

# The American Illness

ESSAYS ON THE RULE OF LAW 一十二章

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## THE AMERICAN ILLNESS

For Esther and Sarah

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#### PART 1:

## INTRODUCTION

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# The Rule of Law in America

#### F.H. BUCKLEY

ifty years ago we thought we knew how to make a country rich: self-government, good education, free markets, and loads of World Bank infrastructure grants. Nothing very complicated, in short. We know better now. The gap between rich and poor countries, which we expected to shrink, has grown larger. What we failed to recognize was the role of intangible assets: the cultural values of thrift and industry, honesty in government, and the rule of law.

What the rule of law might mean is, as we shall see, not always clear. But however one might define it, rich countries enjoy a robust rule of law, and departures from it in third-world countries have left their citizens impoverished. More recently, America itself has suffered from an economic decline, and this book asks, with the assistance of leading scholars in the legal academy, whether a decline in the rule of law has contributed to this. America sends experts to lecture people in other countries about the importance of the rule of law, but in doing so, do we fail to recognize the beam in our own eye?

America's legal system, and its reliance upon lawyers, has long made it the world's outlier. Other countries seem to depend more on informal social norms and less on legal ones. Here, however, the rule of lawyers seems almost to be coded in the country's DNA. Or so at least Edmund Burke thought, as he surveyed the men whom today we call the Founders of America. In his 1775 Speech on the Conciliation with the Colonies, Burke attributed the "untractable" spirit of the colonists to their lawyers and students of law: "This study renders men acute, inquisitive, dexterous, prompt in attack, ready in defence, full of resources. In other countries, the people, more simple, and of a less mercurial class, judge of an ill principle in government only by an actual grievance; here they anticipate the evil. . . . They augur misgovernance at a distance; and sniff the approach of tyranny in every tainted breeze."

Not everyone would disapprove of the Founders' litigiousness. Moreover, America's fascination with the law has not prevented it from becoming the richest country in the world. It does not follow, however, that America's legal system has been a help and not a hindrance. Beethoven wrote the Ninth Symphony in spite of his deafness and not because of it.

The question of what the legal system has contributed is more acute today because of America's recent economic decline. Before now, the contribution of the legal system, positive or negative, had been obscured by the relative advantages the country enjoyed when compared with other nations. As we will see in my article that follows, these advantages have been largely dissipated in recent years, and America's exceptional legal system, warts and all, will now stand out in sharper focus. And that is why this book is timely.

#### The Rule of Law

This is the century of the rule of law. In the 20th century, economists such as Milton Friedman offered a simple prescription for economic growth. All that a country like Russia need do, he thought, was shrink the state by privatization: "Just after the Berlin Wall fell and the Soviet Union collapsed, I used to be asked a lot: 'What do these ex-communist states have to do in order to become market economies?' And I used to say: 'You can describe that in three words: privatize, privatize, privatize.' But, I was wrong. That wasn't enough. The example of Russia shows that . . . privatization is meaningless if you don't have the rule of law." Friedman's prescription for growth was an important component of what came to be called the Wash-

ington Consensus, a set of classically liberal policies that dominated the literature about economic development after the fall of communism. Apart from privatization, other elements included deregulation, free trade, and low taxes. Property rights came in last in the list. As Friedman and others came to realize, however, this ignored the crucial role of social and legal institutions in promoting growth.

The recognition that the simple economic rules of the Washington Consensus could not capture the secret of growth, and that institutions mattered, came to be called neo-institutional economics.<sup>3</sup> Neo-institutional scholars argued that changes in growth patterns could not be explained without recourse to cultural differences. For example, Ghana and South Korea had very similar economies and per capita GDP in the 1960s. Thirty years later, the South Korean per capita GDP was 15 times that of Ghana. What explained the difference, said Samuel Huntington, was each country's culture.<sup>4</sup>

