

Introduction: Is the Rule of Law Waning in America - 12th Annual Clifford Symposium on Tort Law and Social Policy

Stephan Landsman

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INTRODUCTION

*Stephan Landsman**

What is the rule of law? Is it waning in America? And, if so, should we be concerned? These and myriad other questions confront the nation as it struggles with natural and political emergencies, tort reform, the disappearance of trials in both civil and criminal cases, and disputes about judicial selection and independence.

The Twelfth Annual Clifford Symposium on Tort Law and Social Policy gathers together a multitalented array of scholars to address these questions about the rule of law. Included in this group are psychologists, economists, political scientists, sociologists, and, of course, legal scholars. Through the lenses of their different disciplines, they attempt to define the nature of the rule of law and measure its value in American society.

The Symposium begins with a pair of papers that, in very different ways, focus on tort reform and its implications for the rule of law. Professor Catherine Sharkey¹ examines creeping tort reform through “preemption preambles” in agency rulemaking, while Professor John Fabian Witt² explores the challenge of regulating a plaintiffs’ bar that is often free of market controls when pursuing tort claims. Their articles remind us of the intimate connection between the rule of law and what happens in America’s courtrooms. Professor Robert Burns³ continues this focus on the courtroom by asking if our trial process reflects our concern with the rule of law. He argues that it does, to a significant extent, and that there is a lot of value in our adversarial approach. This observation is buttressed by the work of Professors Theodore Eisenberg and Geoffrey Miller,⁴ who present data regarding 2800 contracts filed by major corporations with the Securities and

* Robert A. Clifford Professor of Tort Law and Social Policy, DePaul University College of Law; A.B., Kenyon College; J.D., Harvard University.

1. Catherine M. Sharkey, *Preemption by Preamble: Federal Agencies and the Federalization of Tort Law*, 56 DEPAUL L. REV. 227 (2007).

2. John Fabian Witt, *Bureaucratic Legalism, American Style: Private Bureaucratic Legalism and the Governance of the Tort System*, 56 DEPAUL L. REV. 261 (2007).

3. Robert P. Burns, *The Rule of Law in the Trial Court*, 56 DEPAUL L. REV. 307 (2007).

4. Theodore Eisenberg & Geoffrey P. Miller, *The Flight from Arbitration: An Empirical Study of Ex Ante Arbitration Clauses in the Contracts of Publicly Held Companies*, 56 DEPAUL L. REV. 335 (2007).

Exchange Commission in 2002. Only 11% of those contracts opted out of judicial review by embracing arbitration rather than courtroom litigation—a striking vote of confidence in the judicial branch by big business.

In the next piece, Professor Samuel Issacharoff⁵ explores the impact of the rule of law on the way business is conducted in the United States and elsewhere. He suggests that the American approach to regulation, which most often relies on ex post review (primarily by the courts at the behest of private litigants), yields substantial economic benefits because it dramatically lowers impediments to market entry. He reminds us, however, that in such a setting, curtailing ex post legal proceedings poses a serious risk of undermining accountability and obedience to socially beneficial regulation. In the very different setting of criminal sentencing, Professor Nancy King⁶ examines the pernicious effect on the rule of law of the growing practice of insulating the criminal process from any sort of review by means of prosecutorial insistence on the waiver of appellate rights in exchange for a plea bargain. Returning to the question of the value added by adherence to the rule of law, Professor Gillian Hadfield⁷ focuses our attention on the social contribution of skilled lawyers. She argues that their combined efforts constitute considerable “legal human capital” that can substantially boost the productivity and well-being of a society.

Professor Herbert Kritzer⁸ shifts our attention to the question of judicial selection and the issues it raises for the rule of law. Kritzer sees politics as an unavoidable component of the judicial selection mechanism but suggests ways to improve its harmonization with our concerns about neutral and fair judging. Professor Brian Tamanaha⁹ follows and explores a related topic—the temptation to treat the law and judging as strictly instrumental activities driven by a desire for certain outcomes. He challenges the notion that the law should be viewed as an empty vessel open to capture and manipulation by judges.

5. Samuel Issacharoff, *Regulating After the Fact*, 56 DEPAUL L. REV. 375 (2007).

6. Nancy J. King, *Regulating Settlement: What Is Left of the Rule of Law in the Criminal Process?*, 56 DEPAUL L. REV. 389 (2007).

