Where Are We Going? Reflections on the Rule of Law in a Dangerous World

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1. INTRODUCTION

Thank you for the kind welcome, and the much too generous introduction.

It is an honour to have been asked to deliver this lecture in memory of Sir David Williams, one of the preeminent legal thinkers of the latter part of the 20th century, and one of this venerable institution's most memorable scholars and administrators.

I had the privilege of getting to know Sir David and Lady Sally Williams in the 1990s, as a visitor at Queen's College for what Canadians simply call, the Cambridge Lectures. As many of you know, a host of Canadian judges and lawyers descend on the hallowed precincts of Queen's College every second summer. Fellows run ongoing betting wars on who are Cambridge's rowdiest summer guests—the hordes of teenagers from all parts of Europe, or the Canadians, as they are simply known at Queen's. The odds are unclear on rowdiness, I understand, but one thing is beyond doubt—the Canadians drink more wine.

Because of my frequent visits to Cambridge; because over the course of years Frank and I became very fond of David and Sally and many others who I see here tonight; and, not a little, because my dear Canadian friend Stephen Toope is now filling David's shoes as Vice-Chancellor, and with my second appointment as Visitor of Queen's College I feel very here welcome tonight. Or more precisely—I feel very at home. Thank you.

In reviewing Sir David's writings in preparing my remarks, I was struck by two themes that mark his mature work.

The first is the theme of civil liberties. David took up the law of civil liberties early in his career. Until he did so, it had widely been regarded by lawyers as a random collection of interferences with freedoms. David took these musings and shaped them into a coherent body of legal thought. His particular insight was that the freedoms we call civil liberties are embedded in a political, social and judicial setting which shapes and confines them, and that to understand them, we must understand that matrix.

The second and intertwined theme that emerges from David's work is that legislative, executive and judicial branches of governance each have roles to play in articulating and applying civil liberties, as for most areas of the law. He was particularly interested in the interplay between the three branches of government in achieving respect for civil rights, and even more particularly, in the role of judicial oversight in defining and applying those rights. Starting from the premise that all laws arise from fallible human beings, he argued that lawmakers and the executive (e.g.,

the police and administrative decision-makers) must be subject to constant and principled scrutiny by the judicial branch of governance.

Sir David's appreciation of the interplay between Parliament, the Executive and the Courts was precocious. He came to this subject before it became fashionable. In the intervening years much has been written and said on the subject. Yet it remains at the heart of our legal debates as we approach the end of the first quarter of the twenty-first century.

Tonight, I would like to explore with you, from a twenty-first century perspective, the twin themes so dear to Sir David's heart—civil liberties in a free society; and the interplay between Parliament, the Executive and the Courts in defining and applying our civil liberties.

2. A FREE SOCIETY: WHAT DOES IT MEAN?

Politicians and citizens are fond of boasting that they live in a free society. But what, precisely, do we mean by the term "free society"?

Different scholars offer different definitions. But at a minimum, it seems to me that a free society is a society that respects certain fundamental freedoms: freedom of religion; freedom of expression; freedom of movement; the basic democratic freedoms of voting and holding public office; and the basic personal freedoms, like freedom from arbitrary detention, arbitrary search and seizure, and cruel and unusual punishment.

There are two aspects to the definition of a free society I have just offered—the enumeration of the basic freedoms, and an attitude of respect for those freedoms. Many countries have long lists of constitutional freedoms, but do not respect those freedoms—with that respect grounded in the rule of law and upheld by an independent judiciary. Both articulated freedoms and respect for those freedoms grounded in judicial enforcement are essential to a free society.

All three branches of governance are implicated in maintaining a free society.

Parliament or the legislature has a duty to craft and pass laws that respect civil liberties, or freedoms.

The Executive branch of governance has a duty to respect them in carrying out its duties. The police must do so in their investigations and their interactions with members of the public. Ministers must do so in making decisions, for example on extradition, entrusted to them by the law. The plethora of administrative agencies that administer laws and the schemes they set up must do the same.

Finally, the judicial branch has the task of scrutinizing laws and exercises of executive power for conformity to basic rights and standards inherent in the constitution, written or unwritten.

