

Remarks from General Counsel Panel, WJP Scholars Conference

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Moderator:

Bill Neukom, Founder and CEO, World Justice Project

Participants:

- Hillary Krane, VP and General Counsel, NIKE Inc.
- Bruce Sewell, General Counsel and Senior Vice President of Legal and Global Security, Apple
- Colin Stretch, Vice President and General Counsel, Facebook
- Kent Walker, Senior Vice President and General Counsel, Google

Bill Neukom

Well, good morning again, we have had a full day and a half of brilliant scholars discussing with each other, and a few of us lucky enough to be in the room, the subject of the rule of law and key aspects of that concept. We thought it might be worthwhile to fold into the program what I would refer to as comments from a set of practitioners, well informed, quite expert in their awareness of the rule of law, and to ask them to discuss with you and with each other their views of the rule of law and whether it matters to their companies, and why it matters and how it matters to their companies. This is thin ice and their remarks will speak for themselves.

Let me try to set a little bit of context for their remarks by way of introducing them and their jobs and their companies very briefly, in my own terms and they can correct this record as we go forward, and please do. These are four CEOs of four companies which are highly legalistic enterprises. Which is to say that there are probably fewer jokes about lawyers from the campuses of these companies than there are in some other companies, because the folks, particularly at the top, understand that if you are going to be in the intellectual property business, for example, and if you are going to have a global scope, that you need law workers to find ways for your business to be successful. So they are in legally intensive businesses which have a great need for wise legal counsel. And that makes their jobs quite strategic and also gives them an opportunity to be what I think of as thought leaders in their communities, within their corporate communities. And that is thought leadership in a group of very, very smart folks in other parts of the company who are very dedicated to the mission of the company and expect a lot of analysis and a lot of good results.

Their companies each have global scope and global reach. They depend on, I think, increasingly for their growth, on the development of developing markets. So they have a keen interest in understanding better the markets in countries other than in the US and Canada and Western Europe for example, and that means these General Counsels become very well informed and regularly updated on the globe itself, and broad conditions that matter in marketplaces all around the globe.

In collaboration with:

Stanford
Law School

Washington, DC office
1025 Vermont Avenue NW, #1200
Washington, D.C. 20005 USA
202.407.9330

Seattle, WA office
1411 Fourth Avenue, #920
Seattle, WA 98101 USA
206.792.7676

worldjusticeproject.org
facebook.com/World-Justice-Project
twitter.com/TheWJP

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And I think their companies are strong illustrations of companies who recognize that whereas their first responsibility may be return for their investors, their shareholders, on the same token, because of their size and their wealth and their competence, these companies also have a responsibility to make communities functional. For self-interest, functional communities tend to be better markets, and also, in a broader sense, given their influence in world affairs, these companies can do something about making the world a better place. And it is not just a sort of current corporate social responsibility movement, which I think is a well and good and healthy thing, these companies were there well before that. They do, I think, a very impressive job of balancing their efforts, their investments, both for self-interest and for the broader public interest.

So you have very bright, very well informed people who are making decisions that matter, housed in companies that have a very broad view of the role of companies and the responsibilities that come with this success. So with apologies for confusing the context and inviting you to correct that context, let me start with asking Hilary Krane from Nike to share some ideas, and we've agreed in light of being somewhat delayed this morning, it will be more like 8 minutes of semi-prepared remarks to give the audience plenty of opportunity. And I will say that in the audience is another general counsel in the last chapter of work, Doug Melamed in the back corner. Doug is now here at the law school, served nobly as the GC at Intel, and he should probably be sitting here and not me. We will hear from him I'm sure in the course of give and take.

There are also a number of law school students here. Some of them are here involuntarily. They get an hour of credit for a rule of law seminar given across the way, so we will probably hear from them as well. Our co-host Liz Magill is here from the law school. Liz, thank you for joining us at this stage. Hilary, please.

Hilary Krane

Thank you Bill. First of all I want to thank Bill and the Dean for inviting us, and particularly me, here today to have this conversation with you. It is humbling to talk to a group of scholars at this level about this very serious subject. It is also humbling to come on stage after the presentation of that last award, which underscores that the real and most important aspect of rule of law come in the human stories of the people who are affected by the rule of law and the overall impact that the rule of law or the absence of it has upon individual lives, family lives, community and humanity as a whole. When you look at it in that context, sitting in the GC chair for global corporations seems pretty insignificant. However it is not lost on me that our activities and how we engage in them influence the development or the non-development of the institutions that lead to some of the subjects we've been talking about the last few days. So please forgive me and us if our remarks seem a little sterile in the context of the greater human story that is at work here.

