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Bedrock of Democracy

Rule of law conference brings international recognition

**RULE OF LAW CONFERENCE
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Cover
 At Jamestown, Rt. Hon. Lord Phillips, retired Justice Samira Day O'Connor, and Chief Justice of the United States John G. Roberts Jr.
 Photo by Joe Fudge

Contents

Summer 2007

Features

Bedrock of Democracy

Rule of law conference brings international recognition

By Rob Walker



For the Public Good

Emphasis renewed on pro bono service

By Rob Walker



Medicine and Law

Medical malpractice course seeks common ground between often-opposed professions

By Joan Tappone



Special Counsel

Powerbroker Richard Cullen leads mega firm

By Richard Foster



Departments

- 2 For the Record
- 8 Faculty Briefs
- 12 Student News
- 27 Class Notes

BEDROCK OF DEMOCRACY



Rule of law conference brings international recognition

By Rob Walker

Four hundred years after the founding of the Jamestown colony, lawmakers, jurists and leaders from around the world gathered this spring to celebrate and examine the colonists' most valuable import: the rule of law.

In a four-day conference that concluded April 14, the Law School hosted presentations that paid tribute to lawyers and lawmakers from Thomas Jefferson and John Marshall to civil rights icon Oliver W. Hill.

The gathering culminated with a star-studded event at Historic Jamestowne, where John G. Roberts Jr., Chief Justice of the United States, and his British counterpart, The Rt. Hon. Lord Phillips of Worth Matravers, Lord Chief Justice of England and Wales, along with retired Supreme Court Justice Sandra Day O'Connor unveiled a plaque honoring the rule of law and those who dedicate their lives to it. Before the cover was lifted from the plaque, a fife and drum corps in full costume played historic tunes and a replica of the Godspeed, one of the three ships that brought the first English settlers to Jamestown, sailed past.

In presenting the plaque on behalf of the English Inns of Court, Lord Phillips said, "We are bound together not just by friendship but by a mutual dedication to the rule of law."

While presenters at the conference spoke eloquently of the rule of law as a cornerstone of democra-

cy and human rights, others offered strikingly different perspectives on how the rule of law has been applied throughout history. Among the most eloquent voices were those of a Native American leader, a veteran of the American civil rights struggle, and a Chinese dissident working to bring democratic reforms to China.

Many of the discussions also addressed the role the rule of law will play in building new and emerging democracies. Speakers outlined the challenges posed by technology and globalization in a world of disparate cultures and systems of justice.

At a black tie dinner at the Jefferson Hotel in Richmond, the Law School presented its most prestigious honor, the William Green Award for Professional Excellence, to Chief Justice Roberts. In his speech that evening, Roberts cited a Virginian, Chief Justice John Marshall of Richmond, who saw the fundamental importance of the separation of powers and an independent judiciary. "That separation and independence is the United States' greatest contribution to the rule of law," Roberts said. "It was in America that English ideals of liberty took root."

He noted that the ideals of liberty continue to move back and forth across the Atlantic. The British Parliament enacted the Constitutional Reform Act of 2005, creating an independent judiciary there.

The Law School also honored Hill, the Richmond-



born civil rights attorney and pioneer, with the first Oliver W. Hill Social Justice Award. Elaine R. Jones, former President of the NAACP Legal Defense Fund, presented the award to Hill. Together with Dean Smolla and Justice Lemons, Jones read a Proclamation outlining Hill's commitment to building a more just and inclusive America and securing equal rights for African-Americans. The proclamation also noted his many awards, including the 1999 Presidential Medal of Freedom. (See related story, page 17.)

The conference played to enthusiastic audiences—many of them standing-room-only—at venues on campus, in Richmond and in Jamestown. It received expansive coverage in local and national media.

Conference panelists included, among others, Associate Justice Stephen G. Breyer of the U.S. Supreme Court, Dean Kenneth W. Starr of Pepperdine Law School, Erwin Chemerinsky, professor at Duke University School of Law, and Joe Shirley Jr., president of the Navajo Nation. Lord Phillips was joined by The Rt. Hon. Lady Justice Arden, Court of Appeal of England and Wales, The Rt. Hon. Lord Mance, Appellate Committee of the House of Lords, and The Rt. Hon. Lord Justice Rix, Court of Appeal of England and Wales.

Conference co-chair Justice Donald W. Lemons of the Supreme Court of Virginia, said, "The rule of law is the bedrock principle of democracy. From shared history, culture, traditions and values, we reach some fundamental consensus on the rules that govern our society. It is helpful to have a public dialogue about the rule of law as we confront new and challenging issues."



