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It is an honor to be invited to address you at this celebration of the silver anniversary of the Federal Bar Association for the Western District of Washington. Please accept my congratulations on the health, longevity, and high importance that your organization has achieved during the past quarter century. I want to thank in particular your President, Kevin Swan, for inviting me. He had the kindness (and I hope not the bad judgment) to remember his old Federal Courts professor at the University of Washington Law School, and to imagine that I might have something of interest or value to say to you tonight.

The title of my talk is "What is the Rule of Law?"—and its subtitle is "Perspectives from Central Europe and the American Academy." I represent the "American Academy" part, and as I will make clear in a little while, the other part comes from my sustained engagement, over the past ten years, with legal theorists and political philosophers in the Republic of Slovenia.[1] Slovenia, by the way, is a nation that was created twelve years ago as the northernmost of those "breakaway" republics of the former Yugoslavia.

Before I begin developing my theme, permit me to say a relevant word or two about my own personal background. For nearly a decade I was a partner in the litigation department of a large San Francisco law firm, before rising like a Phoenix, seventeen years ago, from the ashes of law practice and into the rarefied air of the Ivory Tower. Now you will recall that the Phoenix is a kind of bird, and some of you may even be tempted to say that what we professors do in academic law is often a bit bird-brained. To those of you who think this I will even admit that I specialize in what you might be tempted to call the most bird-brained and useless academic field of all—the philosophy of law. Nevertheless, if the Phoenix has a bird's brain it also

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1. For more about this collaboration, see Marijan Pavčnik & Louis Wolcher, *A Dialogue on Legal Theory Between a European Legal Philosopher and His American Friend*, 35 TEX. INT'L L.J. 335 (2000).

has the ability to fly up for a bird's eye view, and I hope that this means we can profitably think together about the Rule of Law from a "bird's eye view," at least for the next twenty minutes or so.

At the time of our nation's founding, John Adams declared, in a very famous epigram from his *Novanglus Papers*,[2] that the most important characteristic of a democratic republic consists in its being "a government of laws and not men."[3] Since men are not the only kind of people who can acquire power these days (thankfully), I will take the liberty of updating Adams' saying by deleting the word "men" in favor of the gender-neutral term "people." Having done so, I surmise that a lot of people in this room would probably say that they know exactly what Adams' epigram means. But I have to confess to you that I am not one of them. Taking Adams' saying as our initial indication of the Rule of Law, I for one am prone to wonder, *What on earth does this "Rule of Law" idea mean? And does it mean the same thing everywhere?* I will take these as my two guiding questions tonight.

The habit of everyday life is usually not to question things too often or too rigorously. But the utter *questionability* of the so-called "Rule of Law" was brought home to me vividly in the early nineties, shortly after the fall of the Berlin Wall, and after the breakup of the Soviet Union and the former Yugoslavia. Due to a series of international exchanges and a Fulbright award, I was able to acquire close professional and personal ties with scholars at the University of Ljubljana School of Law, in Slovenia. This small country achieved its independence in 1990 (for the first time in one thousand years, by the way), and its intellectuals were (and still are) struggling to think through and implement the meaning of "Democracy" and the "Rule of Law" in a country that had officially known nothing but the social and economic system of Communism and its official ideology for half a century. Although theirs is a *genuine* struggle for democracy and the rule of law—I am sure of that—it is still worth asking what *kind* of democracy and what *kind* of rule of law they are struggling to achieve. One fact that made me really think about the ambiguity of the meaning of the Rule of Law came from a survey of Slovene public opinion that was conducted in 1996: Only twenty-four percent of those surveyed said that they trusted the law courts and lawyers in Slovenia—indeed, the study showed that the Slovene president, their police, their army, their educational

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

3. *Id.*

institutions, and even their *banks* were all trusted at a significantly higher level than were the courts.[4] What was going on? And what does this apparent contempt for law entail for the meaning of the Rule of Law in their country and in ours?

