CHAPTER ONE

DEFENDING THE RULE OF LAW

The response of the United States to the 9/11 terrorist attack profoundly compromised the rule of law.[1] This book chronicles and evaluates the broad spectrum of efforts to *defend* those foundational principles. In this chapter I define the rule of law, explain why it is indispensable, and offer a framework for analyzing the successes and failures of its defense.

WHAT IS THE RULE OF LAW?

Although lawyers and philosophers have debated the meaning of the rule of law for centuries, there is a broad consensus about its core. Because its content has accreted gradually (and irreversibly), history is a powerful guide.[2] Eight centuries ago rebellious English barons extracted from King John the promises enshrined in Magna Carta:

> [N]o free man shall be seized or imprisoned or stripped of his rights or possessions, or outlawed or exiled, or deprived of his standing in any other way, nor will we proceed with force against him, or send others to do so, except by lawful judgment of his equals or by the law of the land.

The Petition of Right reaffirmed this in 1648.[3] About the same time John Lilburne asserted the right against self-incrimination before the Star Chamber; and William Penn insisted that the charges against him be public, comprehensible, and based on law.[4] In 1679 Parliament stopped the king from evading the writ of habeas corpus by sending prisoners outside the jurisdiction of courts; ten years later the Bill of Rights established that all state actors were subject to law.[5] English

common law prohibited torture as early as the fifteenth century; other European nations followed in the eighteenth century.[6] English accused won the right to a speedy public trial before an independent judge and a jury of their peers, and not to suffer cruel or unusual punishment. The French Declaration of the Rights of Man and the Citizen (1789) and the first ten amendments to the US Constitution (1791) recognized these rights and others: freedom from unreasonable search and seizure, protection against double jeopardy, reasonable bail, representation by counsel of the accused's choice, indictment by a grand jury in serious crimes, confrontation of witnesses, deprivation of property only through due process of law, and freedoms of speech, assembly, association, the press, and religion. Centuries of struggle abolished slavery, whose domination of man by man is the antithesis of the rule of law.[7]

Although international human rights rarely were mentioned before World War II, President Roosevelt's 1941 State of the Union message embraced the "Four Freedoms": speech, expression and worship, and freedom from want and fear.[8] The postwar revision and expansion of the Geneva Conventions strengthened the rights of prisoners of war. Latin American nations incorporated basic rule of law concepts in the 1948 American Declaration on the Rights and Duties of Man; Europe did so in the 1950 European Convention on Human Rights. The Universal Declaration of Human Rights came into force in 1976 and was expanded by the International Convention on Civil and Political Rights and the Convention against Torture. The rule of law was embodied in the postwar constitutions of nations (Germany, Canada, the UK, South Africa, Spain, Switzerland, and the former socialist countries) and supranational unions (the European Union Treaty and the Preamble to its Charter of Fundamental Rights).[9] International bodies repeatedly reaffirm its principles: UN Secretary General Kofi Annan in 2004, a Helsinki Ministerial Council Decision in 2008.[10]

The rule of law also can be approached ontologically. A logical starting point is the Roman law maxim *nulla poena sine lege*, on which civil law regimes have built their ideals of *Rechtsstaat* and *état du droit*. A.V. Dicey paraphrased this: "no man is punishable or can lawfully be made to suffer in body or goods except for a distinct breach of law established in the ordinary legal manner before the ordinary courts of the land."[11] The rule of law also is defined by its opposite – the state of exception – grounded on other Roman law maxims: *necessitas legem non habet* (necessity follows no law) and *salus populi suprema lex* (the people's safety is the highest law), now often invoked as *raison d'état*.[12]

Karl Schmidt, its influential German theorist (and advocate), defined the sovereign as "he who decides on the exception," which "defies general codification."[13] Schmitt warned that the rule of law condemned the liberal state to suicide,[14] a view shared by Justice Jackson.[15] Clinton Rossiter agreed that "in time of crisis a democratic constitutional government must temporarily be altered to whatever degree is necessary to overcome the peril and restore normal conditions."[16] States of exception have been invoked by colonial regimes,[17] during the Cold War, in the "war on crime" – by both the state and vigilantes[18] – and during the present "war on terror." Although some characterize it as pure lawlessness,[19] others see a hyperlegality that perversely empowers the state.[20]