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For me, at its base, rule of law from a legal or business or engagement-in-the-world perspective really turns on the ability to have reliable expectations about how things will proceed in any given environment. Business is based on planning. You make long term plans, you commit a great deal of resources, human, financial, and otherwise, in developing enterprises to both serve your shareholders and, to build on an earlier point, a much wider group of stakeholders. I do not view that bit as a second bit, or as the stakeholders or shareholders being at odds with each other. I think the experience of my company has demonstrably proved that how well we do with all of our stakeholders influences how well we do with our shareholders. It is a virtuous circle in that the more predictability that you can create through rule of law, the better engaged you are with all of the people who are affected by and contribute to your commercial success, aides your commercial success at the end of the day, and gives consumers, which are based in what my company is interested in, and the shareholders who give you your capital, confidence to continue to give you capital to continue along your mission.

So, it is in that context that I always think about the rule of law, and it is very difficult. It can be the absence of law, you all I know have talked about a lot of non-law kind of rules for supporting communities, and those can be very effective if they are reliable. The hard part is you cannot always understand them from far away. They are frequently based on understandings of community dynamics that are difficult to comprehend from far away in corporate offices and even for people close to the ground, because if you are part of the dynamic, the ability to understand and place reliance upon it become more difficult. Even though I believe that some of those non-legal structures are more reliable than other legal structures. My company does business in a number of countries that, if we put their IP laws on the table, they would take volumes, and they would look very much like the laws of the United States or other western enterprises. One would say in an antiseptic view, I can read those books, I can understand what they say. Oh look there's even enabling regulations, let me just get a team of associates and I'll have this mastered in a week.

The problem is, that they are not enforced, or maybe they are enforced some places and maybe they are enforced in different ways than other parts of the country. Maybe just subject to corruption, you can rely on them and have the experience of successfully relying upon them for a period of time and then due to an unforeseen hand intervening somewhere, they become unreliable. When you have no rational ability to rely on the system or the results it is going to give you, you are left in essentially the same position as you are dealing with a totalitarian state, and at least with a totalitarian state you know going in, and have some predictability about who is sitting in power, what they might likely do. Much more disconcerting is the uncertainty of where intervention will come to disrupt your expectations and therefore make doing business much more difficult.

All four of us actually just came from a conference of GCs leading global companies and we had a very interesting dialogue at one point about risk management and the world as it is today and we heard from two different companies in the same business, I will not identify them.

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One of them was talking about the mitigation identification strategies they were using to deal with the corruption in their industries and the lack of rule of law where they were working and how the investments they were making, how to try and help themselves. The other, much to my surprise, told a story about retrenchment, pulling out and coming home. Doing the economic analysis of realizing the investment of human capital and financial capital in order to mitigate the risks, had fundamentally changed the analysis of the return on investment and engagement in these other parts of the world, and they were systematically disengaging and coming home, because they recognized that even though it was limited and the cost of doing business here may be more expensive, may limit the reach of their enterprise, the eliminations of the uncertainty and that risk was more valued by them than it had ever been, so they were changing their business model.

So when you ask yourself, how important is rule of law to business, it is absolutely fundamental. People make basic strategic decisions all the time based on the calculus of what you can rely on and what that will return to you. I will say specifically from my standpoint the absence of rule of law also gives rise to the need for private ordering, and what do I mean by that? You know Nike is well known for having encountered difficult labor problems in the 1990s and having struggled with that ever since. The answer to that was to develop our own code of conduct, our own auditing systems, and our own oversight systems. We did not have the benefit of our industry coming together to do that. We set up one standard, everyone else set up their own standard, and we have been about the business of enforcing those standards to make sure we are comfortable with how we are doing business in the world. It is hard, I will tell you the easiest in the factory where Nike represents 100% of the business in that factory. Yeah we have influence. People say all the time, you are paying for the product, tell them what to do. Well, you can do that when you have 100% or the majority of the factory. Many factories in the world, particularly in the apparel industry, have a clientele made up of many people and frequently Nike is under 10% of a factory. So those factory owners, many of whom, I would even say most of whom, are intent on doing the right thing, are having a very different situation to deal with. They have 20 codes of conduct on the wall, all of which are different from each other on the margins. All of which send in different auditors. Consumers and customers don't know quite what to rely on, because what standard is being applied. So it is difficult for our business partners, it is difficult for us, it is difficult for the overseers and watchdogs to understand what is going on. So private ordering has brought a ton of advancement and it is a positive thing.

We are proud of the efforts we have made. We are in a constant effort for self-improvement, but it has been necessarily limited. It necessarily brings with it real costs, and opportunity costs that can be avoided by true rule of law. I would suggest that the people participating at all levels, workers, managers, owners in the factories, also benefit, and will benefit, by predictability and reliability and the consistency that rule of law at a governmental level as opposed to a private order level will bring. I am not advocating abandoning private ordering. I do not believe our company would or could do business in the world without the private ordering we have set up. I am just saying that I think it will always come in second to effective and reliable rule of law in all of the places we do business in the world.

