



A Government of Laws, Not of Men

American Democracy and The Rule of Law

Introduction

The strength of our democratic institutions relies on the public’s understanding of those institutions. However, we are not preparing Californians with the civic knowledge and skills they need to be active and engaged participants.

This white paper is intended to provide concise and accessible context to the understanding of “the rule of law,” and its relevance to the daily lives of individuals. The first of three sections defines the concept of “the rule of law” and provides the historical development from a Western perspective. The second briefly discusses the implementation of “the rule of law” in other countries and jurisdictions, and highlights some of the differences between the United States and countries abroad. While the third underscores the relevance of “the rule of law” to Californians by briefly discussing California’s turbulent past, and modern day advantages to a stable legal system that have helped to create a thriving economy in the great State of California.

What is the Rule of Law?

The concept of “the rule of law” can be a difficult one to define in specific terms. This section will attempt to assert a general definition of “the rule of law” and provide some context to the development of that definition historically and culturally. Finally, this section covers how “the rule of law” is implemented by the government with a focus on the judicial branch and its interactions with the executive and legislative branches.

- *Overview of the Modern Conception of the Rule of Law*

A modern view in the United States is that through the separation of powers between the legislative, executive, and judicial branches “that it may be a government of laws and not of men.”¹ This perspective extends to create a system of government where individuals and the government itself are subject to laws that are administered with equity, and neither are subject to

¹ Mass. Const. pt. 1, art. XXX

the whims of an individual or group. This concept is not particularly new as variations of these ideas can be dated back to Plato. However, as noted by Judge O'Scannlain in his lecture at the University of Notre Dame London Law Centre, that is not to say there has not been much confusion regarding the definition of “the rule of law.”²

Throughout the ages there have been plenty of governments and regimes that have focused on ruling through law. Typically, these regimes create laws that are severe and then use the law to crack down on society and anyone who might infringe upon their control of power. Their justification for this concept of “the rule of law” is that it is applied uniformly across society. There are multiple examples of this in the modern era, including the Italian Fascist Party under Mussolini, the Nazi Party under Hitler, and the Communist Party of China under Mao Zedong. There are still leaders across the world who use this authoritarian definition of “the rule of law” to justify their tyrannical regimes, adding confusion to what is meant by “the rule of law.”³

An unbiased place to start in establishing a better understanding of the modern concept of “the rule of law” is the annual Rule of Law Index provided by the World Justice Project (WJP)⁴. The WJP is an independent non-profit that engages in multi-disciplinary analysis of justice and “the rule of law” around the globe. Annually, the WJP produces a study indicating the state of “the rule of law” across the world. In order to do this, the WJP has established that “the rule of law” is a system where four principles are upheld. These four principles make up the definition of “the rule of law” for the purposes of this paper.

² Diarmuid F. O'Scannlain, *The Rule of Law and the Judicial Function in the World Today*, 89 Notre Dame L. Rev. 1383, 185-86 (2014) (Discussing the definition of the rule of law and the confusion's that can arise from it).

³ *Id.*

⁴ *Id.*, at 1387.

First, the government, its officials, individual citizens, and private companies are accountable under the law.⁵ Second, the laws are clear, publicized, stable, just, and they are applied evenly in order to protect fundamental rights, including the safety of oneself and property.⁶ Third, the process by which the laws are enacted, administered, and enforced is accessible, fair, and efficient. Finally, justice is delivered in a timely fashion by competent, ethical, independent, and neutral judges that have adequate resources and are representative of the communities they serve.⁷

These four principles taken together represent the foundations of a democratic society that create a system where men are governed by laws. First and foremost, the government is to be held accountable under the law and to the people. The citizens have access to protection and equal rights under the law. Under these definitions, citizens should understand how to access remedies under the law to protect themselves and their property. Finally, under this definition, it is clear that the judiciary plays a large role in supporting “the rule of law” and providing access to justice to the people.