Chief Justice John G. Roberts Jr. at Jamestown. (Opposite page, from left) Justice Stephen G. Breyer, retired Justice Sandra Day O'Connor, Elaine Jones, Xu Wenli, Joe Shirley Jr., Lord Justice Rix and Kenneth W. Starr.

'A LOT OF WRONG DECISIONS'

The conference opened with a panel discussion before an audience of over 400 people on "Global Issues and the Rule of Law." Lord Phillips and Justice Breyer were among the 10 high-ranking British and American jurists asked by Dean Rodney A. Smolla, moderator and the conference's co-chair, to define "rule of law."

Justice Breyer described it as a complicated system that satisfies citizens' natural desire for fairness. "We make a lot of wrong decisions in our court. I admit it," Breyer said. "But people will follow them even when they're wrong. That's the rule of law."

The rule of law "is an antidote to insidious corruption of power," said Lord Justice Rix. "By promoting rationality, it promotes the dignity of man."

Judge J. Harvie Wilkinson III of the 4th U.S. Circuit Court of Appeals described the rule of law as "an exquisite balance" between liberty and order. It confers rights but those rights are not absolute. It must be applied, he said, with "humility and restraint. Its abuses usually arise from arrogance and highhandedness." And despite the lofty sound of the term, rule of law is applied every day "by DMV clerks renewing your license or by agents of the IRS."

Those public servants should do their duty with humility, "putting themselves into the shoes of the motorist or the taxpayer, just as the judge puts himself in the shoes of the litigant," Wilkinson said.

Judge Carl Stewart of the 5th U.S. Circuit Court of Appeals, said rule of law "gives citizens confidence that there are norms. They will get a fair shake."

Justice Breyer said that after the terrorist attacks on Sept. 11, 2001, he became aware that "there is a division in the world between

the forces of reason and of irrationality." By advancing the rule of law, the United States and Britain are "trying to further the force of reason."

In his keynote address that evening at the Jepson Alumni Center, Lord Phillips stressed that the rule of law will help resolve the struggle between free countries and those that "deny all the basic individual rights we now take for granted."

AN ELUSIVE REALITY

On the second day of the conference, speakers focused more critically on how the rule of law has been applied throughout history. From slavery and the separate-but-equal doctrine to the destruction of American Indian nations, rule of law has been for many an elusive reality and a tool for oppression. For them, the 400th anniversary of Jamestown is something to commemorate, but not to celebrate.

Professor Kevin Gover of the Sandra Day O'Connor School of Law at Arizona State University, and Joe Shirley Jr., president of the Navajo Nation, the largest and most influential Indian tribe in North America, offered insight into the plight of Native Americans, past and present, and how the law has been used to deny their basic human rights.

Gover cited opinions by Chief Justice Marshall, who had been lauded throughout the conference by other speakers, that gradually stripped away Indian rights. Marshall's rulings, he said, turned the rule of law "into a tool, a weapon for dispossession of Indians." As a result, said Professor Gover, "Indians have very little confidence in the rule of law."

Gover added that, in Chief Justice Marshall's opinions, the Indian tribes were treated as wards of the United States, not as sovereign nations. "What it comes down to is that [in Marshall's writings] European nations represented a superior civilization," Gover said.

"We are bound together not just by friendship but by a mutual dedication to the rule of law."

— Rt. Hon. Lord Phillips



Social justice award honors civil rights icon

With the creation of an award bearing his name, the Law School honored Oliver W. Hill during the rule of law conference for a lifetime of work that furthered social justice.

Elaine R. Jones, former president of the NAACP Legal Defense Fund, joined Dean Rodney A. Smolla and Justice Donald W. Lemons of the Supreme Court of Virginia to honor Hill with the first Oliver W. Hill Social Justice Award. They presented the award to Hill, who turned 100 May 1, at a luncheon during the conference. Hill was greeted with a standing ovation.

"One of the last living giants of the early civil rights era," as the *Richmond Times-Dispatch* called him, Hill was born in 1907, in a city, state and nation that legally sanctioned segregation. Hill spent his vigorous professional life working to push rule of law back onto the right path. Eventually, the courts concurred.

The resolution accompanying the award spoke of landmark civil rights cases dealing with schools, public facilities, voting rights, fair housing, and service on juries.

In a passionate address, Jones, who described Hill as "a mentor and friend," spoke of being the first black woman to graduate from the University of Virginia School of Law.

"It was an experience for all of us," she said with a laugh.

She discussed rule of law from the African-American perspective, beginning in the 17th century. "I have read that history," Jones said. "I have never had more depressing reading."