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[BN] Thank you Hilary, I think we will just run the table. Gentlemen, let us just proceed in that direction. Bruce?

Bruce Sewell

Thank you all very much for inviting me and all of us to come out on a Saturday morning and talk about this. I want to do something a little differently, I want to give you a little background on my engagement in rule of law. I think we are at a really interesting place, whether it is ten years into something, and it is time to step back and take a look at where it is going, or if its other pressures that are mounting in our society or environment, I do think it is worth asking a couple questions about where this endeavor is going. I'm going to try to do that instead of necessarily just getting into what we think of the rule of law.

Let me start with some background. I first got involved with Bill and the WJP about ten years ago. At that time I was the GC of Intel, not of Apple, so my job has changed a little bit. As far as I know, at the time no one had ever tried to tackle the subject matter with this sort of rigor and perspective that Bill envisioned. I don't want to put words into his mouth, but my sense of the mission at the time, was that we had a concept, really a constellation of concepts, that almost everyone talked about but no one could define. We all seemed to agree that this thing was important, even fundamentally important to the way societies were organized and how they functioned, but there was no actual evidence of that fact. There was no real way to answer the basic question, does it really matter? It seems to me that's what the WJP really took on, and over the past few years it is been an absolute privilege to watch and occasionally provide some feedback as Bill and the WJP team have undertaken the herculean task of developing a framework to define, measure, and ultimately study these concepts. They have essentially created a science around the rule of law where none existed before. It is actually a stunning achievement, but of course like any scientific field there is no end point. We do not get to a final answer. Instead we just keep watching, recording, questioning, and revising our ideas.

The last thing I want to say by way of introduction is that what I have learned over the past ten years and I am sure this is absolutely preaching to the converted, it is really, really difficult to define and measure rule of law in any meaningful way. If you adopt too abstract a definition, it becomes hard to measure. If your definition is too granular, then the concepts that are specific to a certain country or culture are not portable to other countries and cultures. Furthermore the relationship between rule of law concepts and other disciplines such as philosophy and politics is really slippery. In order to create a definition of the rule of law that is comprehensive, there is always the temptation to add concepts that reflect the underlying political or philosophical or moral biases of the person developing the definition. There is not necessarily anything wrong with this, but as with any scientific endeavor, there is a need to be aware of those biases, so you can account for them in evaluating the data.

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Ok, so enough caveats to satisfy any lawyer. What I want to do over the next few minutes is to throw out some concepts that flow from the way I think about the rule of law, but also, the reason I have chosen these is that there are questions now that we ought to be addressing, with respect to some of the assumptions that perhaps are built into my thinking about this space. So, let me take a shot at three of them.

Apple's business depends substantially upon the existence of a relatively affluent middle class. So we are always looking for tools that will help us to anticipate where in the world that middle class is likely to be strong or growing over time. We have found a very high degree of correlation between societies that score high or are trending toward higher scores on most of the rule of law metrics and rising GDP within that country. I am not sure if this is still true, but I once read that the best indicator of that is female literacy. The correlation between female literacy and growing or high GDP is remarkable. The proposition that high scores against the metrics that represent rule of law metrics and growing GDP is very strong and solid.

So one way that I think about this rule of law concept and in particular the Rule of Law Index as a tool to help us, Apple, myself, to understand where markets are going and where we should be making investments. What is particularly interesting about this though is the notion of evolution. Initially I assumed rule of law was a progression that inevitably societies moved towards higher compliance, higher scores if you will over time, and that the process would accelerate over time as certain basic ideas and structures took root. I am less certain of that now and as a result less certain about the predictive value of the Index. If we look at the opening up of Russia and then compare that with what is now truly a failed state, or recall the optimism around the Arab Spring and contrast that with the tenuous state of the Middle East today. So I have a sense that things are changing. What I think it is hard to put a finger on is whether this is systemic or episodic. But I think it is worth thinking about and asking whether there are things changing. That is one concept. I just throw it out and we can talk about it later.

Another way I use rule of law is to help evaluate timing and risk questions when considering how and when to invest in a new market or conversely when we should consider paring back our investment in an existing market. Using a sort of rule of law summary, or shorthand if you will, I have developed a couple of attributes I use when I am trying to evaluate whether a country or a market is one which should support substantial investment of time and resources. So let me just go through the four issues.

The first is transparency. Can I access and understand the rule that will be used to govern Apple's behavior in that market and the behavior of the people with whom we will interact? Is there consistency? Are the rules applied in all cases or only in select cases or only with select actors? Is there neutrality? Are the rules applied in a non-arbitrary and non-biased fashion? Is there accountability? If an actor, state or private, abuses any of the first three principles is there somewhere to go for redress? The reason these three features are ultimately so important goes to one of the things Hilary was talking about. Because, when I am advising Apple on commercial matters, the attribute that finally I am looking for, the thing that is probably the most important is this notion of predictability.