- *Historical and Cultural Context in Western Society*

As previously mentioned, the concept of “the rule of law” is not a new one in Western philosophy and culture. Like many other traditions in our current culture, “the rule of law” can be traced back to the Ancient Greeks and Romans. Plato and Aristotle were the first to discuss the idea. In the late middle ages, the expansion of the concept of limited government and access to equal treatment occurred with the enactment of the Magna Carta. Finally, the ideas and philosophies from the enlightenment established the path to the United States Constitution, which established the first written federal document to completely embrace “the rule of law.”

⁵ Mark David Agrast et al., *Rule of Law Index 2015*, World Just. Rep. 2015, 10.

⁶ *Id.*

⁷ *Id.*

It was the Greeks in the late seventh and early sixth centuries B.C. who were the first Europeans to establish a legal system with rules.⁸ Once established, the Greeks applied the laws uniformly across the citizenry.⁹ Although Plato thought that the best system would be for wise men to rule, he believed that wise men would not want to rule and that un-wise men would not want to concede power to the wise. He therefore saw “the rule of law” as the only way to prevent anarchy and tyranny.¹⁰ Aristotle concurred with Plato and posited that in a perfect world laws would not be needed, but that in an imperfect world “the rule of law” is necessary.¹¹

The Romans carried on this tradition until the fall of the Roman Republic. Cicero—the great Roman orator, lawyer, and senator—further expanded on the necessity of “the rule of law.” Cicero believed that tyrants would exempt themselves from “the rule of law” and break the social contracts that it engenders.¹² In contrast, citizen judges who are subject to the law would bind their judgements to the law.¹³ Although the fall of the Republic essentially destroyed the judicial system in Rome, the system of lawyers and magistrates was a legacy that would return.

Following the fall of Rome, there were challenges in checking the power of the kings and emperors in Europe. As time went on, England began to restrict the authority of the king by pushing for a monarchy that was subject to laws, which led to the establishment of the Magna Carta in 1215. Notably, it was an actual document, but more importantly, it was a document that began to limit the power and authority of the king by stating, “No free man shall be taken, imprisoned, disseised, outlawed, banished, or in way destroyed, nor will [w]e proceed against or

⁸ John Kelly, *A Short History of Western Legal History*, 1-9 (Clarendon Press 1992).

⁹ *Id.* at 5.

¹⁰ *O’Scannlain*, at 1391.

¹¹ *Id.*

¹² *Id.* at 1392.

¹³ *Id.*

prosecute him, except by the lawful judgment of his peers, and by the law of the land.¹⁴” This was one of the first documented occurrences of the King of England’s authority limited by law.

The limit on the King of England’s power was further pushed forward by Chief Justice Coke. In the early 17th century, Coke asserted that it was within the power of the courts to find against the government when the crown or parliament acted outside the realm of common law precedent.¹⁵ By 1688, the English Bill of Rights made it possible for the parliament to dethrone King James II because, according to parliament, he acted against the common law and had subverted personal freedoms of his citizenry.¹⁶

By the late 17th and early 18th century, the idea that there were natural laws which bound both the government and its citizens had become widely accepted. The writings of John Locke and Montesquieu laid the foundation for “the rule of law” and separation of powers that would influence the writers of the United States Constitution. John Locke developed the idea that the government’s legitimacy relies on the consent of the people because individuals would not consent to a government that does not offer them security within natural law.¹⁷ Montesquieu argued for the separation of the legislative, executive, and, most importantly, judicial powers. Montesquieu believed that when the power to create laws is mixed with the ability to implement laws that corruption is imminent.¹⁸ As such, he argued that judges should not have any say in making law or policy. Thus, judges should only have the ability to apply the relevant law to the facts. These ideas greatly influenced the founding fathers in the development of the American constitution.

It was, therefore, not a new idea when the founding fathers wrote natural laws into the constitution and bound the government to those laws. To Hamilton, Jefferson, Adams, and the

¹⁴ *Id.* citing the Magna Carta of 1215

¹⁵ *Kelly*, at 177.

¹⁶ *Id.* at 233.

¹⁷ John Locke, *Two Treatises of Civil Government*, Book Two, Chap. 11, § 136.

¹⁸ *O’Scannlain*, at 1396.

other founders, natural law necessarily included “the rule of law.”¹⁹ Thus, the foundation of natural laws within the constitution restricts the government to act within the bounds of the law and gives the judicial branch the discretion to void any action taken by the government outside those natural laws. This protects American citizens from any one individual, or group of individuals, exerting their own will without being subject to the law. On balance, all three branches of government have checks on the each other, but the judiciary plays the largest role in protecting citizens from individual tyranny.