Culture embraces such things as the private virtues of fidelity, thrift, and industry, the social norms of promise-keeping and trust, and the practice of religion. One important component is legal culture, or the rule of law. Daniel Kauffman reports that rule of law variables are associated with significantly better development outcomes: "An improvement in the rule of law (or, say, control of corruption) from relatively poor to merely average performance would result in the long run in an estimated fourfold increase in per capita incomes, a reduction in infant mortality of a similar magnitude, and significant gains in literacy." 5

The economist's recent discovery of the rule of law has been mirrored in the legal academy. In the 1970s and 1980s, an influential group of radical legal scholars, associated with the Critical Legal Studies Movement, rejected the goals of formal equality, certainty, and predictability, which are the hallmarks of the rule of law. For the CLSers, law was necessarily indeterminate, in failing to provide a single right answer in most or all cases. Indeterminacy was then a permission slip for socially progressive judges and lawyers to bend the law to suit their politics. Such ideas, once fashionable, now find few adherents, and most legal academics, like their peers in departments of economics, have come to recognize that departures from the rule of law are troubling.

But what is the rule of law? In what follows I distinguish between two things it might mean: the absence of government corruption and a benign set of legal norms. Let us take each in turn.

### A. Corruption

Studies show that corruption has a significant negative effect on economic performance.<sup>6</sup> Entrepreneurs and investors cannot safely start or finance businesses in states that cannot credibly commit to respect property rights and to honor contracts.<sup>7</sup> As a prosperous society, then, one might expect America to rank high on measures of credible commitment and to have relatively little corruption. Surprisingly, however, the U.S. does not come out particularly well on cross-country measures of corruption. Transparency International conducts surveys of business leaders on their perceptions about bribery, kickbacks, and public sector anti-corruption efforts, and ranks the U.S. behind many of its first-world competitors.<sup>8</sup>

This likely understates America's corruption problem, when corruption is understood to embrace wasteful lobbying of the kind described in Steven Magee's article. What corruption is for poor countries, lobbying is for rich ones, a means of obtaining political influence through the expense of

Table 1.1 Transparency International's 2011 Corruption Perception Index

1 , 1				
Country	Rank	Score		
New Zealand	1	9.5		
Denmark	2	9.4		
Finland	2	9.4		
Sweden	4	9.3		
Norway	6	9		
Australia	8	8.8		
Canada	10	8.7		
Germany	14	8		
United Kingdom	16	7.8		
United States	24	7.1		

*Source*: Transparency International Corruption Perception Index, at cpi.transparency.org /cpi2011/results/.

money.<sup>9</sup> No other country has anything like the number of American lobbyists who load up legislation with interest group bargains.

This is not to suggest that lobbying is devoid of value or that it is unworthy of First Amendment protection. Lobbyists do provide useful information about the likely effect of legislation. At the same time, however, there is little reason to think that interest group pressure is invariably benign, where a concentrated rich group (e.g., an industry association) competes against a dispersed and poorly organized group (e.g., consumers). When a narrowly concentrated group is able to act collectively, through lobby groups, it has an incentive to redistribute wealth to itself even if its gains are small compared with the losses it imposes on the society as a whole. In a large country such as America, the dispersed groups are relatively more spread out, and the relative clout of the concentrated groups stronger. Interest groups just might provide unbiased information—but only as an incidental by-product of their business.

### B. Legal Norms

Courts might fail to adhere to the rule of law for a variety of reasons. The judges might be corrupt; they might not be independent of the government; they might shirk their duties and impose unnecessary wait times on litigants; they might be ill-trained. None of these problems beset American courts (even if American judges are greatly underpaid). Instead, any departure from the rule of law in America results from the content of its legal norms, which frustrate the intentions of bargainers and permit their property to be plundered.

It is conventional to distinguish between thick and thin definitions of the rule of law.<sup>12</sup> A thick definition would include democratic institutions and the protection of personal and religious freedom. As I define it, a thin definition of the rule of law would include substantive private law rights: contracts are enforced and private parties are protected from looting by the state or other private parties. Countries that adhere to a thick definition are attractive places to live; countries that adhere to a thin definition are attractive places to do business.<sup>13</sup>

A country might have both kinds of rule of law, or one and not the other. China seems to be adopting a thin rule of law without embracing a thick