7. Gillian K. Hadfield, *Don't Forget the Lawyers: The Role of Lawyers in Promoting the Rule of Law in Emerging Market Democracies*, 56 DEPAUL L. REV. 401 (2007).

8. Herbert M. Kritzer, *Law Is the Mere Continuation of Politics by Different Means: American Judicial Selection in the Twenty-First Century*, 56 DEPAUL L. REV. 423 (2007).

9. Brian Z. Tamanaha, *How an Instrumental View of Law Corrodes the Rule of Law*, 56 DEPAUL L. REV. 469 (2007).

Professor Robert MacCoun¹⁰ looks at a very different aspect of the rule of law, the reach of its “shadow” in criminal matters involving drug use. He argues that America’s rigid legalism on the issue of drugs has shut off opportunities to pursue strategies that reduce the collateral harms arising out of drug use. This raises the question whether there are some places where formal law is an impediment to social improvement.

Professor Bernadette Meyler¹¹ returns us to the core question of the Symposium—whether the rule of law is waning. She considers the relationship between law and emergency, arguing that different sorts of emergencies warrant different responses. Economic exigency may justify temporary suspension of a host of market-based legal principles, while political threats may not justify nearly as sweeping a suspension of legal rights. As changes are made that curtail political rights, we may seriously jeopardize the rule of law.

Next, Professor Jean Sternlight¹² considers the claim that alternative dispute resolution (ADR) mechanisms may clash with the rule of law. She contends that, in light of the experience of countries where ADR has been successfully used as part of rule of law reform efforts, it may provide a way around stagnant legal systems and help foster social harmony that might be threatened by legal contention.

The Symposium continues with four papers by scholars using social science methods to assess Americans’ attitudes about the rule of law. The first of these comes from Professor James Gibson.¹³ It surveys public attitudes towards law and finds remarkably high levels of support for the established legal machinery. American views on this question are significantly more supportive of judicial processes than those of many other societies, and have not diminished despite recent threats to the nation’s security. Professor Michael Saks and his colleagues¹⁴ follow with a fascinating experimental study that indicates a more nuanced view among the population—one influenced by the importance of the rules in question and the motives for violating them.

10. Robert J. MacCoun, *Testing Drugs Versus Testing for Drug Use: Private Risk Management in the Shadow of Criminal Law*, 56 DEPAUL L. REV. 507 (2007).

11. Bernadette Meyler, *Economic Emergency and the Rule of Law*, 56 DEPAUL L. REV. 539 (2007).

12. Jean R. Sternlight, *Is Alternative Dispute Resolution Consistent with the Rule of Law? Lessons from Abroad*, 56 DEPAUL L. REV. 569 (2007).

13. James L. Gibson, *Changes in American Veneration for the Rule of Law*, 56 DEPAUL L. REV. 593 (2007).

14. N.J. Schweitzer, Douglas J. Sylvester & Michael J. Saks, *Rule Violations and the Rule of Law: A Factorial Survey of Public Attitudes*, 56 DEPAUL L. REV. 615 (2007).

Although the rule of law is highly valued by Americans, they appear (at least in this study) sensitive to context when applying it.

Professor Susan Silbey¹⁵ shifts from a quantitative to a qualitative focus by exploring two striking examples of the way the law enters the lives of normal people and how they, in turn, come to live and experience the law. Finally, Professor Tom Tyler¹⁶ draws our attention to the credibility authorities establish if they adhere to law's rules. When the government lives by the law's dictates, its power is enhanced. When the law is put aside, deference is eroded. While Americans' support for principles is high, the same cannot be said about support for officials who turn their backs on principle.

This Symposium offers a rich mix of views about the status of the rule of law in the nation today. What it makes clear is how important the rule of law is to America's social fabric and how seriously Americans take challenges to our allegiance to lawfulness and fair process.

15. Susan S. Silbey, *Talk of Law: Contested and Conventional Legality*, 56 DEPAUL L. REV. 639 (2007).

16. Tom R. Tyler, *Does the American Public Accept the Rule of Law? The Findings of Psychological Research on Deference to Authority*, 56 DEPAUL L. REV. 661 (2007).