It was this judicial function that particularly interested Sir David Williams. His analysis of the relative contributions of each branch of governance led him to conclude that the courts were

best equipped to formulate the legal and democratic principles essential to a well-functioning democracy, and to do so in a manner more consistent than the legislature. Parliament must strive to ensure that the laws it passes respect fundamental freedoms. The Executive must act with the same respect. Thus Sir David emphasized the importance of judging police conduct against the standard of reasonableness.[1] But fundamentally, the difficult task of fine-tuning falls to the courts, he believed. The judiciary was best equipped and positioned to provide the constant scrutiny necessary to maintaining a free society.[2]

But what, precisely, is involved in the judicial scrutiny fundamental to maintaining a free society? Why does it sometimes prove difficult and controversial? It is to this question that I turn next.

3. DEFINING THE LIMITS OF FREEDOMS

At the heart of the difficulty in upholding fundamental civil liberties lies a stark proposition: *freedoms are not absolute*.

If freedoms were absolute, the task of Parliament, the police and the courts in upholding a free society would be easy. They would simply say no to any abridgement of speech, any curtailment of religious practice, any incursion on personal liberty. But that is not the real world. As Sir David understood, rights and freedoms are embedded in society. In day-to-day reality, they

[1] David Williams, *Keeping the Peace*, London: Hutchinson & Co., 1967, at pages 19-20.
[2] David Williams, *Not in the Public Interest*, London: Hutchinson & Co., 1965 at page 214.

surface a part of a problem involving a tangle of interests and values, which may involve conflicting rights or overriding public concerns. The first task of a judge when a breach of a fundamental right is alleged is to identify and define the right involved in the particular problem raised. In most countries, a written Bill of rights with constitutional or quasi-constitutional force, is the starting point for identifying the right and defining its scope. Once the right has been defined, a second question presents itself: to what extent may it be limited, in view of conflicting rights or fundamental overriding considerations? The first task is usually not too difficult. The second may be harder.

The simple fact is that freedoms, viewed in context, are never absolute. The drafters of the American *Declaration of Independence* penned their seminal description of the free society they envisioned without alluding to this reality. Thus the First Amendment declares, *Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.*[3] Never, ever, under any circumstances. But we all know that when legislators and judges came to drafting actual laws and deciding actual cases, it was necessary to introduce limits on the right of free speech. "What about the person who falsely cries 'Fire!' in a crowded theatre?", Oliver Wendell Holmes mused. Surely the public good of protecting the lives of the theatre goers would outweigh the speaker's interest in falsely crying "Fire". And what about libel and slander? Could a civilized society allow falsehoods to ruin honest men's reputations without recourse through the laws of defamation?

[3] *The Constitution of the United States*, Amendment 1, available at https://www.law.cornell.edu/constitution/first_amendment.

It can be argued that the answer to this question is increasingly "yes" in the United States, where politicians enjoy virtual immunity from libel, and "truthiness" and "fake news" are accepted as surrogates for objective facts. But this does not negate the basic proposition that the right of free expression has been limited in the United States and will continue to be limited when it comes up against higher imperatives. In short, however ringing the words of the First Amendment, the right to free speech is a limited right.

The same is true of every right proclaimed in the Amendments to the *Declaration of Independence.* And it is true of Canada and Great Britain and every country that takes civil liberties seriously. Rights are inherently limited.

The task of limiting rights can be accomplished in two ways, one internal, one external. Internal limitations are definitional limits that judges create in applying the right in an actual situation. The logic is simple—the drafters of the constitution cannot have intended that it would override the pressing public concern at hand, therefore we must read an unexpressed limit into it. American rights law is replete with various techniques for accomplishing this task. For example, different intrusions on certain rights may attract different levels of scrutiny—the higher the level of scrutiny, the more drastic the limits on the right.

A variant on the internal process of limiting rights is found in the common law of Great Britain. Because fundamental rights were defined case-by-case by judges (at least before the 1998 *Human Rights Act*), they emerged in limited form.