She recounted how slaves were legally constrained from owning property. Their masters could punish them, sell them, mortgage or



lease them at will. A slave could not go before a tribunal against his master for any reason.

Even after the Civil War and constitutional amendments aimed at righting wrongs, the courts supported laws that disenfranchised blacks again. A century passed before the Voting Rights Act of 1965 was passed, fully guaranteeing blacks the right to vote.

The task fell to lawyers, with Hill at the forefront, to work in courthouses and capitols against the inequality in "separate but equal," and to work within the law to overcome injustices.

"The founding fathers were very smart men," Jones said, but "we're talking about the rule of law."

Jones recounted the threats Hill and his family faced. He once came home to find his wife sitting on the porch with a gun because she had been threatened. The Hills would not allow their children to answer the phone. A mortician once arrived at the house to collect Hill's body.

The lesson from Hill's life, Jones said, is that "a small group of thoughtful citizens can change the world. As lawyers, we can make a huge difference."

He found in the system of justice that came to Jamestown "a system he could challenge under," Jones said. "Oliver Hill saw that this law could work for all of us."

The luncheon ended with the crowd of about 280 singing "Happy Birthday" to Hill, who took the microphone and said, "I want to thank everyone who has had anything to do with this."

while the Indians were made increasingly dependent, and their rights, including access to courts, were denied. Over time, he said, "there was an outright effort to destroy these tribes as entities."

"The treatment of the Indians, even more than our treatment of other minorities, marks the rise and fall in our democratic faith," Gover concluded.

Gover's hard legal lesson was followed by Shirley's powerful and emotional description of what has happened to his people "since the foreigners came across the big waters."

He spoke of how the U.S. government spends billions of dollars on relief overseas while Indians languish in poverty and disease.

"I am seeing what goes on in my world," he said. "The U.S. agreed to be our trustee. With the rule of law, we should be doing well, but our people live in

shacks without running water."

He said the American Indians who were "discovered" by the settlers at Jamestown already had a government in place that was, effectively, a democracy run by rule of law. The colonists took ideas from them. "We helped create the U.S. government."

Shirley called for a return to sovereignty for Indians, and for aid to help the Indian nations recover. Doing so would fulfill broken promises and the rule of law, he said. "Stop trying to assimilate us. We were created by our Creator. We want to keep our culture, our way of life. Life is about standing on our own two feet."

GLOBAL RULE OF LAW

Speaking through an interpreter, Xu WenLi, a founder of the Chinese Democracy Party and now a senior fellow at Brown University, told the rapt audience that

the rule of law has been non-existent in China for most of its history. Xu was first arrested in 1982 for his pro-democracy activities and for publishing underground newsletters. He spent 16 years in prison. In solitary confinement, he watched the web-spinning and mating habits of spiders in his cell to keep from going crazy.

Finally released from prison on Christmas Day in 2002, Xu and his wife were granted asylum in the United States. While grateful for the sanctuary offered in America, he said he was perplexed by the exploitation of immigrants that often takes place and by the complexity of the justice system here.

"Righteousness can survive in this society but so can evil," Xu said.

As the United States and China have become close commercial partners, leaders of the democracy movement there still remain in prison.

Andrew Prozes, global CEO of LexisNexis Group,

an international information management company, spoke of the rule of law in international business. Prozes' credentials go deeper than his years as a business leader and lawyer on the world stage. His parents fled Estonia in 1944, ahead of the Soviet army, only to end up in the German labor camp where he was born.

Prozes recalled his father pounding the table, talking about laws. "There was no rule of law under the Soviets," he said. "Those experiences shaped me."

Today, his firm is advancing in world markets, the largest of which is China, where "just a tenuous sense of rule of law exists." There, the political process enters into the judicial system. A strong nationalist sentiment favors Chinese businesses. Intellectual property, which is the core of his business, is not protected. "We send so much information and data there, and we are fearful of what is happening with it," Prozes said. "The Chinese say not to worry."

Jamestown events underscore connection

By Susan Godman Rager, L'87

The rain came down steadily as we left Richmond and headed toward Jamestown. I thought back to the three small ships with 105 people aboard, beginning a journey with none of the comforts we were experiencing. How daunting rain would have been to them. Bad weather had kept them hovering off the English coast until February 1607. On our journey the rain subsided, and by the time our motorcade reached Jamestown, the sun was coming through. The three small ships had none of the support we had, and probably had diminished expectations of arriving, or certainly of arriving on any sort of schedule.

Sir George Yeardley, governor of the colony and convener of the first legislative assembly on this soil, a paternal ancestor of mine, is buried under the chancel area of the Jamestown Memorial Church, which was erected near the time of the colony's 300th anniversary. Robert Beheathland, gentleman, an ancestor of my mother's, was aboard one of the three ships that made landfall at Jamestown in May 1607.