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From a business perspective, predictability is the cornerstone of rule of law. The problem is that even in markets that exhibit all of these traits, they can be surprisingly unpredictable at times. We only have to look at our own country, what is going on with our election system, or what is going on with Europe, with concepts of Brexit. Having developed this taxonomy of things that I am looking for used to give me great comfort that there would be stability and predictability within that particular market. I am not sure that that is nearly as reliable as it used to be.

The final thing I want to throw out is a new twist. This for me is a new concept, I am sure it won't be for the rest of you. Most of the time, when I think about rule of law I am focused on risks that arise in markets that are low on the rule of law scale. More recently though I think there is some really interesting activity in terms of opportunities for corporations to make significant changes in countries with really high rule of law scores. Here I am talking about the role that corporations are playing in shaping the relationship between governments and their citizens.

For example in the area of human rights, privacy and other social causes, in the past few years we have seen an increase in the role of the activist corporation, whether in the context of opposing the so-called religious freedom laws in Indiana and Alabama, supporting the LGBT interests actively right now in North Carolina or trying to take on the government to define the concept of privacy rights and citizens' privacy rights. I think these are very high rule of law activities. I am not sure you could get away with these kinds of behaviors in countries that are low rule of law countries. But it is fascinating to think about this shift. I don't think it is going to diminish any time soon. I think it is a trend that is here to stay. As governments become less capable of providing basic services, I think corporations will be called upon to step in, and with that shift will come opportunities to start shaping the society. Whether that's a good thing or a very dangerous thing is what we ought to be discussing, I am not going to take a position on it. I do think it's a very interesting issue and it is a trend that I expect will continue. With that, I, as they say in Congress, will cede my time.

Colin Stretch

So, like Hilary and Bruce I am grateful for the invitation to be here. I will keep this brief, I am really interested in understanding how I, how we, can be helpful to you. I am really anxious to get to the question portion of the session, because you folks are the ones doing the important work of studying this topic. I really am delighted to be here to answer any questions you may have, and provide any insight I might be able to bring to bear.

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To lay the foundation for that, let me describe a little bit about Facebook and then I will try to tie that back to the topic of the day. Facebook today serves about a little over one-and-a-half billion users every month. It is almost truly a global company. There are few countries, China in particular, where we are not able to offer service. More than 80 percent of our users are overseas. Most of the growth of the company is international. Most of the growth of the company, and I am talking about users, and the growth of the business are in developing markets in areas like India and the Asia Pacific region and Latin America and Africa. Happily we have, at least from a user perspective, signed up lots of folks in the United States and in Canada and in Europe so now we're turning our sights to the rest of the world. We're available in over 70 languages and we're doing this with an employee base of around 12,000-13,000 people, which is quite small when you think about the scale of the company. We are present internationally; we have people on the ground in about 45 countries, but those are typically very small presences, it is often a very small office of maybe 10-12 people, primarily focused on sales efforts, on outreach to advertisers to encourage them to try our products.

The mission of the company—and really everything we do can tie back to the mission pretty strongly (if you see Mark Zuckerberg speak, and he has been speaking quite frequently through his Facebook page so you can tune in)—everything we do comes back to the mission which is to give people the power to share and to make the world more open and connected. And the way he thinks about it and the way we think about it is that the way to accomplish that goal is to give more voice to more people. And if you take that a step further really what we are trying to do is to sign up everybody. I'm not saying we are going to get there. If you look at various teams' goals, the first goal is always growth, how do we get more people onto our services. The question that we face when we look at countries around the world, and I think I'd be interested to hear if Hilary and Bruce have a different view, our question is never if we are going to provide service in a particular market – it is always yes. We are trying to sign up everybody in the world; we want to make the entire world connected. We don't have to face the sorts of decisions that companies that require more investment in a particular region have to make. So we can serve a country from Silicon Valley, or from our data centers around the world.

So we are always trying to go in, and the main question for us as we look around the world is how do we make sure the service is available? And that is often a very difficult technical question, which I am not here to speak to because I can't. But from a legal and regulatory perspective, what are the obstacles that will prevent us from remaining on in a particular service. And the one that is the news recently, or at least on my mind recently, is how do we avoid a situation where the government is going to shut us down, as we grow our services around the world, and as we sign up more users and add more and more communication and consumption of media moves online, we do disrupt the established institutions and we do run into disputes with governments that are used to having much more control over things like information dissemination. So what happens when you are in a country and people are consuming and sharing content that ten years ago, twenty years ago, would not have seen the light of day? So that is one area of real potential dispute around the world. Essentially content standards.