- *Active Role of the Judiciary Branch*

As discussed above, the role of the judiciary is essential to, and historically a central part of, maintaining “the rule of law.” Returning to the principles that were established by the World Justice Project, the judicial branch plays a role in all four.

The first principle holds that government, as well as individuals, are accountable under the law.²⁰ Here the courts play a vital role. When the founders established the constitution they gave the Supreme Court the ability to stop actions taken by any level of government if they did not comply with the constitution. This feature of judicial power protects against illegal actions taken by Congress, the President, or any governmental agency. In those cases, the Supreme Court is charged with applying the law as it is given to them (though they are restricted by the Constitution and precedent), providing the courts with the ability to hold the other branches of government accountable to “the rule of law.” Of course, the courts are also charged with holding individuals accountable to “the rule of law.”

The second principle requires that the laws are clear, publicized, and just, and that the laws be applied evenly to protect fundamental rights, including the security of persons and property.²¹ Here again the judicial branch plays an extensive role. The courts are charged with

¹⁹ *Id.* at 1398.

²⁰ *Agrast*, at 10.

²¹ *Id.*

applying the law to every individual circumstance that comes before them. In this capacity, the courts can protect the fundamental rights espoused in the constitution, such as the freedom of religion, by protecting individuals from those who would infringe upon those rights.

The third and fourth principles require the laws to be enforced in a fair and efficient fashion and by competent, ethical, and independent representatives who have adequate resources and reflect the makeup of the communities they serve.²² These principles also require the courts to administer justice efficiently and fairly; the courts need to remain independent and should only apply the law to the facts given to them.

- *Interactions of the Executive Branch and Legislative Branch*

The executive branch of the federal government includes the Presidency and the agencies that he controls, which are widely varied and diverse from the Department of Agriculture to the Central Intelligence Agency. Federally, the legislative branch includes the two houses of Congress: The House of Representatives and the Senate. The main responsibility of the legislature is to provide the laws and policies that govern society. After ultimate approval of these laws, it is the responsibility of the executive branch to implement the law. The executive branch administers these laws by determining the best route to enact the policies it has been provided by the legislature.

“The rule of law” has slowly developed over time to create limitations on the executive and legislative branches of government that prevent them from excluding themselves from the laws they pass. If the legislature passes, or the executive branch implements, laws inconsistent with the constitution, then the Supreme Court can overrule them.

Therefore, the executive branch occasionally needs to enforce decisions made by the Supreme Court, such as with *Brown v. Board of Education* that decided segregation is

²² *Id.*

unconstitutional. In 1957, three years after the decision, President Eisenhower had to use the National Guard to force Little Rock Central High School in Arkansas to desegregate.

Alternatively, if Congress wishes to amend the constitution—possibly to overturn a Supreme Court decision—it can under Article V of the Constitution. Article V provides that Amendments may be proposed either by the Congress with a two-thirds vote in both the House of Representatives and the Senate, or by a convention of states called by two-thirds of the state legislatures. Congress then gets to determine whether the amendment is ratified by three-fourths of the state legislatures or state ratifying conventions in three-fourths of the states.²³

Amending the constitution to act as an end-run of the judiciary aside, together the three branches function in tandem, but independently. There is a strong set of checks and balances to maintain “the rule of law.” The founders used the traditions and philosophies established over thousands of years to create a government that they hoped and believed to be as resistant to corruption as possible and able to uphold “the rule of law.”

How is the Rule of Law Applied Differently in Other Countries?

The previous section was a general overview of the government and “the rule of law” in the United States, but there are some obvious differences in other parts of the world. This section will briefly go over a few of those differences.