Canada inherited these common law rights with their internal limitations, and then recast them in codified form when it adopted the *Charter of Rights and Freedoms* in 1982. The model chosen was more continental than American. Rights were still (with some exceptions) defined in absolute terms. But the opening section of the *Charter* makes it clear that the rights (all but the democratic rights) can be overridden by laws, and by implication executive action, which must conform to law, if the limit can be justified. Section 1 states that everyone is guaranteed the rights set out in the *Charter*, "subject to such reasonable limits as may be demonstrably justified in a free and democratic society." As lawyer Eddie Greenspan put it in an article shortly after the *Charter* was adopted, "Don't get too excited, people of Canada. We're giving you this bundle of rights, but you might not be able to use them.[4]"

Under the *Charter*, rights can be limited both *internally*, by judicial definition of what the right protects, and *externally*, by the s. 1 override. (In addition, the *Charter* contains a third method of limitation—by legislative override under s. 33—but this has not been much used and need not detain us here.) Rights that already contain internal, or definitional, limitations, include s. 7 (the right to life, liberty and security) can be limited if the limit conforms to the "principles of fundamental justice", and the right to freedom from unauthorized search and seizure is penned as a right to freedom from *unreasonable* search and seizure. Since the principles of fundamental justice and reasonableness do much the same work as s. 1, this has produced debate about breaches of these sections can be "saved" under s. 1. In addition, courts have imposed internal limitations

[4] Edward Greenspan, "Ifs, Buts, and Whereases": Paper Presented at Ambassador's Lecture Series Presentation at the Canadian Embassy, Washington, D.C. on September 26, 1995, The Law Society of Upper Canada Gazette, Volume XXIX, Number 3/4, September/December 1995, page 212.

on some sections stated in absolute terms; thus the free expression guarantee was analyzed in terms reminiscent of the American levels of scrutiny doctrine in *Irwin Toy* v. *Quebec*,[5] and freedom of religion has been limited by the restriction that it does not protect practices that harm others: *R. v. Big M Drug Mart*.[6] Similarly, the guarantee against cruel and unusual punishment has been judicially qualified by the stipulation that to violate, a practice must shock the Canadian conscience: *R. v. Smith*.[7]

Shortly after the *Charter* was adopted, I attended a talk by an American constitutional scholar. He observed that the *Charter* would allow Canadian courts to take one of two courses—they could build up internal, definitional limits on the individual rights, or they could interpret the enumerated rights broadly and purposively, and then use s. 1 to limit the right. He urged the first approach on us; he argued that it would lead to a more consistent articulation of the principles underlying the various rights, and avoid the broader more malleable and more pragmatic process that he predicted would prevail under s. 1.

But this was not to be. The Supreme Court of Canada very early pronounced that the guarantees of the *Charter* must be interpreted broadly and purposively: *Hunter v. Southam*,[8] *R. v. Big M Drug Mart*.[9] The result was that most of the work of imposing limits on rights was left to

[5] *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 SCR 927, available at https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/443/index.do.
[6] *R. v. Big M Drug Mart Ltd.*, [1985] 1 SCR 295, available at https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/43/index.do.
[7] *R. v. Smith*, [1987] 1 S.C.R. 1045, available at https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/227/index.do.
[8] *Hunter et al. v. Southam Inc.*, [1984] 2 S.C.R. 145, available at https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/5274/index.do.
[9] *R. v. Big M Drug Mart Ltd.*, [1985] 1 SCR 295, available at https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/43/index.do.

s. 1 of the *Charter*. One can debate whether the ubiquitous use of s. 1 to limit *Charter* rights has borne out the American scholar's fear that pragmatism would win at the cost of decisions based on a principled understanding of the inherent limits of the rights—something Sir David Williams saw as important.

It is true that despite a detailed articulation of the principle of proportionality,[10] The European principle chosen to frame the justifiability debate under s. 1, the Supreme Court of Canada has frequently divided on whether the state has shown a limit to be justifiable under s. 1 of the *Charter*. It is also true that critics can (and do) argue that this undermines principle and predictability, and that the scenario of judges second-guessing politicians on pragmatic grounds of whether the legislative goal was "pressing and substantial", minimally impairing, or proportionate in effect provides fuel to the argument that the court is usurping Parliament's legislative role. But that ship, for better or worse, has sailed in Canada, and appears unlikely to return to harbor.