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Another area of real potential dispute as I will get to in a moment – not just potential but actual dispute – is what happens when law enforcement wants access to information that historically they would have been able to gain access to, through institutions that were based in their country. Yet we are headquartered in Menlo Park. There are various complex legal structures that you have to go through in order to seek information from a company that is external to your borders. You have law enforcement trying to solve a crime. Typically it is law enforcement officers overseas investigating a crime that took place in their country that they believe was perpetrated by people in their country and the victims of the crime are people in their country and they come to us and say we would like information on this and we say you have to go ask the U.S. government and the U.S. government will ask us and then we can maybe respond. That is an area that is fraught with conflict. It is a very difficult situation; we do not have the mechanism in place to deal with it internationally today.

What happens? Well what we saw in Brazil on Monday, what can happen, is they can shut down our service. So we had one judge in a relatively remote area of Brazil who was presiding over an investigation of an alleged drug trafficking ring, who has at the prosecutor's request sought to obtain information about the suspects and their use of Whatsapp which is a messaging service that Facebook owns. We both legally and technically are not able to provide that information because of the way the service is architected and were not able to comply with the order. So the judge sent an order not to us, we heard about it from the telco providers, to the five major wireless carriers in Brazil and ordered them to turn off our service for 72 hours or risk a fine of about 5 million a day. So they of course turned off our service. So the net result of this is that we went from a relatively localized dispute without an easy answer, I am not suggesting it is an easy question but its relatively localized involving a small number of people, to an order turning off service for over 100 million people in Brazil who use Whatsapp every day to communicate and order their lives. That just seems nuts to me.

To tie it back to why to me this is a relatively example to what we're talking about here is that we lack or lacked in that circumstance a mechanism for dispute resolution. There is a conflict of interest and an unclear path to decision regarding law enforcement access and our ability to provide a secure service to users. And because that doesn't have an easy answer we went immediately to shutting off service in an entire country and 100 million people saw their service go down. How that ties back to our mission is that again, that's a bad day for me and for the company and for users. So that's sort of my context. I would love to hear from Kent and you folks about how you see the path from the disruption of technology to these established institutions that are used to having more control over these important areas and whether there are mechanism that can resolve these sorts of disputes in a way that does not result in what, to me, are such outrageous sanctions that there is hardship to a significant volume of people.

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Kent Walker

Let me pick up on that, because I think in many ways the internet is our largest current experiment in the rule of non-law, as well as the clash of laws. I think the two are deeply related. So as all good internet stories do, this one starts in the early 1600s, when Europe is in flames. It is literally the war of all against all, Catholics are killing Protestants, and Protestants are killing Catholics for thirty years, hence it becomes known as the "Thirty Years War", which ends only with the treaty of Westphalia: the principle of wherever your prince is, whoever your prince is, that is your religion. We assume that the guys on the other side are infidels and should be killed, but we are not going to do it. And that Westphalian order becomes the basis of modern state-to-state business and dispute resolution and everything else. It is great, and works pretty well for 300 years.

Then comes along the internet and a former member of the Grateful Dead named John Perry Barlow who in 1996 issues the Declaration of Independence of Cyberspace. It essentially goes like this: "Governments of the Industrial World, you weary giants of flesh and steel . You have failed in your efforts to provide a sustainable forward looking environment for our people. We are declaring a republic of the mind. Your laws have no application here. Go away and let us be in peace." And that actually works remarkably well for the first twenty years of the internet. Because the internet then is cute, and it is fairly irrelevant. Countries around the world do not really care what a small minority of their citizens are doing online. And in fact you see an internet ecosystem begin to flourish based on a variety of laws which essentially create immunity from liability for the content of communications, which are up on platforms around the world. The American system, the Pax Americana of the internet prevails for quite a while, and allows companies like ours to flourish with American notions of free expression and defamation, privacy, anti-trust, taxation, etc.

But over time the internet turns out to be a pretty powerful thing in the lives of many people around the world. Not just for communication but for economic growth and development as well. So governments not surprisingly get more interested and you see a rise of something I would call digital sovereignty. Countries one after the other say "hey, wait a second, how can it be that I can regulate my telephone system but I can't regulate the internet?" And they challenge our claims of jurisdictional independence. Colin's operating from Menlo Park, I'm running services from Mountain View. We are providing services from America. How is it we can be regulated by China, France, Brazil? They say "no, sorry you are essentially a facility in our country and are subject to our laws." The European Court of Justice last year said if you are providing services in our country you are subject to our laws.