English philosophers conceptualized the rule of law as negative liberty: "a power to do or not to do" (Locke), "the absence of opposition" (Hobbes).[21] Their descendants concur: freedom is "not being interfered with by others" (Isaiah Berlin), "simply to be unconstrained from pursuing whatever goals we may happen to set ourselves" (Quentin Skinner).[22] The horrors of Nazism shaped German scholars. Franz Neumann insisted on "the generality and the abstractness of law together with the independence of the judge."[23] Otto Kirchheimer agreed that "the security of the individual is better served when specific claims can be addressed in institutions counting rules and permanency among their stock-in-trade rather than by reliance on transitory personal relations and situations."[24] The Holocaust convinced Isaiah Berlin of the imperative of human rights.[25] Communism provoked Martin Krygier to champion "opposition to arbitrary exercise of power," which "threatens the dignity of all who find themselves mere objects of power exercisable at the whim or caprice of another."[26] Memories of fascism may have influenced Gianluigi Palombella to argue that the purpose of the rule of law is "to prevent the law from turning into a sheer tool of domination, a manageable servant to political monopoly and instrumentalism."[27] Even without direct experience of oppression, American theorists arrived at similar concepts: "the sense of injustice" (Edmond Cahn), "the liberalism of fear" (Judith Shklar), "freedom from abuse, oppression, and cruelty" (Amy Guttmann), "law is not brutal in its operation; law is not savage; law does not rule through abject fear and terror, or by breaking the will of those whom it confronts" (Jeremy Waldron).[28]

Recently, some philosophers have based the rule of law on a Kantian respect for human dignity and autonomy.[29] The "most essential message of human rights" for Michael Ignatieff was "that there are no excuses for

the inhuman use of human beings."[30] Human rights "help people to help themselves. They protect their agency." Kant's categorical imperative embodies "the idea of moral reciprocity: that we judge human actions by the simple test of whether we would wish to be on the receiving end." Martin Krygier warned that the "arbitrary exercise of power … threatens the dignity of all who find themselves mere objects of power exercisable at the whim or caprice of another."[31] Jeremy Waldron sees law itself as "a mode of governing people that treats them with respect, as though they had a view or perspective of their own to present on the application of the norm to their conduct and situation."[32] Repudiating Nazism, the first, unamendable, article of the postwar German constitution declares: "Human dignity shall be inviolable. To respect and protect it shall be the duty of all state authority."[33]

Many lawyers and philosophers have embraced a procedural concept of the rule of law, partly because it elicits the broadest consensus. Justice Felix Frankfurter wrote in a 1943 opinion: "The history of liberty has largely been the history of observance of procedural safeguards."[34] Justice Robert Jackson stressed the centrality of procedure by asserting – paradoxically – that he "would rather live under Soviet law enforced by American procedure than American law enforced by Soviet procedure."[35] Lon Fuller advocated a "thin" version of the rule of law based on eight principles: the state should act through general rules that are publicly available, prospective, comprehensible, consistent, capable of performance, sufficiently clear and stable to let citizens orient their actions conformably, and administered in ways congruent with their terms.[36] Ronald Cass insisted on "fidelity to rules" that "tell officials how, to what ends, and within what limits they may exercise power."[37] Neil MacCormick places argumentation at the core of law.[38] Waldron takes a similar approach in his list of procedural protections:

A. A hearing by an impartial tribunal that is required to act on the basis of evidence and arguments presented formally before it in relation to legal norms that govern the imposition of penalty, stigma, loss, and so forth;
B. A legally trained judicial officer, whose independence of other agencies of government is ensured;
C. A right to be represented by counsel and to the time and opportunity required to prepare a case;
D. A right to be present at all critical stages of the proceeding;
E. A right to confront witnesses against the detainee;

F. A right to an assurance that the evidence presented by the government has been gathered in a properly supervised way;
G. A right to present evidence in one's own behalf;
H. A right to make legal arguments about the bearing of the evidence and about the bearing of the various legal norms relevant to the case;
I. A right to hear reasons from the tribunal when it reaches its decision that are responsive to the evidence and arguments presented before it; and
J. Some right of appeal to a higher tribunal of a similar character. [39]

The rule of law thus is the philosophical foundation on which nations have constructed civil rights and liberties and the global community has concluded treaties incorporating international human rights. In what follows I will often use those concepts interchangeably.

