] Lawyers operate as the mediators between the stuff of law and the culture; they are the central institutional bearers of our rule of law myth. In a sense, lawyers are the quintessential Americans. Our nation was born in a controversy cast as a legal dispute. We are largely ruled by lawyers. Our judges are lawyers first. Lawyers are the trustees of the rule of law, and upon their virtue rests law's legitimacy. They are the main operatives of the rule of law. When we talk of teaching students to talk, think, and act like lawyers, we are talking of developing their capacity to function faithfully within the conventions that inform the rule of law. What then are the implications for legal education?

3. Implications for Legal Education.—Most of our students will practice law. As a state institution, our principal charge is to train lawyers to operate

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48. ARISTOTLE, NICHOMACHEAN ETHICS, Book VII, 1:1155a, *in* BIX, *supra* note 26, at 95.

49. WILLIAM PENN, CHARTER OF LIBERTIES AND FRAME OF GOVERNMENT OF THE PROVINCE OF PENNSYLVANIA IN AMERICA, *in* COLONIAL ORIGINS OF THE AMERICAN CONSTITUTION 274 (Donald S. Lutz ed., 1998).

50. *See* DE TOCQUEVILLE, *supra* note 21, 283-90.

within the legal system. If law professors begin by disabusing students of the determinacy of law, how shall we end? What knowledge, faith, and professional habits must we instill?

It is a peculiarity of American law schools that their faculties are less and less engaged in the very activity for which they train students,[51] for it is as true in law schools as it is in other university schools and departments that scholarship drives the academic community. And the currently favored form of scholarship mostly looks at law from the outside, often from a perspective supplied by other disciplines. More traditional legal scholarship—doctrinal studies, comprehensive treatises, or textbooks—is considered somewhat pedestrian, not very interesting, of a lower order. Thus, there has developed something of a dissonance between the research and the traditional teaching function, and inevitably, the scholarly impetus leaks into the classroom. At the same time, from the bench and bar there has been a pull somewhat in the opposite direction—for greater experiential modes of learning, such as law school clinics provide.

The result of these opposing forces is a widening divide between the research and teaching function and between law scholarship and law practice. As we are often reminded, less and less do judges or practicing lawyers read or cite law review articles.[52]

I hesitate to be so dramatic as to say that we are seeing a battle for the soul of legal education, but it seems to me that law schools are not holding together very well. Indeed, the place of law schools within the university traditionally has been an uncomfortable one.[53] As anyone who has carried "across the street" the school's recommendations for promotion and tenure well knows, our traditional ways are strange to most scholars. I was attracted to law teaching in part because it seemed to me to offer a career in teaching and scholarship where one had one foot in the university and the other connected somewhat to the workaday world of law practice. It is harder and harder for a single faculty member to maintain that kind of footing, to keep up with law in the academy and the law in action.

That said, I want to make it very clear that I am not denigrating the sort of scholarly work that has become predominant. Much of it is admirable and socially valuable for students, lawyers, lawmakers, and the general public alike; and many of its practitioners are fine teachers and good colleagues. But I do

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51. *See* ANTHONY T. KRONMAN, THE LOST LAWYER: FAILING IDEALS OF THE LEGAL PROFESSION 265 (1993).

52. *See, e.g.*, Philip F. Postlewaite, *Publish or Perish: The Paradox*, 50 J. LEGAL EDUC. 157, 173 (2000). We might liken what is happening in legal education to what happened to religious scholarship in the Nineteenth Century when the study of religion gradually shifted its focus from religious practice and the training of clergy to the study of the phenomena of religion from a scientific, critical, or historical perspective. Rather than teaching how to think and talk about God, the prevailing viewpoint was exteriorized to the critical study of texts and beliefs as social facts. *See* KAHN, *supra* note 20, at ix.

53. *See* Robert E. Rains, *Andrea's Adventures in Law Review Land*, 50 J. LEGAL EDUC. 306, 309 (2000).

think we ought to begin to reconsider how we train lawyers in this country. It is my understanding that most other legal systems train lawyers in a somewhat different way.

In England, for example, law is a department within the university. Undergraduate students major in legal studies. In these situations, the divide between scholarship and teaching is not so great because the purpose is not to train lawyers so much as to teach about the law. Students who wish to become lawyers emerge with a rich perspective about the nature of law, and then enter a period of what is essentially an apprenticeship or concentrated professional training where lawyers teach them how to be lawyers. To a great extent, American medical schools approach professional training in this way: typically the last two years and an extended postgraduate period involve practicing doctors training new doctors to practice. Perhaps we ought to reconfigure legal education in a somewhat similar way. I offer no well-honed models; what must be kept in mind is that we must provide not only education *about* the law but also training *within* the law. Both are conducive to teaching students to be lawyers, but professional training is most essential to the maintenance of the rule of law.

The rule of law is real, but it is subject to a pathology, and it involves a paradox. Its preservation depends upon recognition of its limits, and even more importantly, upon an appreciation of how it works, and the existence of practical skills to keep it working. To maintain the rule of law and to provide good-faith lawyers upon which the rule of law stands, we must both enlighten and train.