- *European Union*

The European Union’s judiciary, the Court of Justice of the European Union (CJEU) is quite remarkable because it is almost completely reliant on “the rule of law” for legitimacy.²⁴ In the European Union, each member state maintains its own complete government, including executive, legislative, and judiciary branches. The CJEU decides cases that fall under European

²³ U.S. Const. art. V

²⁴ Thomas von Danwitz, *The Rule of Law in the Recent Jurisprudence of the ECJ*, 37 Fordham Int’l L. Rev. 1311, 1312-13 (2014)

Union law in cooperation with the national judiciary of individual member nations. The court has established jurisprudence and precedent to enforce laws across the European Union in the interest of human rights. In order for these rulings to hold, the CJEU relies on member nations to accept “the rule of law,” and deference to the CJEU.²⁵ This deference gives legitimacy to certain uniform legal principles being applied across 28 different countries and allows the CJEU to maintain “the rule of law” among all its members so that none of the countries can act against the communal laws established by the European Union.

- *China*

On the opposite side of the spectrum lies China. A good example of China’s relationship with “the rule of law” came on July 9, 2015, when the government rounded up 120 some civil right lawyers and 50 support staff and detained them in prisons.²⁶ For a long time, China has considered “the rule of law” to mean the use of law to maintain control.²⁷ Although Chinese officials have made statements saying that “the rule of law” requires governing by their constitution, China has no mechanism to enforce such proclamations.²⁸ The actions that the government took in 2015 indicate there is no independent judiciary, and the government is not held accountable to laws. Clearly China does not function under the Western notion of “the rule of law.”

Why is the Rule of Law Relevant to Individual Californians?

Although the “rule of law” may seem like a lofty concept, irrelevant to the daily life of the average Californian, it is quite essential to the proper functioning of government. This is made clear by looking at California’s history. More generally, this section discusses how all of

²⁵ *Id.*, at 1314-16.

²⁶ *Human Rights: Uncivil*, Economist, Jul. 18, 2015, <http://www.economist.com/news/china/21657828-china-says-locking-up-lawyers-it-defending-rule-law-uncivil>.

²⁷ Paul Gewirtz, *What China Means by ‘Rule of Law’*, N.Y. Times, Oct. 19, 2014, <http://www.nytimes.com/2014/10/20/opinion/what-china-means-by-rule-of-law.html? r=0>.

²⁸ *Id.*

society relies on government to continue to function and provide for the safety and welfare of its citizens.

- *A Lack of “the Rule of Law” in Early California*

The impression most people have of California is that when it received statehood in 1850 it also had a fully functioning government. This falsehood is memorialized on the Great Seal of California by the goddess Minerva’s presence because, according to Roman mythology, she too was born fully formed. San Francisco in the early 1850’s, however, provides a great example of the disasters that follow when the government cannot maintain “the rule of law,” and that at its inception the California government was anything but fully formed.

In the 1850s, San Francisco had an inadequate police force. The city also faced massive population growth and a general growing unrest after a series of fires required parts of the city to be rebuilt both in 1850 and 1851.²⁹ The citizens of San Francisco took it upon themselves to form the San Francisco Committee of Vigilance of 1851, which ultimately became a vigilante group consisting of over seven hundred members that hung eight people.³⁰

As an historical anecdote, this highlights the need for a strong government. California was a part of the so-called Old West and suffered the same mob mentality that existed across the country in the absence of government and “the rule of law,” demonstrating that it is not always an absolute monarch or tyrant that can destroy a society.

- *Current Application of the Rule of Law in Civil Law*

The civil law system in the United States and California protects and regulates all areas of our lives outside the criminal system. While civil law provides the system that allows business to incorporate and protect investors, it is the same system that regulates climate control and environmental protections. It also provides the venue to settle disputes against a corporation

²⁹ MARY F. WILLIAMS, HISTORY OF THE SAN FRANCISCO COMMITTEE OF VIGILANCE OF 1851, 175-85 (Westphalia Press, 2015).