WHY IS THE RULE OF LAW IMPORTANT?

At the end of *Whigs and Hunters*, E.P. Thompson acknowledged that "concern with the rights and wrongs at law of a few men in 1723 is concern with trivia" compared to contemporaneous evils, like the slave trade and colonialism, or those of his own twentieth century, such as Nazism and liquidation of the *kulaks*.[40] The same criticism might be made of this book: even the worst American rule of law violations since 9/11 – extraordinary rendition, torture, targeted killing, electronic surveillance, civilian casualties, indefinite detention without trial, civil liberties abuses, and distortions of the criminal process (entrapment, military commissions) – seem insignificant next to the costs of America's wars in Iraq and Afghanistan, the shame of its prisons, climate change and other environmental threats, worsening inequality, and mistreatment of immigrants, Native Americans, African Americans, and other minorities.

But Thompson defended his chosen topic. "What is remarkable … is not that the laws were bent but the fact that there was, anywhere in the eighteenth century, a rule of law at all." While acknowledging law's "class-bound and mystifying functions," Thompson showed that the "ruled" "would actually fight for their rights by means of law" and "could actually win a case."

> It is inherent in the especial character of law, as a body of rules and procedures, that it shall apply logical criteria with reference to standards

> of universality and equality. It is true that certain categories of person may be excluded from this logic … But if too much of this is true, then the consequences are plainly counterproductive … The essential precondition for the effectiveness of law, in its function as ideology, is that it shall display an independence from gross manipulation and shall seem to be just. It cannot seem to be so without upholding its own logic and criteria of equity; indeed, on occasion, by actually *being* just … In the case of an ancient historical formation like the law, a discipline which requires years of exacting study to master, there will always be some men who actively believe in their own procedures and in the logic of justice … the rulers were, in serious senses, whether willingly or unwillingly, the prisoners of their own rhetoric; they played the games of power according to rules which suited them, but they could not break those rules or the whole game would be thrown away … There were even occasions … when the Government itself retired from the court defeated. Such occasions served, paradoxically, to consolidate power, to enhance its legitimacy, and to inhibit revolutionary movements. But, to turn the paradox around, these same occasions served to bring power even further within constitutional controls [original emphasis].

Breaking with fellow Marxists who cynically dismissed law as an epiphenomenal instrument of class domination,[41] Thompson concluded:

> [T]he inhibitions upon power imposed by law seem to me a legacy as substantial as any handed down from the struggles of the seventeenth century to the eighteenth … the notion of the regulation and reconciliation of conflicts through the rule of law – and the elaboration of rules and procedures which, on occasion, made some approximate approach towards the ideal – seems to me a cultural achievement of universal significance … an unqualified human good.

The philosopher Michael Oakeshott called the rule of law "the single greatest condition of our freedom."[42]

South Africans who fought against apartheid for nearly half a century appealed to the rule of law. Alan Paton, who published *Cry the Beloved Country* when the National Party first took power, praised the rule of law as "one of the noblest achievements of sinful man … protecting himself against his own cruelty and selfishness."[43] Nobel Prize Winner Nadine Gordimer called the Universal Declaration of Human Rights "the essential document, the touchstone, the creed of humanity."[44] Two leading human rights lawyers concurred. John Dugard found "opportunities for relief" in legal rules; Geoffrey Budlender noted that because "repression and discrimination were, for the most part,

carried out through the mechanism of law," it could be a means of resistance.[45] Elie Wiesel, who survived the Holocaust to devote his life to fighting genocide, called the rule of law the sacred text of a "world-wide secular religion."[46] Michael Ignatieff saw human rights as "the lingua franca of global moral thought."[47] UN Secretary General Kofi Annan viewed them as the "yardstick by which we measure human progress."[48] The conservative British historian Paul Johnson pronounced them "the most important political development of the second millennium."[49]

