

Rule of Law Talk

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Rebellion is afoot!

In Shakespeare's *Henry the VI* Dick the Butcher plots to overthrow the government. "The first thing we do," he says, "let's kill all the lawyers."

Perhaps Dick the Butcher thought the world would be a better place without lawyers. Or, perhaps, he thought that lawyers would stand in the way of his plan to rule England.

Why would Dick the Butcher fear lawyers? Because lawyers are an integral part of the "rule of law." And if the law ruled, then Dick the Butcher and his friends could not.

I am here today to talk about the rule of law and why the rule of law is important to all of us as citizens of this great county. In the process, I will discuss the role that judges, attorneys, and – most importantly – you, as American citizens, play in protecting and preserving the rule of law in our society.

As Americans, we are so immersed in the rule of law that we don't actually think about it. Yet it is a daily part of our lives literally from cradle to grave, from the issuance of our birth certificates to the probating of our estates - and it is a part of

every aspect of our lives in between. It governs our transactions, our interactions, and our transgressions.

But, what is “the rule of law”?

It is the principle that the law applies equally to everyone, that no person is above the law. You may have seen a statue of the woman [raise your right hand] holding up the scales of judgment. She is wearing a blindfold, symbolizing that - under the rule of law - justice is blind.

Summed up in two words the rule of law is “equality” and “fairness” - two things that would have spoiled Dick the Butcher’s plans.

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Let’s begin our look at the rule of law in the criminal justice system. And in doing so, let’s consider something more fundamental – our freedoms.

In high school many of us read – or had to read - “A Tale Of Two Cities,” Charles Dickens’ novel of the French Revolution. As you may recall, that book tells the story of a father imprisoned because – although he had done nothing wrong – he had angered a nobleman; then, after the revolution, it is the story of a husband who was imprisoned because – although *he* had done nothing wrong – he *was* a nobleman.

When we read that book we were outraged! It wasn’t fair. It wasn’t just. How could it happen? It could happen because, before the French revolution, there was the rule of the royalty and, after the revolution, there was the rule of the mob.

Compare this to our American system of justice: If you are accused of a crime you have the right to a lawyer, you have the right to a fair trial, you have the right to

have your case decided by an impartial judge or jury. You don't have to prove your innocence. The burden is on the government to prove – beyond a reasonable doubt – that you are guilty of the crime.

Of course, it is easy to get applause at a political rally by complaining about criminals being set free on technicalities, but it is those technicalities represent the fundamental rights that protect you and me from being hauled out of our beds in the middle of the night, thrown into prison, and left to rot like the characters in “A Tale Of Two Cities.” Or like so many others across the globe today.

Now, I'm not saying that our criminal justice system is flawless. Sometimes guilty people do go free. Worse, sometimes innocent people are convicted. But the reality is that our system, with all its flaws, is still the best, fairest system we've come up with to balance the rights of the individual, on one hand, with the power of the government, on the other.

While we all hope to avoid the criminal justice system, another aspect of the rule of law affects us every day: the civil justice system.

When we fill up our gas tanks we know that the price won't change when we go in to pay. When we go to work we know that our employer can't pay us less than agreed. And when we deposit our paychecks in the bank we know that the money will be there to withdraw later.

And because we know these things we are more willing to buy, to sell, to save, and to invest – the things that make our economy grow, that create jobs, and that allow us to sleep soundly at night knowing that our financial wellbeing is not at the mercy of the local warlord or whichever political party is in power.

In short, the rule of law provides certainty. While we may not always agree with the law, at least we know what it is and we can plan accordingly.

Of course, there are times when our plans go awry. And there are times when disputes arise. How should these disagreements be resolved?

In ancient times the answer was brute force -- the powerful took what they wanted and the powerless were left to fend for themselves. In fact, this still occurs in many places around the world. But under the rule of law any person -- regardless of station or birth -- can take his or her dispute to court for a resolution by an impartial judge or jury. They say “you can’t fight city hall.” But the fact is that you can fight city hall because of the rule of law.