³⁰ *Id.*, at 362.

or negotiate a contract. Civil law encompasses most of the law that protect its citizens both personally and financially. The courts apply this evenly across individuals, corporations, and even governmental agencies. This is illustrated by examining a few court cases and laws that have restricted or permitted the actions of all these groups. Specifically, this section will briefly examine how the courts have handled issues of equal protection law, commercial law, and property law. The non-partisan, U.S. Government funded policy group Freedom House produced a report titled “Today’s America: How Free?” This report provided helpful guidance for this section and is a great resource for more analysis on the “rule of law” and its effectiveness in the United States.³¹

- Equal Protection

The “rule of law” might be most strongly associated with civil law through the common legal concept of equal protection. Equal protection posits that government should not treat one group of people differently without a cause. This is especially true when it comes to matters of race or gender. There have been many famous cases about equal protection such *Brown v. Board of Education*³², which ended the separate but equal laws used to segregate African Americans in the south. A more recent case is *Obergefell*³³, in which the Supreme Court legalized same-sex marriage. The Court held that the government could not treat people differently based on their gender or that of their partner. However, a more nuanced understanding of the role of the judiciary relating to equal protection can be seen in a series of California Supreme Court cases relating public school funding.

³¹ FREEDOM HOUSE, REPORT: TODAY’S AMERICA HOW FREE? (2008) [hereinafter FREEDOM HOUSE REPORT], available at <https://freedomhouse.org/report/special-reports/todays-american-how-free>.

³² *Brown v. Board of Education of Topeka*, 347 U.S. 483 (1954).

³³ *Obergefell v. Hodges*, 135 S.Ct. 2584 (2015).

Collectively known as *Serrano v. Priest*, these three cases, decided between 1971 and 1983, were critical to the education funding system in California.³⁴ At the start of the cases, the State of California partially funded its schools through state funds, and required schools to rely largely on local property taxes. This resulted in wide discrepancy in funding between schools located in affluent communities and those in moderate or low income neighborhoods. Because poorer communities could not afford to raise their property taxes, a coalition was formed and filed a class action law suit seeking equal access to education.

This first case, *Serrano v. Priest* (1971) 5 Cal.3d 584, 589 (“*Serrano I*”), made its way all the way to the California Supreme Court. The Court found that there was a fundamental right to education for children. The court also decided that state policy was resulting in different treatment based on the individual’s income, their neighborhood, and surrounding local businesses. Because this funding formula resulted in the State of California treating people in poorer communities differently than those in wealthier, previous legal doctrine required that the State have a very strong and compelling reason for the unequal treatment. The Court found that California did not have a reason compelling enough to allow for the unequal treatment and that it was in violation of the equal protection clauses of both the U.S. and California Constitutions. In the next *Serrano* case, *San Antonio Independent School District v. Rodriguez* (1973) 411 U.S. 1, the United States Supreme Court reversed a decision similar to that of *Serrano I*, holding that education is not a fundamental right under the Federal Constitution. However, because *Serrano I* was also decided based on the California Constitution, *Serrano II* had no effect on the viability of plaintiff’s claims in *Serrano I*. The final *Serrano* case, *Butt v. State of California* (1992) 4 Cal.4th 668 (“*Serrano III*”), resulted in the Court calling on the California Legislature to resolve the unequal treatment, which it did just a few years later. By determining that the State’s actions were not in conformity with equal protection clause of the California Constitution, these cases

³⁴ See *Serrano v. Priest*, 5 Cal.3d 584 (1971) (*Serrano I*); *Serrano v. Priest*, 18 Cal.3d 728 (1976) (*Serrano II*); *Serrano v. Priest*, 20 Cal.3d 25 (1977) (*Serrano III*)

highlight the role of the courts in enforcing the “rule of law.” Put simply: the Court’s role is to determine whether a matter is consistent with the “rule of law” and to ensure that laws are applied fairly and impartially.

- Commercial Law

The federal government is permitted to create laws governing products and services that are provided across state lines under the commerce clause of the United States Constitution.³⁵ This authority was confirmed in 2005 when the United States Supreme Court overturned New York and Michigan laws that did not allow their citizens to purchase or order wine from outside state lines.³⁶ The Court held that states were not permitted to treat the sale of products made in their state differently than products made in other states. As a United States Supreme Court case, this decision also applies to California. While California may enact laws to restrict trade, outlaw certain products, or regulate the economy, it must do so in a manner that treats all companies and consumers equally, regardless of their state of residence.