Before I attempt to answer this question, let me say something about John Adams' epigram that many of you may find rather shocking. There is a very important sense in which the idea that democracy entails a "government of laws and not of men" is *complete and utter fantasy and nonsense.* I am referring explicitly to the idea that legal texts—rules, decisions, principles—somehow *automatically* determine the actions of those who apply them. I say that this idea is complete and utter fantasy and nonsense because it incorrectly imagines that "laws" and "humans" reside in two utterly different logical spaces—that THE LAW represents a realm in which musty documents from the past push or can push people in the present like so many levers on a complicated machine, and that humans, who are fated always to live their lives in the present, are or can be miserable slaves of the documents that they or their ancestors deposited in the past.

In the curious dreamworld depicted in Adams' epigram, a great reversal is enacted: Our own previous creations—legal texts and practices—come to rule over us and dominate us like the multitude of self-replicating brooms that are brought to life by the sorcerer's apprentice (played by Mickey Mouse) in the famous Disney cartoon. In this picture THE LAW dominates humans, rather than the other way around. This dehumanized idea of law, wherein the human subject "becomes the object of his object" (to quote the Chilean legal philosopher Rolando Gaete[5]) is brilliantly and vividly depicted in Franz Kafka's great parable "Before the Law."[6] In that parable a man from the country comes to the Door of the Law seeking admittance—just like everyone else, he too wants to receive justice. But the doorkeeper will not let him in, and so the man sits down and waits to be admitted later. In fact, as he waits and waits the days grow into months, and the months into years, until finally the man nears the end of his own life, without ever once having been allowed admittance to the Law. As the man is dying, he asks the doorkeeper just one last question: In all my years of waiting, he

4. *See* Louis Wolcher, *Pavčnik's Theory of Legal Decisionmaking: An Introduction*, 72 WASH. L. REV. 469, 479 n.34 (1997).

5. Rolando Gaete, *Technological Thinking and the Identity of Modern Law*, *in* BULLETIN OF THE INTERNATIONAL ASSOCIATION FOR THE SEMIOTICS OF LAW 6 (No. 9, Feb. 1993).

6. FRANZ KAFKA, THE TRIAL 267–69 (Willa & Edwin Muir trans., 1937).

wonders, why is it that no one *else* has ever come seeking admittance to the Law? At the very moment of the man's demise, the doorkeeper at last deigns to answer his question; the doorkeeper bends down and whispers: "No one but you could gain admittance through this door, since this door was intended for you. I am now going to shut it."[7]

Kafka's parable appears in his novel *The Trial*.[8] The book as a whole depicts a bureaucratic nightmare-world corresponding to the fairy-tale world that is projected by John Adams' sunny phrase "a government of laws and not of men." In Kafka's world dehumanized legal institutions relentlessly grind people down, and human freedom and spontaneity are cruel illusions. But I have always thought that the good news in this otherwise depressing novel comes from the parable "Before the Law," for in its deepest meaning this parable says that legal domination and emancipation are both absolutely impossible without constant human participation. It took the gatekeeper's presence and implicit threats to keep the man outside the Law, just as the man also kept himself outside the law by failing to attempt an unauthorized entry. As for the man's being before the Law in the temporal sense of the word "before," the primordial phenomenon of time assures that he could never in principle have entered the door anyway! For there is no pause or gap in time—no stasis of time between the past and the present—that could ever be filled by such a thing as THE LAW *before* it gets received and applied in just the way that it *is* received and applied. Therefore humans must always make their appearance in time before the Law can appear, and never the other way around.

All of this implies that neither Kafka's nor Adams' worlds are even remotely possible, metaphysically speaking. This is because legal texts always require *interpretation*, and interpretation is always a *human* act. The irruption of the human being in the act of interpretation occurs even in the so-called "easy" case, where just *this* unique set of facts must be subsumed (by a human!) under a general rule that never explicitly refers to these particular facts as such. Even the quintessentially clear rule of chess that "Bishops can move only on the diagonal" contains nothing within its four corners about *this particular move in this particular game.* Some*one*—a human—must *make* the rule apply in every instance of its application. It was Plato, in the *Phaedrus*,[9] who first drew attention to the fact that written

7. *Id.* at 269.

8. *Id.* at 267–69.

9. Plato, *Phaedrus*, *in* THE COLLECTED DIALOGUES OF PLATO 475–525, at 521 (Edith Hamilton & Huntington Cairns eds., 1961).

words can never "speak" what they mean, since they themselves have no understanding.[10] Only the one being who is endowed with *logos* (the power of speech) has understanding, and that being is none other than the human being.