Even unlikely heads of state feel compelled to pay lip service to the rule of law: Vladimir Putin (Russia), Jiang Zemin and Hu Jintao (China), Robert Mugabe (Zimbabwe), Mohammed Khatami (Iran), Abdurrahman Wahid (Indonesia), Burmese military rulers, Vicente Fox Quesada (Mexico), and Abdul Rashid Dostum (an Afghan warlord).[50] Apartheid South Africa repeatedly proclaimed its respect for law. In 1985 a Nationalist MP claimed that "even South Africa's severest critics readily concede that the standard of the administration of justice in South Africa is of the highest order."[51] Opening parliament the next year, Prime Minister Botha asserted: "We believe in the sanctity and indivisibility of law and the just application thereof." Chinese President Xi Jinping recently called his country's Constitution a "fundamental law," declaring that to "govern the nation by law means to govern in accordance with the Constitution."[52] China subsequently halved its imposition of the death penalty and adopted a new Criminal Procedure Law. The Chief Justice of the Supreme People's Court promised increased judicial independence, transparency, fairness, and professionalism. (But two years later he radically backtracked: "We should resolutely resist erroneous influence from the West: 'constitutional democracy,' 'separation of powers' and 'independence of the judiciary.'") In response to a damning report and resolution by the UN Human Rights Council, North Korea maintained that its citizens enjoyed robust human rights, including freedom of speech and religion and protection from slavery and torture.[53] It introduced a UN resolution praising its own human rights record and insisting it had "nothing to hide."[54] Its envoy claimed that alleged prison camps photographed by the UN were "normal" "reformatories" and "we don't even know the term 'political prisoners.'"[55] With no apparent sense of irony, Turkish President Erdogan justified his declaration of a state of emergency in July 2016 after the attempted coup: "The aim is to rapidly and effectively take all steps needed to eliminate the threat against democracy, the rule of law and the people's rights and freedoms."[56]

Although such rhetoric is intended as public relations, it makes promises that cannot be entirely ignored.[57] Therefore, when international relations realists assert that nations are motivated solely by self-interest,[58] constructivists reply that rule of law and human rights norms shape conceptions of self-interest.[59] Australia, for instance, enacted its first national anti-discrimination law in 1975 after signing the International Convention on the Elimination of All Forms of Racial Discrimination.[60] That UN Security Council resolutions rarely mentioned the rule of law during the Cold War but featured it 69 times between 1998 and 2006 argues for its increasing salience.[61]

Advocates make a variety of claims for the rule of law. For Michael Barkun and Friedrich Kratochwil, it offers the hope of a "third party" outside the state.[62] Michael Ignatieff elaborates:

> Human beings are at risk of their lives if they lack a basic measure of free agency; that agency itself requires protection through internationally agreed standards … when all other remedies have been exhausted, these individuals have the right to appeal to other peoples, nations, and international organizations for assistance in defending their rights. [63]

A human rights lawyer visiting a refugee camp after the 2000 coup in Fiji said the Universal Declaration of Human Rights – prominently displayed and taught to residents – "was having a powerful effect on these people, many of whom were at the lowest point in their lives. As a set of ideals and statement of their rights as human beings, it helped these refugees gain courage and retain their sense of dignity and self-worth."[64]

Arguments for its value transcend political orientation. The libertarian Friedrich Hayek believed that a government "bound by rules fixed and announced beforehand" made it "possible to foresee with fair certainty how the authority will use its coercive powers in given circumstances, and to plan one's individual affairs on the basis of this knowledge."[65] Contemporary neoliberal policymakers contend that the predictability ensured by the rule of law is essential for economic growth.[66] Legal mechanisms redress wrongs that might provoke violence, even revolution, if allowed to fester. Especially at moments of crisis, legal remedies function as a residual glue, embodying values and binding factions that might otherwise rupture. Freedoms of speech, association, and assembly are both prerequisites for democracy and checks on the majoritarian tyranny to which democracy is susceptible. Justices Holmes and Brandeis, on the Supreme Court's liberal wing, saw those

freedoms as the only path toward an otherwise unknowable political truth. Justice Sutherland, a conservative, embraced the same freedoms as a necessary corrective for governmental error.