All states have laws that are designed to protect consumers from hazardous products or inadequate services. States and local governments can also use permit laws and zoning restrictions to ensure the safety of their citizens. A clear example of this is the state and local government bans on smoking in public places. California enacted its statewide ban in 1995 effectively restricting smoking in almost all work environments, including restaurants and bars. States also regulate certain service providers and professionals, such as salons and doctors. These laws must be applied fairly and equally. For instance, the United States Supreme Court in *New*

³⁵ U.S. CONST. art. 1, § 8, cl. 3.

³⁶ *Granholm v. Heald*, 544 U.S. 460 (2005)

Orleans v. Dukes overturned a state law that restricted new vendors from opening in areas where older vendors previously existed and continued to operate because new vendors were being treated differently than the established vendors.³⁷ While we have thus far focused on the equal treatment of people, the principle of equal application of the law through the “rule of law” also extends to protecting the interest of the common good and regulating property use.

- Property Law

The Fifth Amendment of the Constitution protects American citizens’ property by stating that “No person shall...be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.”³⁸ This provision strongly protects the rights to property for individuals, but it also leaves the government the power to exercise control through eminent domain. The legal concept of eminent domain allows for the government to take privately owned land and use it for the public good, such as the development of parks or public buildings. The government must reimburse the person or company that the land was taken from at fair market rate or higher.

Historically, the government would take land for the construction of things like roads, government buildings, and military bases, but the law has evolved to now include large scale construction that removes blight by encouraging economic development. This expansion was largely due to a case in 2005: *Kelo v. City of New London*.³⁹ In this case, Suzette Kelo, a homeowner in New London, Connecticut, was informed that the city would be buying her home through eminent domain. The city was working with developers to turn a neighborhood that was deemed to be economically depressed into a place with new businesses and homes. The city was trying to revitalize the community while at the same time build a broader tax base. The Court found that these goals met the legal standard for public use. At first glance this example might

³⁷ *New Orleans v. Dukes*, 427 U.S. 297 (1976).

³⁸ U.S. CONST. amend. 5

³⁹ *Kelo v. City of New London*, 545 U.S. 469 (2005).

seem like an unfair use of the law and one that violates principles of the “rule of law,” but a relatively recent economic study and law article from the Emory Law Journal argues otherwise.

In the Emory Law Journal article, several professors examined the effects of urban decay on the “rule of law” in cities.⁴⁰ This study was conducted to understand the correlation between the deterioration of the “rule of law” in cities like Detroit; cities with crumbling infrastructure and citizens hostile to their local government. They found that infrastructure plays a major role in the “rule of law” because infrastructure maintenance is a bellwether for determining if the government is meeting the needs of the community. This goes to the heart of the social contract theory within the “rule of law.” A critical part of the social contract is the government’s responsibility to make and maintain essential public goods. This allows citizens to carry on with their daily lives and encourages them to engage in more reciprocity and cooperation, which in turn stimulates economic growth. Alternatively, when people see urban decay they assume that the government has failed them. They lose faith in their representatives and neighbors, and no longer trust that the “rule of law” exists. This leads to spikes in crime rates due to a lack of the “rule of law.”⁴¹

- *Current Application of the Rule of Law in Criminal Law*

Equally important to a strong and thriving society is the order and security established by Criminal Law. Criminal law requires that the public trust that the criminal justice system is following “the rule of law” to ensure justice is accessible and applied fairly. As the World Justice Project laid out in the Rule of Law Index, an effective criminal justice system is a key aspect of the rule of law because it is the mechanism by which grievances can be redressed and actions can be brought against individuals for offenses against society. An effective criminal justice system is capable of successfully investigating and adjudicating criminal offenses in a timely manner, it is impartial and free of corruption or improper government influence. These

⁴⁰ Brent T. White, Simone M. Sepe, & Saura Masconale, *Urban Decay, Austerity, and the Rule of Law*, 64 EMORY L.J. 1, 1 (2014).

⁴¹ *Id.* at 59-60.

systems also ensure that the rights of both victims and the accused are successfully protected. Effective criminal justice also requires correctional systems that reduce criminal behavior and treat prisoners humanely.⁴² The courts play a major role in upholding all of these principles by ensuring fair trials and just sentencing, and by providing access to legal representation for all American citizens.