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That creates a real challenge when those laws do not align. All of our companies do more business outside the United States than inside the United States, and it is normally commonplace for international companies to say “we are a good corporate citizen. We do the right thing, and we follow the laws of countries in which we do business.” But what do you do when those two things conflict? What you think is the right thing and the laws of the countries in which you do business are diametrically opposed to each other? That creates existential challenges and very different philosophical approaches of how to respond. Are you a deontologist and a Kantian and want to keep your hands clean and stay away and disengage? Are you a utilitarian consequentialist who is trying to serve people around the world as best as you can and make things better even in fraught nation states or where you are not very comfortable about the protection of human rights, the right to free expression, or access to information? Is there an in-between path you can navigate? There are a lot of countries that may have very different conceptions of how the world works.

How do we create some model that is beyond private ordering, because private ordering unfortunately has limitations, and is by definition personal and relational, and less scalable than you need for a global environment. The power of a scalable and reasonably consistent global environment cannot be understated. It is essentially what makes global trade work. And I would argue that global trade, or the least the combination of trade and technology, is the fundamental driver of progress for mankind for the last millennium. You look at the graph of total average family income, and it stayed flat, just flat as a board, until 1600 or so when the industrial revolution and global trade take off and it goes like this, exponentially. And that is great, not because we get to have slightly better refrigerators every year, but because they have enough to eat in places where they otherwise would be starving to death. Babies don't die because they have medicine they didn't have before. People often talk about the importance of independence and autonomy and these are usually code words for poverty and deprivation. The more we can succeed in connecting people around the world, not only is the internet a platform to exchange messages back and forth, but it is also as vehicle for economic empowerment and education. The poorest kid on the streets in Delhi has access to the same search tools and internet knowledge as the president of the United States. That's unprecedented, and it is remarkably empowering. So in a real sense we are trying to figure out, how do you take this experiment of the internet, with its rule by convention and general agreement, mesh it into a global environment of the rule of nation states, and promote greater alignment of those nation states on the principles of law that we talked about before.

Colin talked earlier about the law enforcement challenges we have all had. Facebook and Apple and we and others have been working on something called a comity agreement where you try and get a “coalition of the due-process” among various different countries to say, “okay, we trust you enough, there's enough of a shared sense of due process protection, that we can exchange information with law enforcement around the world.” It would be a novel thing in international law, which has been based on a series of largely bilateral agreements between countries for the exchange of information in law enforcement matters.

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The interesting question for this group is the nexus between the local rule of law efforts on the ground in developing countries and that larger global mission of trying to create more alignment in rule-of-law states, and to spread the rule of law, perhaps using as a basis the rule of non-law, perhaps finding complementary ways of doing it, or perhaps finding other ways of doing it that haven't been invented yet.

[BN] We would like to thank each of the four of you. Lots of grist for the mill. I am going to ask the panelists first if they have comments they would like to make to each other and then go to the audience. This is an audience of scholars, and of budding scholars, that is to say students, so it is a nice mix of that kind of talent. Anything that the four of you would like to say now that you've heard your colleagues speak?

[HK] I'll just jump in, because I come at this as the only non-internet based company on this panel from such a different perspective and it struck me a few things listening to all of my colleagues. Where is the line between morality and rule of law? I think Kent hit on it in the last question. What is the difference between rule of law in a country and an agreement about fundamental principles for a world ordering where those laws can converge to make predictability for global enterprise? And those are very different things. When you get to the privacy question, we would think, we just heard it, most European countries are considered pretty high rule of law states. Well guess what folks, among their fundamental principles is a principle of the individual's right to privacy in a way that does not and has not existed in the U.S. system. And there is a clash, you have two different systems, both of which have fundamental rule of law according to their own rules, would do pretty well in the Index, not perfect, including us as we all know. But there is a conflict here, how do we tease apart what is rule of law, predictable ordering, the system versus rule of law that looks like our rule of law? And what is rule of law if it is predictable and reliable and protects people but is based on fundamental philosophical points of view different from our own. Is it lesser? Is it equal? Or is it just an impediment to a global convergence of standards that will allow something transformative for the internet to serve the population of the whole world. I think these are fascinating questions that the current discussions of the rule of law that take us very far away, that does not and I have not yet seen a road to take us all the way to the answering of those questions. Which is why I think that the perspectives of these three really challenge the boundaries in a way that is very untraditional in regards to our historic conversation on rule of law.

[BN] Other comments from the panelists? If not we will throw it over to the audience.

Audience Question #1

Thanks, so I am so delighted to hear from the four of you on this because I think the conversation on the rule of law is in the midst of changing and it really has to change. We in our previous session were talking about what counts as law, formal law, informal law. One of the points is that traditionally our focus has been on controlling governments and normative requirements that limit what governments do, a very important piece of the way to organize conversation about human rights and rule of law and a very important piece of what informs the Rule of Law Index.

