

The Rule of Law

By Lesley Rosenthal

“A government of laws, and not of men”
John Adams, Massachusetts Constitution, 1780

The Rule of Law is one powerful concept that can bring people together in these fractious times. The basic idea is that democratic governments provide a level playing field, evenhandedly applying a well-publicized set of laws, allowing fundamental rights to flourish, and providing other preconditions for justice to be done. Adherence to the Rule of Law promotes a stable social and civic order, citizen engagement, and a positive climate for economic investment.

Historically, Rule of Law served as a repudiation of the idea of “*L’etat c’est moi*” (“I am the state”), favored by English and French kings to place themselves above the law, or, put in the form of a legal maxim from Roman times, *Princeps legibus solutus est* (“The sovereign is not bound by the laws”). The great Roman lawyer and statesman Cicero was one voice in the wilderness as the Roman republic was sliding into autocratic rule, keeping alive the idea that rules bind rulers and ruled alike: “The magistrates who administer the law, the judges who interpret it – all of us, in short – obey the law in order that we may be free.” Importantly, Cicero conditioned the supremacy of law on its consistency with justice.

I was delighted when Pamela McDevitt, NYSBA’s Executive Director, asked me to guest-edit this edition of the *NYSBA Journal* on a theme of the Rule of Law. In turn, I invited the authors whose works appear in these pages, including two judges, two practitioners, a law professor, a law student, and the executive director of a leading Rule of Law nonprofit organization, to pick up the mantle of Cicero and John Adams and to produce a variety of pieces providing their perspectives of the Rule of Law – its history and its relevancy for our times.

Hon. **Cheryl E. Chambers**, Associate Justice of the Appellate Division, Second Judicial Department, contributed a historical piece, *From the Star Chamber to the Separation of Powers: Origins of U.S. Judicial Independence and the Rule of Law*. Her article traces the origins of American Rule of Law adherence as a reaction against conditions in England and the colonies in the 17th and 18th centuries, particularly the Star Chamber. Her piece demonstrates that the separation of powers, particularly the independence of the judicial branch from the executive, was key to structuring our nation as a democratic Rule of Law state.

Former NYSBA President **Mark H. Alcott**, now the American Bar Association’s delegate to the United Nations, builds powerfully on that point. In his article, *Defending Judges, Standing Up for the Rule of Law*, he explains how contemporary Bar leaders can defend this principle by speaking out against attacks on judicial independence, as judicial codes of ethics prevent individual judges from defending themselves.

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I invited retired N.Y. Court of Appeals Associate Judge **Albert M. Rosenblatt** to share his research on state constitutions and the rights that they guarantee. His piece, *Always in the Direction of Liberty: The Rule of Law and the (Re) emergence of State Constitutional Jurisprudence*, is a first-ever virtual encyclopedia of state court interpretations of the fundamental rights articulated in those states' constitutions. In making the point that these decisions outline a set of rights that are often broader than the parallel rights guaranteed in the U.S. Constitution, his piece shows how state courts and state constitutions bring the promise of federalism to life, providing a form of "vertical" checks and balances to complement the "horizontal" checks provided by the three independent branches of government at the federal level.

Dr. **Juan Carlos Botero**, Executive Director of the World Justice Project, explains how the leading Rule of Law index rigorously compares 113 nations, including our own, for their Rule of Law adherence. His contribution to this edition, *The Rule of Law Index: A Tool to Assess Adherence to the Rule of Law Worldwide*, places American Rule of Law compliance into a global context.

Lisa E. Davis, a leading New York City-based entertainment law practitioner, has contributed a powerful opinion piece, *The Lawyer's Oath and the Rule of Law*. Focusing on the guarantees of the First and 14th Amendments to the Constitution and threats she perceives to these treasured principles in our contemporary times, Ms. Davis calls upon us to advocate not only for our clients, but for the Rule of Law itself.

Over the fall 2017 semester I had the privilege of piloting a domestic Rule of Law-themed seminar at Harvard Law

School. My writeup of the course appears in these pages under the title, *Teaching the Rule of Law to Its Next Generation of Advocates*. Using a simulation method, I challenged students to see themselves as the future guardians of the Rule of Law and to learn the skills needed to maintain and perfect it.

Rounding out the edition, **Agathon Fric**, one of my students from that course, translates Rule of Law concepts into a personable call to action in his piece, *Just Keep Stirring*. In his view, "the rule of law, like love, is in the doing. It is a verb, not a noun. It requires consistent, positive, and proactive steps to remind the people of what the Rule of Law has done for them lately – securing political accountability, fundamental rights, order, and security."

Rule-of-law themed artwork of another of my students, **Elizabeth Pyjov**, graces the cover and pages of this edition.

We are honored to include contributions from ABA President **Hilarie Bass** on *Promoting the Rule of Law at Home and Abroad*, and from our own NYSBA President **Sharon Stern Gerstman**, with a clarion call for better funding for our courts, the better to effectuate the Rule of Law in New York.

I hope you find these pieces, pulled together as a Rule of Law-themed edition of this *Journal*, to be educational, provocative, and actionable. The breathtaking diversity of our contributors – ranging across a broad geographic span, various political affiliations, genders, races, and generations from millennial to octogenarian – underscores that the Rule of Law is for everyone. I am grateful to the Association for this opportunity to bring together these leading voices on a topic of utmost importance. ■

ON THE COVER

Alluring Corruption: The Illusion

By Elizabeth Pyjov

November 2017

Medium: Mixed media (tempera on canvas, with colored pencils and pastel on top)

Dimensions: 36 inches by 36 inches

In the Artist's Words

"At the center of the painting is a colorful, curvy spiral which contrasts to a pale-colored and subtle chessboard above it. Corruption can look and feel very attractive at first. Every type of dishonesty or vice that is connected to money and prestige seems alluring from the outside. This painting highlights this illusion: how much more attractive disorder can seem than order. People's eyes often light up when they hear the words 'Italian mafia' or 'Russian mafia.'

"The spiral is beautiful and seductive. It visually reels us into its maze, and yet that spiral is in pieces, with a hint of blood where it breaks, and full of dead ends within itself, including the final dead end at the center. When the chessboard is far off and barely visible, there is danger and fragmentation behind the allure."

About the Artist

Elizabeth Pyjov was born in Moscow, Russia and grew up in the United States. She has a degree in Romance Languages and Literatures and a secondary field in the Classics from Harvard. She is now a second year law student at Harvard Law School and the President of Harvard Law Students for the Rule of Law. The painting featured in this issue of the *Journal* is one in a series of seven that display Pyjov's interpretation of what the Rule of Law is, where it came from, and the direction she hopes it will go. Her goal is that the paintings lead people to ask and imagine: "How can my country do better?" and "How can we stay in the realm of the open chessboard rather than getting lost in a labyrinth of corruption, fear, and distrust?"