It seems to me that this obvious but nonetheless profound truth shows that each of us in this room is morally *responsible*, every day and every minute, for keeping alive all aspects—good *and* bad—of the social world that we inhabit. We do law—it does not do us. It follows that the most we could ever achieve is "*a government of laws interpreted by humans*," and that this state of affairs could never fairly be put into opposition to Adams' so-called lawless "government of men." I know that it may sound a bit sacrilegious to say it, but both tyrannies and democracies happen to be governments "of men (and women)"—it's just that they are different *kinds* of human ordering. From this point of view, even the practice of so-called judicial "strict constructionism" is not exempt from the fundamental truth that *humans apply law*, and not the other way around. To paraphrase von Clausewitz's famous remark to the effect that war is the continuation of politics by other means,[11] it seems to me that "strict constructionism," "plain meaning," and the jurisprudence of "original intent" are, notwithstanding their pretensions, really just the continuation of interpretation by other means. Indeed, these practices may actually *reverse* von Clausewitz's epigram: for legal interpretation and application (considered as quintessentially "political" acts) are, as Foucault suggests, really the continuation of *war* (between classes and individuals) by other means.[12] Is it not possible to gain an insight into the nature of law by viewing the venue of the legal decision as a battlefield that is littered with the metaphorical corpses of the losers? Indeed, the corpses are no longer metaphorical in the case of the administration of the death penalty. In exercising the power over life and death, the judicial system reveals what Walter Benjamin calls "something rotten in law"[13]—namely, the secret that law is human violence

10. In MARTIN HEIDEGGER, PLATO'S SOPHIST 238 (Richard Kojcewicz & Andrè Schuwer trans., 1997), Plato's rhetorical question about the nature of the written word in the *Phaedrus* dialogue is beautifully translated as follows: "[D]o you really believe that what is written down could speak, as if it had understanding?"

11. "War is not merely a political act, but also a political instrument, a continuation of political relations, a carrying out of the same by other means." JOHN BARTLETT, FAMILIAR QUOTATIONS 448 (15th ed., 1980), (citing KARL VON CLAUSEWITZ, VOM KRIEGE (ON WAR) (1833)).

12. MICHEL FOUCAULT, SOCIETY MUST BE DEFENDED 165 (David Macey trans., 2003).

13. Walter Benjamin, *Critique of Violence*, *in* WALTER BENJAMIN, REFLECTIONS, ESSAYS, APHORISMS AND AUTOBIOGRAPHICAL WRITINGS 286 (Peter Demetz ed., E. Jephcott trans., 1986).

through-and-through, and that it reaffirms itself *as* violence each time it hands down a judgment.

When I was practicing law—and I conducted a dozen or so full-blown trials and countless settlements in my years in the trenches—it became manifestly clear to me how little "law" there is in the Law. The skill and intelligence of the lawyers, the politics and peccadillos of judges, the prejudices of juries, the sheer manipulability of legal texts and emotional responses, not to mention the constructibility of the "facts," the brutal reality that wealth matters enormously to the ability to gain access to the law and to be successful at it: all of these factors, repeated countless times in my practice, showed me that the "Rule of Law" names a particular kind of rule of people, and not some radically pure kind of social arrangement. The Legal Realists of the 1920s and 30s taught us all a valuable lesson when they demonstrated, in field after field of law, the fundamental indeterminacy of legal materials considered as mere "texts," and the ability of the wealthy and the powerful to have a disproportionate share of influence in those important interpretive moments when human beings use the law as a justification for violence.[14] As the great and controversial German legal theorist Carl Schmitt wrote, in his 1922 book *Political Theology*: "Like every other order, the legal order rests on a decision, and not on a norm."[15] The Slovene philosopher Slavoj Žižek recently gave us this useful formulation of the unavoidable implication of Schmitt's decisionism for the meaning of the Rule of Law: "The rule of law ultimately hinges on an abyssal act of violence (violent imposition) grounded only in itself: every positive statute to which this act refers in order to legitimate itself is self-referentially posited by this act itself."[16] In speaking about the insight that there is an important sense in which people's actions *are* law, I would be remiss if I did not also mention America's own John Chipman Gray, whose important book, *The Nature and Sources of the Law*, attempted to demonstrate that in a democracy the ultimate sovereign power to declare "what the law is" does not really reside in the people or their legislature, but

14. *See, e.g.*, WILLIAM FISHER III ET AL., AMERICAN LEGAL REALISM (1993) (collection of articles written by American Legal Realists between 1881 and 1950).