Others advance utilitarian arguments. Violating the rule of law endangers a country's moral standing to insist that other nations conform, thereby endangering its own citizens, especially those who risk their lives in its defense. Henry Shue warned of torture's "metastatic tendencies," which Darius Rejali documented in excruciating detail.[67] Jeremy Waldron agreed: "if we mess with the prohibition on torture, we may find it harder to defend some arguably less important" prohibitions, such as those against flogging, coerced confessions, the stomach pump, and police brutality.[68] Cesare Beccaria, the eighteenth-century founder of criminology, argued that torture was more likely to produce falsehood than truth.[69] Tom Tyler demonstrated empirically that American disputants' obedience to law is grounded in their beliefs that they have been heard and the decision-maker's procedures are fair, based on disputants' own evaluations of "representation, neutrality, bias, honesty, quality of decision, and consistency."[70] Carroll Seron and her colleagues found that respect for the police depended on New Yorkers' belief that the New York Police Department (NYPD) behaved professionally by not abusing its authority, exerting unnecessary force, indulging in offensive language, or being discourteous.[71]

In response to assertions that we must sacrifice liberty to preserve security, rule-of-law defenders argue that the relative costs and benefits are indeterminable.[72] The notorious "ticking-bomb" hypothetical, constantly invoked to justify torturing one person to save many, presupposes unattainable knowledge about the probability of the threat, the efficacy of torture in eliciting truth, and the impossibility of interdicting the threat by other means.[73] Cost–benefit arguments also tend to obscure the fact that the alleged collective good (security for all) is sought at the expense of individual burdens (loss of liberty or worse) inflicted on a few, who often are targeted because of their beliefs (communism), ethnicity (African American, Japanese American, Arab), or religion (Islam). The rhetorical power of utilitarian arguments (despite their flawed empirical foundation) leads some to respond with deontological claims that rights trump utility and the rule of law is essential to human dignity.[74]

The rule of law has been attacked on several grounds. Critics disparage it as historically and culturally specific, even imperialistic.[75] Some formulations are certainly guilty. Dicey identified the rule of law with the common law's preference for judicial decisions over the

civil law's comprehensive codes.[76] Almost a century later Thibaut and Walker displayed an equally parochial conviction about the superiority of common law accusatorial process to civilian inquisitorial procedure.[77] But the German ideal of the *Rechtsstaat* antedates the common law conception of the rule of law and arguably is more coherent (even if it never attains the pandectist ideal). Apologists for authoritarian regimes reject the rule of law in the name of uniquely "eastern" or "nonwestern" conceptions of justice. The Central Committee of the Chinese Communist Party declared that "socialist rule of law must uphold the party's leadership."[78] Similar claims are made by some religions, especially fundamentalist Islam. Arguments for cultural relativism may be more persuasive in the rule of law's contested penumbra: issues such as abortion or marriage equality regardless of sexual orientation. But there is strong historical evidence that, given a choice, the subjects of authoritarian regimes would prefer core rule-of-law values: witness the aftermath of the 1989 fall of the Berlin Wall (including the later "color" revolutions), the Arab spring (especially Tahrir Square), the 2014 demonstrations in Hong Kong (not to mention Tiananmen Square a quarter-century earlier), and the millions of migrants voting with their feet. Communist and many developing nations prioritize economic and social rights over political and civil rights; but those categories are not inherently incompatible.

Nevertheless, two criticisms must be taken seriously by rule of law advocates. First, the powerful can use it as a weapon to preserve their prerogatives. For decades American courts invoked substantive due process to nullify laws protecting workers and strike down the New Deal response to the Great Depression. They applied antitrust law to prevent workers from organizing and deployed the labor injunction against strikes. Herbert Wechsler's critique of *Brown* v. *Board of Education* in the name of "neutral principles" anticipated (and legitimated) the numerous attacks on affirmative action.[79] The Supreme Court has used the Fifth Amendment's "takings" clause to abrogate local land use regulation.[80] The Second Amendment has frustrated efforts at gun control, contributing to untold numbers of deaths. Corporations have interposed the Fourth Amendment against enforcement of regulations promoting worker health and safety and protecting the environment. Most notoriously, the Court has extended First Amendment protections from individuals to corporations and from speech to money, striking down campaign contribution laws that seek to level the electoral playing field[81] and letting closely held for-profit corporations deny employees