These debates, however interesting in my country, need not detain us here. In this country, rights are enunciated in the *Bill of Rights*, adopted in 1998 as part of Britain's commitment to the European Union. The *Bill of Rights* has no equivalent of the *Charter's* s. 1. Yet it is a European document and the European principle of proportionality inevitably colours the analysis of limitations on rights. Suffice to say that whether a judge is sitting in England or in Canada, the task of drawing limits on rights is a difficult one, which inevitably involves policy considerations. The limit may arise from the problem of two conflicting rights—for example, the right to freedom

[10] R. *v.* Oakes, [1986] 1 S.C.R. 103, available at https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/117/index.do.

of religion may conflict with the free trial right in the case of a woman refusing to remove her veil in court testimony,[11] to take only one example of a case that has come before the Supreme Court of Canada. Court settle such disputes by balancing the rights and striving for a solution that protects each as much as possible—a reasonable balance. Or the limit may arise from overriding public policy concerns, like limits on free speech in the interest of protecting groups from hate speech[12], or keeping offenders who present a risk of harm in prison rather than releasing them on bail.[13] Once again, courts apply a balancing approach.

Sir David Williams did not speak of proportionality in the European or Canadian sense. Instead, he drew on the judicial standard of reasonableness, developed in administrative law, to draw limits between individual rights and public safety when reviewing police action. Given the importance of the right and the conflicting concern, was the police conduct reasonable? This is not the reasonableness of cursory review—if it passes the "smell test" it's acceptable; rather, it is reasonableness in the deep sense of asking whether the conduct or law at issue reflects and conforms to a proper legal understanding of the right that is being limited and its importance in the country's legal framework. It is not the reasonableness of the transitory expediency; rather it is reasonableness grounded in historic experience. In a word, it is principled reasonableness.

[11] *R. v. N.S.*, 2012 SCC 72, [2012] 3 S.C.R. 726, available at https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/12779/index.do.
[12] *R. v. Keegstra*, [1996] 1 S.C.R. 458, available at https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/1350/index.do; *R. v. Zundel*, [1992] 2 S.C.R. 731, available at https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/904/index.do.
[13] Cunningham v. Canada, [1993] 2 S.C.R. 143, available at https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/997/index.do.

The same approach may guide judicial review of laws for constitutionality. Indeed, the proportionality test that has developed in Canada may be seen as an elaborate reasonableness test. It looks at the goal that is said to justify the intrusion, asks whether the intrusion goes further than necessary, and weighs up the proportionate benefits and detriments associated with the intrusion on the right. It asks these questions to determine whether the intrusion is reasonable.

Let me sum up thus far. Courts play a vital role in scrutinizing laws and executive action for conformity to rights. But rights are not absolute. This draws courts into inquiries into the limits on the right in question in the circumstances in question. Limits may arise from the definition of the right—what it protects—or from external considerations that justify limiting the right in the circumstances. The precise methodology may vary with the nature of the constitution and legal system in place. What is important in the end is that the law or impugned conduct be reasonable, based on a principled consideration of the right and the circumstances that are said to justify limiting it—what Sir David Williams called the principle of reasonableness.

I recognize, of course that what I have been talking about may not seem relevant in post-Brexit Britain. The 1998 *Bill of Rights* will be gone. Perhaps, eventually, a new document will replace it; perhaps not, leaving the judges to uphold human rights as best they can at common law. Whatever happens, this country has a long history of respect for human rights – one I cannot see it abandoning. Perhaps David Williams' concept of reasonableness will assume a new importance in post-Brexit Britain.

4. THE INTERPLAY OF PARLIAMENT, THE EXECUTIVE, AND THE COURTS: THINKING FAST AND THINKING SLOW

Against this background, I come to the interplay between the three branches of governance in upholding rights and maintaining a free society. Sir David Williams, writing before the 1998 *Bill of Rights*, at a time when judges upheld rights as a matter of common law, suggested that the courts are best equipped to make the difficult decisions on when rights may justifiably be limited, in a free society. But the courts are not alone in this endeavour. Sir David said this in the context of how judges respond to legislative and administrative decisions impacting rights, taken by other, non-judicial branches of government. In reality, all three branches of government are involved in determining the limits on fundamental freedoms, even though the courts may seem to have the last word. (In Canada, the override provision in s. 33 of the *Charter* gives the final word – at least for five years, renewable – to the legislatures.)

This is not a bad thing. It ensures that different bodies look at the issue from different perspectives. It enhances the legitimacy of the ultimate decision. It provides for a second look at legislative or administrative decisions. And judicial review fosters political stability by allowing voice to those who might otherwise not be heard.