15. CARL SCHMITT, POLITICAL THEOLOGY: FOUR CHAPTERS ON THE CONCEPT OF SOVEREIGNTY 10 (George Schwab trans., 1988) (1st German ed. 1922).

16. SLAVOJ ŽIŽEK, THE TICKLISH SUBJECT: THE ABSENT CENTRE OF POLITICAL ONTOLOGY 113–14 (1999).

in the judiciary, whose *interpretations* of legal texts in every real sense *are* the "Rule of Law."[17]

Or so I thought, until I got to know my friends in Slovenia who are trying to build their own version of the Rule of Law. They confront a national environment in which the people at large distrust and disdain law and lawyers, owing largely to the practices of party bosses in the former Yugoslav era. In those days, the political officials of the state and the party routinely interfered and intervened in legal disputes to dictate outcomes, operating under Marx's thesis that bourgeois law is but a temporary expedient that is destined to wither away when socialism becomes fully established in the minds and hearts of the people. The result of this practice in the old Yugoslavia included the arrests of countless dissidents, as well as show trials in which there was only one permissible outcome—conviction and, in some cases, execution.

For my friends in Slovenia the "Rule of Law" did *not* mean the metaphysically impossible capacity of legal texts to "constrain" and "determine" the behavior of those judges who apply them. It meant, rather, somehow obtaining a judiciary that actually *felt* itself to be independent of the more overtly political branches of government, to such an extent that judges would actually *stand up* to the executive and legislative branches—as Chief Justice Marshall did in *Marbury v. Madison*[18]—and hold them accountable for failing to abide by fundamental norms of human rights. In short, I came to learn that in Slovenia the "Rule of Law" meant, first and foremost, a *separation of powers* in which the judicial power is real and concrete, and not merely formal.

From their point of view, my friends told me, it would be an incredible *luxury* to be in a position to worry and fret, as some American politicians do today, about whether or not a particular judge is an "activist." Such a problem, they told me, could only be perceived *as* a problem in a social context in which civil respect for law and legal institutions is already well-established—in fact, where it is ingrained in the respect that people show for judicial authority. Respect for authority of any kind is not something that occurs overnight, and once lost it is very difficult to regain. For Slovene intellectuals the decision in favor of the Rule of Law has been a decision for the *formal principle of judicial ordering as such*; the contingent content of that ordering is for them in many ways beside the point (at least

17. JOHN CHIPMAN GRAY, THE NATURE AND SOURCES OF THE LAW 54 (David Campbell & Philip Thomas eds., 1997) (1st ed. 1909).

18. 5 U.S. (1 Cranch) 137 (1803).

for the time being). They would love to have judges, activist or not, who are not crushingly beholden to political actors—judges who feel themselves able and willing to stand up to the executive and legislative branches of government, as well as to the multi-national corporations who would like to exploit Slovenia's resources by "special deals" that benefit only the few.

This insight into the problems that my Slovene colleagues face has made an enormous impact on my own thinking about the meaning of the Rule of Law. On the one hand, I feel even more sure than ever that there exists no golden "metaphysical certainty" in law, only the base metal of what I will call *social* certainty. The only reason judges think that THE LAW controls them is that they belong to a social group (lawyers and judges) whose members respond pretty much in similar ways to similar problems of application. That kind of relatively uniform social response is wired into us by our legal and social training. It shows, for example, why most people just *stop* at a stop sign, without first thinking, "Does this rule really apply to me in just this context?"[19] In other words, much (even most) of law consists of routinized behavior—almost as if people were mindlessly plodding through a great deal of their lives like mules in harness. The idea that law is in many respects socially (but not metaphysically) determinate means that John Adams' "government of laws and not of men" really describes a *government of social tendencies* about which we rarely think and of which we are rarely aware. The danger that this unthinking process of social interpretation and enforcement can become a tool of special interests, power, prejudice, and injustice is very real. We need only consult our own shameful history of legalized slavery and apartheid to confirm this. ***But—and this is a* big *but—the "capture" of law by injustice is possible only if those who apply the law are respected sources of authority in the first place!***