Remarks from General Counsel Panel, WJP Scholars Conference

But the other part of rule of law is the building of that platform for economic growth that I think you four are speaking to that takes us out of the stratosphere of international treaties to some extent and to the ground level of what is happening on the ground. The connection, I think, that is a really, really, important part of this conversation, that I think we have to be promoting and building that legal infrastructure. I think why I am so glad to hear from you is I think your companies have such a role to play in raising the level of that conversation. Actually I think both Bruce and Kent have had that conversation before, that the access to those human rights that we want is primarily through the economic growth and that building that level is what gets us there. I think you are exactly right, that your high wealth, high rule of law countries are where you can start having the conversation about LGBT rights and privacy rights. I just wanted to comment on that.

[CS] I profoundly agree with that. Most people on the planet are not on the internet. And that's an economic problem and it is an awareness problem. It is yielding the sorts of absence of connectivity in impoverished areas of the world and resulting in the sorts of perils that Kent was describing. So from our perspective, there should be and we are trying to make this a thing, there should be much, much, much, more interest in getting people on the internet. Now we have been accused of being self-serving, and yes we would like more people to be on the internet, guilty, we would like more people to use our service, fine. Our interests are trivial in comparison to the sorts of strides that we can expect to come globally with increased levels of connectivity. 80% of the world that is unconnected right now live within range of a cell tower. This is not people living outside of infrastructure. This is people who cannot afford data or who don't understand, there is an awareness issue with a very, very, limited budget, how much of that budget would you want to put toward connectivity. That number to me is really staggering. It says that there is real opportunity to move the needle on connectivity in the relatively near term.

[BN] Colin I think you shared with Nancy Ward and me in a visit to your office last fall another stunning statistic, and I am sorry for putting you on the spot, having to do with connectivity for every ten folks who get connected one of them gets out of poverty or something like that.

[CS] At least the data we've seen, and this data is hard to tease out, but at least the data we've seen, for every ten people who get connectivity one gets lifted out of poverty. When we are talking about billions who are not yet on the internet, we very quickly get to hundreds of millions who can be lifted out of poverty around the world.

Remarks from General Counsel Panel, WJP Scholars Conference

[HK] Let me just say we still have the problem even domestically in the area of environmental and chemical regulation, where many feel that the national government has been slow and ineffective in acting. We're just trying to figure out, there are four counties in NY that have a rule about what can be in the products for children that would bar our products from entering those counties in NY where they are legal in the rest of the country. We are going consistently to the federal government going please help us here. It is strange for a business to say we prefer more clear national regulation even if it is more severe in order to get us out of the fifty state game. I think you are absolutely right in that you have it going the individual companies, private ordering, to states yielding to nationals to nationals yielding to internationals. With Bruce's first point, it is not a straight line of progress.

[KW] A challenge for a conference on the rule of non-law is, again, how do you scale the solution? Because again, individual governance tends to be local, and non-law structures tend to be extremely local. In the Bay Area we can't get our local governments to agree on transportation, much less larger issues. Once we start to go up the scale globally, we don't have an Alexander Hamilton to get the Virginians to assume responsibility for the New York's debt and create a national government. You have the United Nations, which hasn't always been a friend of free speech, trying to create global structures to create alignment and you have lots of soft tribalistic antagonisms that are making it very hard to form consistent standards around the world.

Audience Question #3

Hilary takes me to my main point. We have been talking mainly about your companies as consumers, but you also produce rule of law. There are informal regimes like fair labor standards, but you also play a major role in lobbying at the national level and the LGBTQ issue I think what you've done with multi-national companies is admirable, but the lobbying done by a company is not always in the interests of what people think of as the public interest. A question is, when you are pursuing your company's interest, to what extent do you think about other interests that may be involved?

[HK] We think about it a lot. Is there any other answer? I wasn't educated in the law school but I went to college here and maybe that rubbed off. Maybe it is enlightened self-interest. I think there is short term self-interest and long term self-interest. Just in the environmental or chemical regulatory space I would absolutely prefer, it might be in our naked short term self-interest to have the least amount of regulation possible, but that won't advance our long term cause for our shareholders or stakeholders. We would like to see the whole economy pulled towards better natural solutions to these problems. A predictable, regular regulatory framework, even though it is more burdensome for us, I think in practice would I think lead to long term success in a more effective way. I can at least say for me and a lot of my colleagues about these issues, although certainly not all of them, I am not trying to whitewash this, we do think a lot longer term than our short term naked self-interest because we are a consumer facing company.

Remarks from General Counsel Panel, WJP Scholars Conference

For Nike, if consumers think we are out there trying to make the planet a less healthy place to make our products cheaply we are going to lose purchase with our consumers and immediately the enterprise falls. So I think, actually being in a consumer space helps a lot to get that view. That is one person's response.