The charge we sometimes hear that judges "make up" rights and their limits, overlooks the fact that whether rights are embedded in a document or expressed as principles of common law, they represent the collective wisdom of a country's historic experience. They cannot be lightly ignored by legislators or administrators charged with applying the law. The democratic model that

has grown up over the centuries and now prevails in the United Kingdom and throughout many parts of the western world is an open, multi-institutional model. Different institutions play different roles. Parliament, or the legislative branch, is composed of elected members answerable through the ballot box to the people. The Executive Branch of government, from Cabinet through agencies to law enforcement, carries out the laws of Parliament. Both Parliament and the Executive operate under the scrutiny of the courts. Many countries have added new institutions to the traditional legislative, executive and court trinity, like Official Ombudsmen and electoral tribunals. All these institutions work, if not together, as essential components of rights-respecting governance, Parliament enacts; the executive acts; the courts review.

The laws passed by Parliament, as well as the acts of the executive, can be reviewed for conformity with basic constitutional underpinnings, or what Sir David Williams called reasonableness. In a federal state with a constitutional bill of rights, like Canada, this includes review of federal or provincial power to make the law or do the impugned act, as well as review for conformity with the *Charter*. In England, review of laws is more limited—review for conformity with the Bills of Rights remains however, even though the remedy is not invalidation but reference back to Parliament. In both Canada and this country, the courts regularly judicially review executive acts.

This multi-institutional approach to governance, which posits different institutions operating more or less independently may be contrasted with single source of power approach, which preceded modern democracy. We are all familiar with Coke's battle for judicial independence. James I, like most monarchs before him, viewed himself as the repository of all

power, including the judicial power. But as we know, that changed, and the independent judiciary was born.

This was a remarkable development. Many of the more authoritarian states in the world, while perhaps genuflecting to judicial independence, in practice view power as emanating from a powerful ruler and the law-making bodies he or it manage to control. One way or another, ways are found to bring the courts and other institutions to heel, should they act too independently. Rights and the limits on them are, in the final analysis, controlled by the central authority. There is no independent check on the authority's determination. As a result, rights may be infringed with impunity. The central authority's decision of whether to recognize a right and where to draw the limiting line – a line that is often set abysmally low - always prevails.

By contrast, an open-textured democracy distributes power among different institutions. While the result may appear messy on the surface, political scientists like Philip Pettit[14] and Will Kymlicka argue that this not only protects basic rights, but also promotes stability in the long-term. Citizens who fail to persuade the Prime Minister of their rights, can bring them to the courts. Even if they do not prevail, they are heard. Pressure that might otherwise build to the point that it destabilizes the country is blown off. New answers are found. In the long term, the country is more stable and arguably more just and prosperous.

[14] Philip Pettit, "Democracy, Electoral and Contestatory," in Ian Shapiro and Stephen Macedo, eds., *Designing Democratic Institutions*, Nomos XLII (New York: NYU Press, 2000) page 105, available at https://www.princeton.edu/~ppettit/papers/Democracy_Electoral_and_Contestatory_NOMOS_2000.pdf.

This has happened in Canada a number of times. Aboriginal groups, unable to make progress by legislative reform, sought relief in the courts. The same happened on same-sex issues, women's issues and difficult issues like abortion and the right to medically assisted death. Responding to court rulings, Parliament often visited or revisited the issues, and enacted laws responding to the issues. This has been described metaphorically as a dialogue between the courts and Parliament.[15]

The second point is that judicial review of legislation and executive action can help develop optimum solutions to issues a country is facing. Nobel prize-winning psychologist and author Daniel Kahneman develops this idea in his book, *Thinking, Fast and Slow*. Kahneman explains two basic ways human beings react to problems they are confronted with. The first is fast thinking. Short-cuts and instinctual answers are hard-wired into human brains by experience. This is valuable. They help us get to what is usually the right answer quickly, whether the problem is diagnosing a patient with an illness or working out the solution to a complex legal problem. But fast-thinking is not enough on its own. It should be supplemented by show thinking—fact-verification, analysis, consideration of alternate hypotheses and logical and mathematical verification. In other words, to get the right answer, we need to follow up fast-thinking with slow thinking.