As I see it, social power is social power, whether it is called "public" or "private." The humiliations that an overweening and obnoxious boss in the private sector inflicts on a secretary who badly needs the job are every bit as hurtful as a similar round of mistreatment dealt by an uncaring state official to a needy supplicant. Whether it is public *or* private, power always craves to reinforce and extend itself wherever and however it can. In this respect I side with Nietzsche, for experience teaches me (as it did him) that the primordial instinct of Will-to-Power is a ubiquitous and overweening "force

19. Schmitt makes the same point by referring to our attitude about timetables: "I am often less interested in how a timetable determines times of departure and arrival in a particular case than in its functioning reliably." SCHMITT, *supra* note 15, at 30–31.

of all forces" in social life.[20] In the former Yugoslavia, social power attempted to reinforce itself by means of more-or-less direct command and control by a cadre of leaders at the top. In our society, congealed units of social power (e.g., large corporations) are always attempting to enhance themselves by means of the law—by *using* the law to their advantage. The main difference is that the social institution of judicial independence in our country tends to open up a larger space for what I will call "counter-hegemonic struggle."

Don't get me wrong!—I am no Pollyanna when it comes to thinking about the potential of our system to radically emancipate human beings. It is quite clear to me that in the current political war against so-called "frivolous lawsuits" and against publicly funded legal services for the poor, in habeas corpus "reform" and in immigration laws that cut back on judicial review, in the conservative drum-beat for universal "tort reform," in recent drastic curtailments of civil liberties and access to courts in the interest of "security from terrorism," and in countless other ways, today's bastions of congealed social power have mounted a broad and effective counter-attack on the use of law by the powerless. But be that as it may, this battle against the powerless must still be waged on a legal terrain that is at least *somewhat* unpredictable, owing to the diffusion of power that is represented by the institution of judicial independence and widespread respect for that independence. If Legal Realism taught us how the rich and powerful get to stack the deck of the law in their favor, the story I have told you tonight about Slovenia's struggles to achieve democracy ought to teach us to be grateful that at least there *is* a legal game to play in our country—a place in law where people have at least some chance to resist abuse by the powerful, and where judges just might agree with them and do something about it. As I see it, the possibility of access to an institutional place where power does not *always* get what it wants is none other than the possibility of Justice through law.

What all of this says is that the Rule of Law means something quite a bit more realistic than John Adams' trite expression would have it mean. It seems to me that if the Rule of Law sometimes (or even often) can be used as a tool by the powerful, it can also occasionally be wielded as a force to hold power accountable. Its proper home lies within institutions staffed by men and women who do not reflexively do the bidding of the elite, but who actually delve into the past for documents and practices that might be

20. FRIEDRICH NIETZSCHE, THE WILL TO POWER 261–453 (Walter Kaufmann & R.J. Hollingdale trans., 1968).

interpreted (always in the present!) to the disadvantage of the elite. From the standpoint of Justice, the Rule of Law is the chance to use social power to thwart social power—a brutally realistic but refreshingly honest realization that my Slovene colleagues came to more than a decade ago.

Viewed in its proper light, then, and shorn of all its silly metaphysical pretensions, the realistic idea of the Rule of Law that I have attempted to describe to you tonight strikes me as an important cultural achievement, at least for those who value the moral worth of the individual as an ultimate value. In the marketplace we are constantly required to prove our worth by our value to those with the means to pay us in money and prestige. But the Rule of Law is the possibility—however remote—that our worth as human beings is not solely determined by our market price, or by the powerful people we happen to know. But if the Rule of Law in this sense is an achievement, it is also an achievement that must be continually won, over and over again, in concrete struggles before fiercely independent and courageous judges. I speak here of judges who know that the violence of law is always *their* doing, manifested in the interpretations they give. These are judges who do not think of themselves as cogs in a soul-less legal machine, but as creative and responsible actors in an unfolding and uncertain historical drama. It strikes me that such a humanized version of the Rule of Law might be well worth fighting for.

Thank you very much for listening to me so patiently, and good night to you all.