

Witness for the Prosecution: History, Justice, and the Democratic Ideal¹

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When the legislation creating the office of the Director of Public Prosecutions was being brought through the Dáil, a Fine Gael TD speculated about why it had taken Ireland so long to establish such a role. He believed that ‘possibly history played a part’, because the law had not been held in much repute by the vast majority of people during the period of British rule. For that extended period, he said, ‘The law was being administered by a foreigner and by the minions of a foreigner’. ‘To describe a person as the Director of Public Prosecutions was probably the quickest way of attracting a piece of lead or a knife.’

That was not entirely true. No one did more to restore respect for law in nineteenth-century Ireland than Daniel O’Connell, who showed that it could be used as a shield to defend the people, instead of being a weapon wielded against them. We remember O’Connell as the dramatic defence counsel, saving men from the gallows and championing the oppressed. In his lifetime he was revered as ‘The Counsellor’. Yet he also prosecuted, most notably early in his career – including a murder trial in Bantry Bay and in *Hennessey v. Hennessey*, where he prosecuted a mother who had assaulted her son. O’Connell understood that justice depended on both defence and prosecution.

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His own trial for conspiracy in 1844 offers the clearest insight into his philosophy of law. Defending himself after eighteen days in court, he explained that his true client was Ireland itself, and that his duty was to 'keep the people free from the meshes of the law'. He insisted that his mission was to appeal to 'common sense and common justice' as 'the advocate of the rights, and liberties, and constitutional privilege' of the Irish people.

Yet the trial itself exposed the danger of a corrupted system. O'Connell's prosecution was political. The jury was packed, the process a sham. His conviction was overturned within months because the highest law judges in Britain recognised that the rule of law in Ireland would become 'a mockery, a snare and a delusion' if the conviction was allowed stand. O'Connell's respect for law survived even its misuse. For others, however, the case confirmed that in Ireland the law was still a weapon against the people.

That fear resurfaced at the birth of the State. We see it following the assassination of TD Seán Hales, a sitting member of the Dáil, murdered on his way to the chamber in December 1922 - killed in cold blood – by Anti-Treaty gunmen. The shocking news was announced in the Dáil chamber by W.T. Cosgrave, who was visibly shaken. The new State was officially one day old.

Seán's brother, Tom, an anti-Treaty prisoner was not released to attend the funeral. As a direct response of the killing, the Government took the decision hours later to execute four Anti-Treaty prisoners held in custody, even though they had no direct connection to the crime

that had taken place. They chose one from each province – Dick Barrett, Rory O’Connor, Liam Mellowes and Joe McKelvey.

Speaking in Cork on the centenary of the executions, the Taoiseach, Micheál Martin, called the executions ‘manifestly illegal’ and suggested that they ‘damaged the standing and authority of the new state’. Dick Barrett, most notably, was executed without trial or court-martial, killed for a policy he had opposed before his arrest. The Taoiseach explicitly challenged whether these executions had achieved security for the new State, although it was the case that no more TDs were murdered during the Civil War.

Speaking in the Dáil in 2011, six years before he become Taoiseach, Minister Leo Varadkar had no hesitation in calling out the killings. He said that ‘people who were murdered, or executed, without trial by the Cumann na nGaedheal government were murdered. It was an atrocity and those people killed without a trial by the first Government were murdered. That is my view’.

At the time, the Hales family condemned the executions as revenge. The Civil War left a bitter legacy that shaped attitudes to law for generations. Many on the Anti-Treaty side – and their political heirs – came to distrust the independence of the justice system, seeing politics and law as dangerously entwined. That mistrust lingered into the 1970s, when the office of the DPP was finally proposed.

At that time, in 1974, political violence again threatened the State. Senator Billy Fox of Monaghan had been murdered by the IRA, and the government felt itself under siege. All parties supported the principle of an independent prosecuting authority, but Fianna Fáil, now in opposition, expressed serious reservations – shaped by that long history of mistrust and suspicion.

The party questioned the design of the new Office and the standing required of its head. In the Dáil, David Andrews argued that the Director must be a senior counsel of at least five years' experience, of equal stature to the Attorney General. The former Minister for Justice, Des O'Malley, warned that public confidence would not survive if the appointee was someone 'that nobody had ever heard of'. It was not enough, he said, 'simply to pick a man of sound judgment and common sense. I think the public would expect more and be entitled to more than just that.'

Eamonn Barnes had his work cut out for him from the beginning, convincing the public of the merits and value of the new office, convincing some sceptical politicians about his own credibility and authority in the role, and ensuring that public trust and integrity were central to the way the administration of criminal law was done. To reassure those with doubts, and respond to the criticism, Barnes set out to establish the DPP's legitimacy and show that its decisions were made with independence, competence, and fairness.

To give just two examples. In 1979, he gave a two-part interview to *The Irish Press*, reaching readers more likely to be sceptical of him. In 1995, on the 20th anniversary of his appointment, Barnes even appeared on *Liveline* with its original presenter Marian Finucane, to answer questions from the public. His appearance caused uproar in political circles but strengthened public confidence. By his retirement in 1999, the *Irish Times* rightly concluded: 'He developed the office and it never fell on its head.' Barnes proved that justice, to serve democracy, must be impartial, independent, and intelligible. He showed that the prosecutor, as much as the defence counsel, bears witness to the rule of law itself.

Yet the rule of law is never secure. Around the world, it is eroded by political interference, selective or politically-motivated prosecutions, and contempt for legal restraint. The lesson is universal: when the law becomes an instrument of politics, democracy itself is imperilled. The rule of law and democracy itself have always been held together by the most fragile of threads. Across the Atlantic, there are many examples of presidents abusing and over-riding the rule of law, long before Donald Trump came to power, and it is not always the most obvious suspects who did so.