Revisiting the island this time was, in a sense, seeing familiar territory with new eyes. Although I frequently visit, and often think about my personal connections to Jamestown, I had never before focused so intently on the embodiment of principles of English law in the fledgling colony.

Before there was a legislative assembly to address the need for

laws in the colony, rules were promulgated by the ventures that had funded and sent the explorers. While the rules necessarily were tailored to the primitive settlement, their basis was English law and English experience.

On April 14, we gathered to see the ceremony for the plaque presented by the four English Inns of Court to commemorate the 400th Anniversary of the first permanent English settlement in America. As British and American speakers of distinction addressed those assembled, it was suddenly more right than ever to acknowledge the debt of one society to the other.

Dr. William Kelso, director of archaeology for the Association for the Preservation of Virginia Antiquities Jamestown Rediscovery project, led us on a tour of the archaeological dig that is underway, and noted that as the first colony of England, Virginia was the beginning of what became the British Empire. In the intervening years, America and England both have seen expansion and contraction, but the principles that were here at the beginning

have served both America and England well. It was a fitting way to reaffirm the bond between the two nations, and a way to make the ocean in between seem smaller.

Susan Godman Rager is governor of the Chesapeake Bay Company (<http://JamestownChesapeakeBayCompany.com>) of the Jamestown Society. She practices law on Virginia's Northern Neck.





From left:
Andrew Prozes,
Rory Brady, Robert
Seiple, Erwin
Chemerinsky and
James R. Spencer.

Moving into China is an opportunity to make money, he said, but it also is an opportunity to move that emerging giant toward processes and cultures that support the rule of law.

"Corporate economic activity is based on trust," he said. "People who live in countries with the rule of law expect that." Nations and businesses have obligations beyond their own borders and shareholders to see that the protections of the rule of law are enjoyed throughout the world."

Rory Brady, attorney general of Ireland, described issues his nation faces in implementing rule of law with the recent evolution of the European Union. In a keynote address, Brady explained how court systems in many E.U. member nations are overburdened and, therefore, not as effective as they should be. Said Brady, "Delay can undermine the rule of law."

Brady, who used arbitration and alternative dispute resolution to help bring about Ireland's transformation into a prosperous democracy, said those same processes should resolve many problems in the E.U.

"That will require a cultural shift among lawyers and litigants," he said. They must recognize "that justice can be obtained outside the justice system."

CHURCH AND STATE

Debate over separation of church and state was a highlight of the conference, with panelists agreeing that sharp disagreement on public issues is an indicator of a healthy society.

"The freedom to believe or not is woven into our system," said Ambassador Robert Seiple, president of the Council for America's First Freedom. "Ours is a country where we can debate our differences."

Dean Starr spoke of the Jamestown colonists, "embarking on those ships seeking gold and finding disease." He said that with the First Amendment, the founders "broke through a powerful cultural barrier" and demonstrated that "peace could prevail even with religious pluralism."

In the debate over "ecclesiastical freedom," Starr

said, religious organizations enjoy the right to govern themselves "and limits on that require a higher step."

Professor Chemerinsky, whose parents fled Nazi persecution, described Thomas Jefferson's wall between church and state as "high and impregnable." He said there are several justices on the U.S. Supreme Court who now seem willing "to abandon the establishment clause."

"Why trade something that has worked so well for so long for something that's worked so poorly elsewhere?" Chemerinsky asked.

When his turn came, Chief Judge James R. Spencer of the U.S. District Court for the Eastern District of Virginia said, "This is getting good." Robust debate demonstrates "the pure genius" of the drafters. "The creative tension was intentional."

Many of the nation's founders' ancestors had experienced persecution on religious grounds, Spencer said. They understood that a state-sponsored church could become dictatorial. They wanted to ensure that all religions would be protected, but they also intended to keep religion in check, "to protect against the tyranny of the majority," Spencer said.

"People are going to be debating this long after we are gone," he said. "As far as I'm concerned, that's a good thing." ■

The Rule of Law Conference was part of the International Conference Series on the Foundations and Future of Democracy, sponsored by the Jamestown 400th Federal Commission.

Representatives from the Law School and other Virginia colleges and universities that held events in conjunction with the Jamestown 400th anniversary conference series will gather in Jamestown, Colonial Williamsburg and at the College of William and Mary Sept. 16-19 for the World Forum on the Future of Democracy. They will join leaders from mature and emerging democracies for closing programs. For more information see: <http://www.jamestown2007.org/ie-democracyforum.cfm>.