- Sentencing

Most of the laws governing sentencing for crimes are similar across the United States. In order to remove personal moral judgments and biases by judges, guidelines have been created for judges to follow in order to keep sentencing consistent. This is especially important because while juries may find a defendant guilty, it is the judge who then hands down a sentence within a statutory range for the given crime. This maintains the Sixth Amendment Constitutional requirement that a defendant be tried by a jury of peers.⁴³ We have come to understand that this means that the jury is the finder of fact and makes their determination based on the evidence presented in court. If the jury decides that a person is guilty, the judge then applies the sentencing law at a sentencing hearing after the trial. Notably though, some states allow aggravating factors be heard at sentencing, after the conclusion of the jury trial.

These aggravating factor laws are often the product of legislatures wanting to discourage more egregious behaviors, such as attempting to murder a group of people based on their race, as was the case in *Apprendi v. New Jersey*.⁴⁴ A man fired shots into the home of African-American family, and was charged with possession of a firearm for an unlawful purpose. The jury found him guilty. However, no evidence was presented to the jury that this incident was racially motivated. At sentencing, the prosecutor moved to include racial motivation as an aggravating factor and the judge accepted the motion. The defendant then appealed the addition of the aggravating factor all the way up to the Supreme Court. He argued that the aggravating factor

⁴² O'Scannlain, at 13.

⁴³ U.S. CONST. amend. 6

⁴⁴ *Apprendi v. New Jersey*, 530 U.S. 466 (2000).

violated his right to a trial by jury, and the Supreme Court agreed. The Supreme Court has heard a series of cases that have invalidated federal sentencing guidelines, essentially finding that judges and legislatures have to follow the “rule of law” too.⁴⁵ The government is subject to limitations under the Constitution, even when motivated to discourage something as terrible as racial violence. Having these limitations on the branches of government protects the goals to have a fair, reliable, and predictable justice system. It also helps protect the legal rights of defendants, as is true with the right to an attorney.⁴⁶

- Right to an Attorney

The right to counsel was also established with the adoption of the Sixth Amendment of the Bill of Rights. In the past one hundred years this has been expanded quite extensively. In 1932, the Supreme Court decided that if a defendant was unable to defend himself in a death penalty trial due to ignorance, feeble, mindlessness, illiteracy, or the like, that the state had the obligation to appoint a defense counselor.⁴⁷ By 1938, the state was required to appoint attorneys when the defendant was too poor to afford one.⁴⁸ Quickly, the courts expanded the rule so that attorneys were appointed in all criminal cases, including in state courts.⁴⁹ This growth in the right to an attorney strongly intertwines values of the “rule of law” with the criminal justice system.

The right to an attorney is critical to the “rule of law” within the criminal justice system because it balances so many of the goals covered in this paper. Society wants laws that are predictable, but flexible enough to apply to different situations. This is especially important when limiting an individual’s liberty by placing them in jail for years at a time. Values and ethics also change over time, which can often impact the way in which laws are interpreted. The criminal law system is a complicated labyrinth, often impacting public understanding of its many

⁴⁵ See, *Blakely v. Washington*, 542 U.S. 296 (2004); *United States v. Booker*, 543 U.S. 220 (2005).

⁴⁶ U.S. CONST. amend. 6

⁴⁷ *Powell v. Alabama*, 287 U.S. 45 (1932).

⁴⁸ *Johson V. Zerbst*, 304 U.S. 458 (1938).

⁴⁹ *Gideon v. Wainwright*, 372 U.S. 335 (1963).

component parts. For the average citizen, this seemingly contradicts the intended goal of accessibility and clarity of the law. A member of the public would have a very difficult, if not impossible, time navigating the criminal justice system. Requiring the state to provide an attorney balances the goals of ensuring accessibility while protecting flexibility.

Conclusion

In conclusion, although the concept of “the rule of law” can seem opaque, it is fundamental to protecting citizens from tyrannical governments and anarchy by providing guiding principles to those in power. “The rule of law” is the philosophical and legal linchpin of Western society. While the executive and legislative branches each carry out the critical task of establishing and implementing policy across the state and country, it is the judiciary branch that holds the government and individuals accountable to “the rule of law.”

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