[KW] Many of us are lucky enough to be fairly disruptive, and when you are disruptive you are pushing back against a lot of other vested interests out there and in many cases I think we feel about wearing the white hat on the side of consumers for things like copyright, patent reform, access to information and free speech around the world, etc. There are the things that are more zero sum games, where you tradeoff between different embedded interests, there is no question about that. I share Hilary's notion. When we go out, when any of us go out, I think Facebook has had this experience as well, and say we are wearing the white hats and are crusading, people are skeptical and understandably so because we are a profit-making enterprise. One thing I have found actually is more convincing to people is the Goldman-Sachs line that we are "long-term greedy". The other point is the notion that the other way we shape law is through our policies. Billions of people around the world have speech codes essentially through YouTube or Facebook's internal policies. Apple to some degree as well. That is another form of private ordering as well, essentially would be perhaps worth an experiment.

[BS] There are places clearly where there is a clash between what some would define as the public interest and what we might define as a private interest. The one that immediately comes to mind is taxation. We actively lobby to pay a lower tax. You could certainly articulate a reason why it would be in the public interest for us to pay a higher tax. To me that is fundamentally a conflict between views and priorities within the society, and for us to sort of abrogate that position, and say we are not going to put forward a position that says we should be taxed reasonably but not excessively is not only doing a disservice to our shareholders but endorsing a particular view of social control that many of us do not subscribe to, that the government should be the one who determines how resources are allocated exclusively. There are places where there is clash and conflict, but I can't think of any circumstance and I challenge my panelists to come up with an example where any one of us is actively advocating for something that we think is going to be harmful to the public interest. We may be advocating about priorities and balancing, but to actively advocate for something that we think is good for our company but will be bad for someone else is unusual. One last point and this is my own private soap box, so forgive me for a minute. People often lose sight of the fact that companies are not actually non-breathing, non-living, non-thinking things. Companies are made up of people. So when we say things like, when Google say things like we want to do good in the world, it is not just a slogan it is because they actually believe it. The people who are running the company, when Apple chooses not to unlock a terrorist's cell phone, it is not because we are doing that as some sort of monolithic entity that has no social conscience, it is individuals making those decisions. We don't lightly take positions that we think are going to be controversial or hurt people.

Remarks from General Counsel Panel, WJP Scholars Conference

[BN] And we all feel better about those companies and what they are doing with you and the positions you hold. I promised these very busy people that have been away from their desks that we would not keep them long. I'm going to reverse that and say that as they try to exit here, those of you that have more questions can try to buttonhole them. We will give them in their Nike sneakers a thirty second lead.

Audience Question #4

Actually my question has been more or less asked and largely answered. It really had to do with corporate power and leverage and using it in a variety of situations.

Audience Question #5

I had the privilege of being on a commission with Kent and Bruce the other day and didn't get to say this then so I'll say it now. Thank you Bruce for the position Apple is taking on the national security issue. I think this is a courageous if perhaps self-serving position. The question is China. You have all talked about it. It violates all four of your visions. Google has had issues; all of you have had issues. I would love to hear how each company is thinking of how you deal with the rule of law challenges in China.

[CS] I can go first. It is pretty easy because we are blocked. We think you cannot connect the world if you don't offer service in China, so we think about China, what would it take to be unblocked and what will that look like. We don't expect that to happen tomorrow or this year. At some point we expect to have the opportunity to enter, and the conditions that will be placed on our entry, we will have to look at those and decide whether or not we can deal with them and whether that is good for our community. I don't think about it as a rule of law issue, I think about it as a sovereign power issue.

[KW] I think it is both. We have been on both sides of this. In 2006 we shared a heartfelt blog post making a utilitarian case why we should be in China and in 2010 issued a heartfelt blog post making a Kantian case why we should stop serving search results from inside of China. We have said we would like to find ways of serving the citizens of China and continue to engage. It has been challenging given the current direction of travel in China, so we are trying to figure out how to strike a balance that works, and generally speaking trying to find ways to engage.

[HK] I have it much easier not being directly impacted by freedom of expression issues, which I think so trouble my panelists and I understand why. It is a much more prosaic problem for us. We have been there for thirty years and we have seen rule of law actually progress and I think it is continuing to progress. It is two steps forward, one step back just as it is here and every other place in the world. My own sense is engagement with the Chinese, especially with the consumer facing brand that is loved and welcomed there, is helping things.

Remarks from General Counsel Panel, WJP Scholars Conference

We are making forward progress. Having said that, it is where the private ordering started. We have to overlay our own processes on to compensate for those areas where the progress of the Chinese has not been as fast as perhaps everybody would hope. But they are still making progress. From my side it is easier, though I would still say challenging but not unique. We face the same challenges in many other parts of the world as we face in China though the flavor may be a bit different.