The constant judicial scrutiny of laws and law-makers in the multi-institutional democracy of which Sir David Williams wrote constitutes slow thinking. Ideally, slow thinking should go on

[15] "The Charter Dialogue Between the Courts and the Legislatures (Or Perhaps the Charter of Rights Isn't Such a Bad Thing After All," Osgoode Hall Law Journal, Vol. 37, 1997, pp. 75-124.

in Parliament through the process of debate, and in executive action through processes of reasoned decision-making. But if this does not happen, or even if it does, scrutiny by the courts provides another level of thinking slow. On a subject as important as the fundamental freedoms of a country's people, this can only be salutary.

5. WHY THE INTERPLAY BETWEEN THE LEGISLATIVE, EXECUTIVE AND THE COURTS MATTERS NOW

I have been describing an interplay between the legislative, executive and judicial branches which has its roots in the battles of Lord Coke for judicial independence, was transplanted throughout the English-speaking world, and after World War II came to be embraced around the globe. There are worrying signs, however, that this understanding of democracy and governance is increasingly being challenged.

If we look back seventy years, we see a world emerging from and long period of devastation. The Great War had left nations battered and depleted. Just as the economy seemed to pick up, the Great Depression delivered a second blow. On the continent, forces of the right gained strength; legal constraints were questioned. The unraveling climaxed in the horrors of totalitarian national socialism, the Holocaust and World War II.

The response to the anarchy and annihilation of that time in Britain, Canada and host of other countries was "never again". The tools to ensure this were the affirmation of human rights—the inalienable dignity of every human being—and of democracy grounded in the rule of law. At

the international level, we saw declarations of human rights and protocols guaranteeing judicial independence and the independence of the bar. Everyone—or so it seemed—believed in these things. Country after country moved toward democracy and set up independent courts. When the Berlin Wall came down, even Eastern Europe jumped on the bandwagon of democracy and the rule of law. Western economies thrived on the stability provided by the rule of law and domestic courts recognized and enforced minority rights. People built institutions to consolidate the gains. Historian Francis Fukuyama pronounced the end of history, and we all sat back and breathed a collective sigh of relief.

The arrow of the rule of law seemed to arc ever upward. But a few years ago, it wavered and started to fall.

In 2016, Freedom House reported that in 2016, for the 11th straight year, more countries suffered declines in political rights and civil liberties than experienced gains. Its annual *Freedom in the World* report detailed gains by populist and nationalist forces in democratic states and brazen aggression by authoritarian powers that year. Things did not improve in 2017. And they are looking even bleaker in 2018. In January, the World Justice Project reported that almost two-thirds of the 113 countries examined reported an erosion of fundamental rights.[16] (Some details of interest: Canada moved up 3 places to 8th position; the UK dropped one place to 11th. Criminal justice systems performed poorly pretty much across the board.[17])

[16] Will Bordell and Jon Robins, "'A crisis for human rights': new index reveals global fall in basic justice," The Guardian (31 January 2018), available at https://www.theguardian.com/inequality/2018/jan/31/human-rights-new-rule-of-law-index-reveals-global-fall-basic-justice.
[17] World Justice Project, *Rule of Law Index 2017-2018*, available at https://worldjusticeproject.org/sites/default/files/documents/WJP_ROLI_2017-18_Online-Edition_0.pdf.

Behind these statistics lie stories that fill us with apprehension.

In Hungary, Poland and Russia, right wing governments enacted laws and imposed strictures that have undermined the independence of the bar and the bench. Poland's Senate recently passed a bill that would make it illegal to publicly accuse Polish people of Nazi collaboration during the Holocaust. In Russia, judges are seen as doing the state's will, and when they don't, their orders may go unenforced. The Sergei Magnitsky story, a story well known in this country, where its author Bill Browder lives, attests to the dissolution of aspirations to establishing a credible justice system based on the rule of law, in Russia.[18]

In Turkey, lawyers and judge languish in prison as we speak, without as far a we can see, the benefit of open and impartial trials. We have witnessed political attacks on lawyers and judges in the Ukraine and the subversion of the Constitutional Court of Venezuela. Just a few weeks ago, the President of the Maldives defied an Order of the Supreme Court that convictions of political opponents be set aside and that they be released, and arrested the Chief Justice. And in countries closer to home, we see subtler—hopefully temporary—assaults on the independence of the judiciary,[19] as President Trump rails against "so-called judges" and publicly denigrates his

[18] "Q&A: The Magnitsky Affair," BBC (11 July 2013), available at http://www.bbc.com/news/world-europe-20626960.