As with the criminal justice system, the civil justice system is not perfect. But, as with the criminal justice system, it is the best system that we have devised to resolve disputes peacefully and fairly, and to allow folks to air their grievances, obtain a decision, and move on with their lives.

For most of us, most of the time, the rule of law is only important because it provides the certainty and protection that allows us to go through our day-to-day lives - we benefit from the rule of law without consciously thinking about it. For us, the judicial system is a lot like a hospital emergency room: We hope we never have to use it, but we are glad it is there when we do.

As powerful a force as the rule of law is, it is surprisingly fragile.

In 1954 the Supreme Court of the United States ordered the integration of the Little Rock school district. Many people disagreed with the decision. The governor of Arkansas called out the National Guard to prevent integration.

The Supreme Court had no independent power to enforce its decision. What to do about Arkansas rested on the shoulders of President Eisenhower: Take the politically popular approach and do nothing, or call out the army to enforce the Supreme Court's order? He chose to call out the army.

He chose the rule of law over the rule of popular opinion.

But it is not just presidents who have a role to play. The rule of law is like a stool with three legs - judges, lawyers, and citizens - and rule of law only supports us when we all do our part to support it. Let's look at each of these "legs" in turn, beginning with judges.

It sounds pretty silly to say it, but the primary job of judges is to judge. To decide. To resolve disputes. The issue may be one of fact – who is telling the truth? Or one of law – what is the rule to apply to the facts? Regardless, for the rule of law to work, for the system to be as fair as possible, judges must be impartial. Like baseball umpires they call balls and strikes without regard to which team is batting.

Having impartial judges means having judges who will make unpopular decisions when the facts or the law requires it. While it is easy for us to armchair quarterback and second-guess the courts, often a closer look reveals that the courts have reached the right result.

For example, several years ago a woman was awarded two million dollars in damages against McDonalds when she spilled coffee on her lap. The headlines made us all wonder: Two million dollars for a coffee spill? Where do I sign up? And, in any case, how could McDonald's be at fault? She is the one who spilled the coffee!

From what you've heard so far, how many of you think that is an outrage?
[raise your hand]

[wait for show of hands]

“Now,” as Paul Harvey said, “for the rest of the story.”

If we read beyond the headlines we find that the woman suffered third degree burns, was hospitalized for eight days, and underwent skin grafting. Then we learn that McDonalds served coffee at a higher temperature than its competitors, and had received more than 700 complaints about that high temperature. And, finally, we learn that McDonald's made payments to folks who had been injured by its scalding coffee in the past.

In short, McDonalds knew its customers were being injured. Still, it kept its coffee at the same high temperature. Why? Because the higher temperatures improved sales and increased profits.

Once you have more facts the outcome doesn't seem quite so outrageous.

Having impartial judges means having judges that wait until they have heard all of the relevant facts and reviewed the law before making a ruling in any particular case. You have seen judges facing confirmation or running for election being asked “how would you decide?” this or that issue. And you may have been surprised to hear them say: “I can't answer that question.” That is the rule of law in action – the

candidate is saying that he or she is going to be fair and impartial and isn't going to decide a case until all of the facts are in.

Don't get me wrong, judges aren't perfect. I know this because, from time to time, they make a mistake and rule against my clients. But, just as umpires are crucial to baseball, fair and impartial judges – the first leg of the stool that supports the rule of law - are essential to the proper operation of our legal system.

The second leg of the stool is lawyers.

Attorneys provide three services for their clients: First, they help their clients understand what the law is and what it requires. Second, they draft wills, contracts, and other documents to ensure that their clients' interests are protected. Finally, they act as advocates.

As I'm sure everyone here knows, a lawyer is a zealously represents the the client. The theory of our American judicial system is that the best decisions are made on a level playing field. When both sides have able lawyers then a fair and just outcome is more likely.

This approach means that sometimes lawyers represent unpopular clients.

Criminal defense attorneys are often asked "how can you represent someone who is guilty?" But how do we know whether a person is guilty until a judge or jury has heard all the evidence and made a decision? Is it enough that a witness, or a police officer, or a prosecutor accuses the person of the crime? The rule of law tells us that the government must prove its case beyond a reasonable doubt. Thus, the criminal

defense attorney makes the government show that it has done its homework and has accused the right person.