In the nineteenth century, Abraham Lincoln - the greatest American president - imprisoned political opponents on limited evidence, censored newspapers, and treated judicial rulings as optional. At the start of the war, in the most egregious breach, Lincoln decided to suspend *habeas corpus*. Appeals were made to the courts, and Supreme Court Justice Roger Taney ruled in 1861 that only Congress could suspend *habeas corpus*. Lincoln chose to view the ruling as invalid and decided to ignore it.

Lincoln was prepared to stretch the constitution to breaking point to win the war – and he was sometimes prepared to set it aside completely. Lincoln's genius lay in the moral clarity he brought to directing the war effort, how he communicated its aims, and how he brought it successfully to a conclusion, preserving the Constitution, and expanding its benefits to those who had been denied them. Yet his story remains complicated, reminding us that even moral leadership can strain legality.

In the 20th century, Franklin Delano Roosevelt, the greatest president of that century, saved democracy from depression and fascism. Yet he too failed the test of law and justice when he signed Executive Order 9066, authorising the internment of 125,000 Japanese Americans – most of them citizens. Their loyalty was doubted because of their ancestry. Some were imprisoned for being one-sixteenth Japanese. Families were torn apart and sent to camps behind barbed wire. Children were separated from parents. German-Americans were trusted; Japanese-Americans were not.

The Supreme Court upheld the policy. The *Los Angeles Times* justified it in 1943, declaring that 'the Japanese have made for themselves a record for treachery unsurpassed in history.' Among the internees were Pat Morita, later famous as Mr Miyagi in *The Karate Kid*, and George Takei, who would go on to play Mr Sulu in *Star Trek*. Takei's family lost their home and business and were left homeless for years after release.

It was not until 2018 that the Supreme Court finally repudiated the internment rulings when reviewing President Trump's attempted Muslim travel ban. Chief Justice John Roberts wrote: 'The forcible relocation of U.S. citizens to concentration camps, solely and explicitly on the basis of race, was objectively unlawful and outside the scope of presidential authority.' And, of course, he said this while upholding Trump's Muslim travel ban.

We must resist turning the rule of law into a slogan. It is not a badge of virtue, or a weapon to attack our opponents. And it should never be used as a screen for our own failures. When President Obama left office in January 2017, he continued a tradition started by George Washington and delivered a Farewell Address. In it, he referenced the rule of law four times. It was in the context of a world built on principles, and about leaders who were not accountable because they held it in contempt. It was very clear who he was talking about, and with good reason.

President Obama also referenced the rule of law exactly four times in a speech delivered four years earlier, after his re-election, to the National Defence University. It was a speech that mentioned drones 13 times, defending their increased use under his presidency. He admitted that much of the criticism centred on civilian casualties, and that, quote, 'those deaths will haunt us for as long as we live'. But, at the same time, 'I must weigh these heartbreaking tragedies against the alternatives'.

Towards the end of the speech, a woman, Medea Benjamin, interrupted him to plead for him to 'stop the signature strikes killing people on the basis of suspicious activities'. Obama's answer was: 'we're addressing that ma'am'. The woman persisted in trying to speak up for, quote, 'the innocent families', adding 'I love my country. I love the rule of law'. Obama responded politely, at first, saying that 'the voice of that woman is worth paying attention to'. But he then added, to much applause, 'Obviously I do not agree with much of what she said, and obviously she wasn't listening to me in much of what I said'.

President Obama's references to the rule of law centred on the times when America had compromised its basic values, by torturing enemies, and detaining them in ways that ran counter to the rule of law. Guantanamo Bay, he admitted, had become a symbol around the world, quote, 'for an America that flouts the rule of law'. History, he admitted, will cast 'a harsh judgement on this aspect of our fight against terrorism, and those of us who fail to end it.' And once again, President Obama, was absolutely correct. The detention camp at Guantanamo has never closed. In 2018 President Trump signed an order to keep the detention camp open indefinitely. President Biden vowed to close it before his term ended. President Trump has now expanded it to include up to 30,000 migrants.

The examples of Lincoln and Roosevelt and Obama are reminders that even the greatest democracies and leaders can violate the principles they claim to defend. The rule of law is not self-sustaining – it must be constantly protected, explained, and renewed.

It is revealing to explore the way Donald Trump as President has used the phrase ‘the rule of law’. Speaking shortly before the 2020 presidential election, at the White House Conference on American History, he declared that ‘law enforcement’ was ‘the universal symbol of the rule of law in America’. In his telling, the rule of law became the rule of force – law as the instrument of authority rather than its restraint. It was rule by law, not rule of law, an approach that confuses obedience with justice and power with legitimacy.

As we have seen, other American presidents sometimes departed from the rule of law – but they never sought to hollow out the idea itself. They treated the law as a framework to return to, not an obstacle to remove. Trump’s language, by contrast, recasts the law as a weapon to be wielded. It undermines the law in a way that Daniel O’Connell would well have understood. The law being used as a weapon, rather than a shield. This distinction is the fault line between imperfection within the rule of law and opposition to it.

Throughout history the pattern is the same: when power is unchecked, justice falters. When the law is allowed to bend, the democratic ideal begins to break. The lesson for every generation – in Ireland and beyond – is that law must remain the servant of the people and the servant of principle, not its master.

To be a *witness for the prosecution* is to testify to that truth – to stand for justice when it is unfashionable, to speak for fairness when silence would be safer, and to defend the rule of

law when it is most under threat. That is the work of prosecutors. And it is, in the deepest sense, the work of a democracy that wishes to endure.