[19] The rule of law remains strong in the United States, but it is hard to ignore persistent attempts to undermine the traditional checks on the exercise of presidential power. Lawyers helping refugees and immigrants have been called "dirty immigration lawyers" and judges who ruled against the administration have been labeled "so-called judges". (See: Attorney General Jeff Sessions Delivers Remarks to the Executive Office for Immigration Review, Falls Church, VA (12 October 2017), available at https://www.justice.gov/opa/speech/attorney-general-jeff-sessions-delivers-remarks-executive-office-immigration-review and Trump, Donald (@realDonaldTrump). "The opinion of this so-called judge, which essentially takes law-enforcement away from our country, is ridiculous and will be overturned!" 4 February

Attorney-General. The trend is disquieting. The multi-institutional model of democracy that has protected rights for the past seven decades through independent judicial review stands in danger of being replaced by a top-down model where the limits on rights are determined only by the person at the top, one fears.

We are living in a time of unraveling, a time when the public goods that we have taken for granted for the last sixty years—the continuing advance of the rule of law and judicial independence—are faltering. But we should not be complacent. One thing seems certain: we can no longer take for granted the world that Sir David Williams sought, a world where it was accepted that fallible law-making and lawmakers must be subject to the "constant scrutiny" of the courts.

6. THE WAY AHEAD

In closing, I return to Sir David Williams' dual vision—a vision of a country where civil rights are respected and where the interplay between Parliament, the Executive and the Judicial Branch ensures the principled and considered exercise of state power. I believe this vision has served us well, and is worthy of preservation.

2017 at 08:12. Tweet available at https://twitter.com/realDonaldTrump/status/827867311054974976.) Judges seen as deferential have been appointed, despite failure to meet the merit criteria of the ABA. (See: CBS News/Associated Press, "Leonard Steven Grasz, Trump judicial pick rated as "not qualified," OK'd by Senate ," CBSNews.com, 13 December 2017, available at https://www.cbsnews.com/news/leonard-steven-grasz-trump-judicial-pick-not-qualified-okd-senate/.) In England, the morning press not long ago printed photos of the three judges who ruled that Parliament must approve the terms of leaving the European Union under the banner, "Enemies of the People." (See: [19] James Slack, "Enemies of the people: Fury over 'out of touch' judges who have 'declared war on democracy' by defying 17.4m Brexit voters and who could trigger constitutional crisis," *Daily Mail*, 3 November 2016, available at http://www.dailymail.co.uk/news/article-3903436/Enemies-people-Fury-touch-judges-defied-17-4m-Brexit-voters-trigger-constitutional-crisis.html.)

What can we do to ensure its continuance? No magic elixirs can guarantee a society where rights are protected and the rule of law maintained. But those who believe in David Williams' vision are not without tools.

As Harvard political scientists Levistsky and Ziblatt say in a recent book, *How Democracies Die*, "[t]he backsliding of democracy is often gradual, its effects unfolding over time."[20] In their book, the authors argue that even well-designed constitutions cannot guarantee the rule of law, and that the best protection lies in respect for the unwritten norms that serve as the "guardrails of democracy." Insistence on the principled exercise of state power through independent judicial review is one such norm – a norm that Sir David Williams championed. Here are a few things we can do to preserve this norm:

We can continue to remind the public about the benefits of a free society and the rule of law.

When we see slippage in the rule of law at home or abroad, we can speak out.

We can continue to shore up our institutions, first and foremost the judiciary, against gratuitous attack and denigration.

[20] Steven Levitsky and Daniel Ziblatt, *How Democracies Die* (New York: Crown, 2018) at page 187.

We can insist that the men and women appointed to our benches are people of merit and integrity, and that the people have access to justice.

We can hold ourselves to account. Those among us who are lawyers and judges can ensure we conduct our personal and public lives in a manner that inspires public confidence in our justice system. Whatever our walk of life, we can insist on dignity and honesty in the conduct of public affairs.

Last but not least, in the face of rising tides of fear and emotion, let our conduct reflect the judicial standard of reasonableness Sir David Williams championed. Before judging or deciding on an issue concerning rights, let us ask the important questions. What is in keeping with the values that have sustained us over time? What is right? What is reasonable in a free and democratic society? If we insist on this, we cannot go far wrong.

Thank you for allowing me to share these reflections with you.