But lawyers are not only zealous representatives of their clients. They are also “officers of the court.” As an officer of the court, the attorney has taken an oath to play by the rules. Yes, lawyers are zealous advocates for their clients, but they advocate within the rule of the law.

Like judges, attorneys are not perfect. But without them our legal system would not be as fair.

I’ve talked about judges and lawyers, but what about the third leg of the stool, you and your fellow citizens? What is your role in protecting the rule of law? There are actually three roles you may be called upon to play: witness, juror, and elector.

Let’s start with your role as a witness.

Many disputes are disputes of fact – who said what, or who did what, when. A vital part of resolving those disputes is the testimony of witnesses. Simply put, without the testimony of witnesses there is no rule of law.

And let me tell you a little secret about testifying: it’s easy. All you have to do is tell the truth. Something you already know. Something your parents taught you early on and something that you have taught or will teach your children.

Whether testifying in a courtroom or in a deposition outside of a courtroom, your participation is crucial to the functioning and survival of the American judicial system.

Turning to your role as a juror:

Present company excepted, people are not perfect. Witnesses may see the same event and have different memories of what happened. Often the task of sorting all this out falls on the judge.

But recall that the rule of law is about fairness. What if one of the parties to a dispute doesn't believe – for whatever reason – that the judge can be fair? In our system that problem is solved in many types of cases by giving each party the right to ask that a jury decide the facts.

Remember those hospital emergency rooms that we all hope we'll never have to use?

None of us in this room wants to have a dispute end up in court but, if we do, we want the option to say "I want my case decided by a jury." We only have that option because our fellow citizens are willing to set aside their work and personal lives to ensure that this cornerstone of American justice endures.

Have any of you been on a jury? [raise your hand]

[wait for show of hands]

[IF AT LEAST ONE HAND IS RAISED:] Thank you for your service.

[IF NO HANDS ARE RAISED:] Well, you can all look forward to this fascinating opportunity to serve your country.

In addition to being a witness or a juror, in Wisconsin you have a role to play as a voter in judicial elections.

America is the great country it is because every citizen, regardless of their circumstances, has the opportunity to work hard and to go as far as their talents allow. People seize that opportunity because they sense that hard work will be rewarded, and that the system is fair.

All of this can be lost if we choose judges who pre-judge, who are biased, or who do not have the integrity to make an unpopular decision when the facts or the law require it.

Unfortunately, the negative ads and the “he said, she said” of partisan politics is increasingly infecting our judicial elections. So if we want to elect the best judges then we have to look beyond those ads.

The question we should be asking ourselves is: Which candidate is most likely to give everyone a fair shake? Which candidate has an open mind and will decide cases – perhaps a case that you are involved in – based on the rule of law rather than the rule of money, of power, or of a pre-conceived philosophy?

So to sum up:

The rule of law is a goal. Being humans, it is a goal that we can never perfectly achieve. But the cost of not reaching for that goal is high.

If you look around the world you can see how easy it is to lose the rule of law. Indeed, just south of the border in Mexico we can see what life would be like if drugs, guns and money – rather than fairness and equality – ruled our daily lives.

By working together - judges, lawyers, and citizens - we protect the rule of law promote the American system of justice, and better assure fairness and equality.

So, I am here today to ask you to do three things:

First, if called upon to be a witness, testify truthfully.

Second, if called for jury duty, serve patriotically.

Finally, when you step into the polling booth, vote for the judicial candidate that you believe is most likely to be fair and impartial.

Thank you very much for your time. I will be happy to take a few questions.

Some possible questions to expect:

- What can we do about “judicial activism”?
- How do you get past the 30 second ads – how do you decide who to vote for in judicial elections?
- What do you say to those that think that the system is skewed to the rich, who can afford better lawyers (e.g., O.J.)?
- Will the politicization of judicial elections continue?
- Topical questions (for example, questions about Supreme Court confirmation hearings when there is a vacancy on that court, or questions about civil or military courts for terrorists when that issue is in the news)