NEW YORK STATE BAR ASSOCIATION

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NYSBA

The Rule of Law

A Special Issue

Edited By Lesley Rosenthal

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EUGENE C. GERHART
(1912 – 2007)
Editor-in-Chief, 1961 – 1998

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BY LESLEY ROSENTHAL

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The *Journal* welcomes articles from members of the legal profession on subjects of interest to New York State lawyers. Views expressed in articles or letters published are the authors' only and are not to be attributed to the *Journal*, its editors or the Association unless expressly so stated. Authors are responsible for the correctness of all citations and quotations. Contact the editor-in-chief or managing editor for submission guidelines. Material accepted by the Association may be published or made available through print, film, electronically and/or other media.

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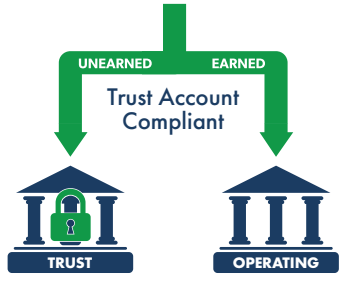

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SHARON STERN GERSTMAN

It's All About the Money

In July, I had the honor of representing NYSBA at the World Justice Forum, sponsored by the World Justice Project (WJP). The WJP is an independent organization whose sole mission is to advance the Rule of Law throughout the world. It was founded and funded by William H. Neukom, a former General Counsel of Microsoft. The benefit of attending the World Justice Forum and other foreign symposia is to learn the approaches taken by other jurisdictions to issues similar to those we face in New York.

One of the projects of the WJP is the maintenance of the Rule of Law Index.[1] It scores and ranks 113 countries on nine factors: 1) Constraints on Government Powers; 2) Absence of Corruption; 3) Open Government; 4) Fundamental Rights; 5) Order and Security; 6) Regulatory Enforcement; 7) Civil Justice; 8) Criminal Justice and 9) Informal Justice. Each factor has several subfactors, and each subfactor is rated from 0 to 1. For 2016, the United States ranked 18 of 113, with a composite score of 0.74, but among countries of similar wealth, we only ranked 18 of 36. The countries which ranked 1, 2 and 3 were Denmark, Norway and Finland, with scores of 0.89, 0.88 and 0.87.

The subfactors where the United States scored poorly in comparison to our wealth group are: sanctions for official misconduct (0.69), corruption in the legislature (0.56); freedom from discrimination (0.52), labor rights (0.58), violent redress (0.62), delay in regulatory enforcement (0.53), and almost all of the subfactors regarding civil justice (composite = 0.65, ranking 27 of 36) and criminal justice (composite = 0.68, ranking 22 of 36).

For those of us who were brought up believing that the U.S. Constitution and the courts bound by it provide the best system of justice in the world, this is harsh and unwelcome news. If we focus on the scores of individual subfactors of civil and criminal justice, however, we can readily see why the United States had scored so poorly. Our scores for the subfactors of civil justice were: Accessibility and affordability (0.41); No discrimination (0.46); No corruption (0.87); No government influence (0.75); No unreasonable delay (0.61); Effective enforcement (0.66); and Impartial and effective ADRs (0.80). Our scores for the subfactors of criminal justice were: Effective investigations (0.76); Timely and effective adjudication (0.74); Effective correction system (0.56); No discrimination (0.46); No corruption (0.73); No improper government influence (0.80); and Due process of law (0.70). If we are honest, we can admit that these scores are consistent with our observations and experience.

We know the high cost and lack of access to civil justice. NYSBA has a history of pushing for court reform to eliminate the complication of our 11 trial courts. It was this policy that pushed us to advocate for a constitutional convention. We have also adopted reports advocating innovations to cut costs and time to resolution; proposals like a simplified procedure for civil litigation, which, unfortunately, never had any traction in the legislature. We know the delay in reaching resolution, particularly at the appellate level, which has caused us, once again, to push for a constitutional amendment that would permit a fifth appellate department. We know of the difficulty of people living at or near the poverty level to seek civil justice, and we fight hard every year for increased funding for the LSC and civil providers in New York. We know the problems of our correction system, which causes us to focus on the minimization of incarceration. We know about discrimination and the disproportionate prosecution, conviction and incarceration of people of color. We have made efforts to provide access to ADR, which has been very

effective in resolving many civil cases; however, we need to fix our justice system, and not just provide alternatives to it.

The answer for a lot of the problems with our justice system comes down to money. While the judiciary is supposed to be a branch of government equal to the legislative and executive branches, it is an impoverished sibling of these two branches. Year after year, NYSBA advocates for adequate funding for our judiciary in the New York legislature and in Congress, and year after year we see either cuts or minor increases.

Funding for courts is not likely to improve significantly in 2018. The tax cuts given by Congress, which disproportionately benefit their campaign donors, will undoubtedly be paid for by a cut to government budgets, which may include the courts. The diminution of the deduction for state and local taxes will cause a decrease in state tax dollars, leaving less income to budget for New York. If we care about civil and criminal justice and the Rule of Law, it's time to tell Congress and the legislature that we expect adequate funding for our courts. NYSBA will be there on the front line – will you? ■

1. The Index may be accessed online at: https://worldjusticeproject.org/our-work/wjp-rule-law-index/wjp-rule-law-index-2016.

SHARON STERN GERSTMAN can be reached at ssterngerstman@nysba.org.

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Friday, February 23rd | NYC & Webcast

What You Need to Know as a Guardian Ad Litem
Tuesday, February 27th | Albany
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Tuesday, February 27th | NYC & Webcast

MARCH

Keeping Current with New York Automobile Litigation
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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.

CONTINUED ON PAGE 10

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

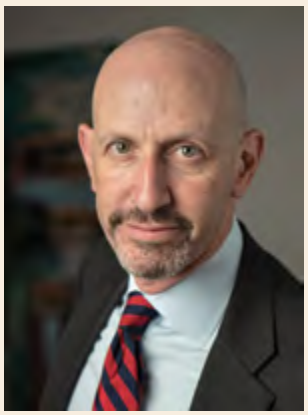
"At the center of the painting is a colorful, curvy spiral which contrasts to a pale-colored and subtle chessboard above it. Corruption can look and feel very attractive at first. Every type of dishonesty or vice that is connected to money and prestige seems alluring from the outside. This painting highlights 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?"

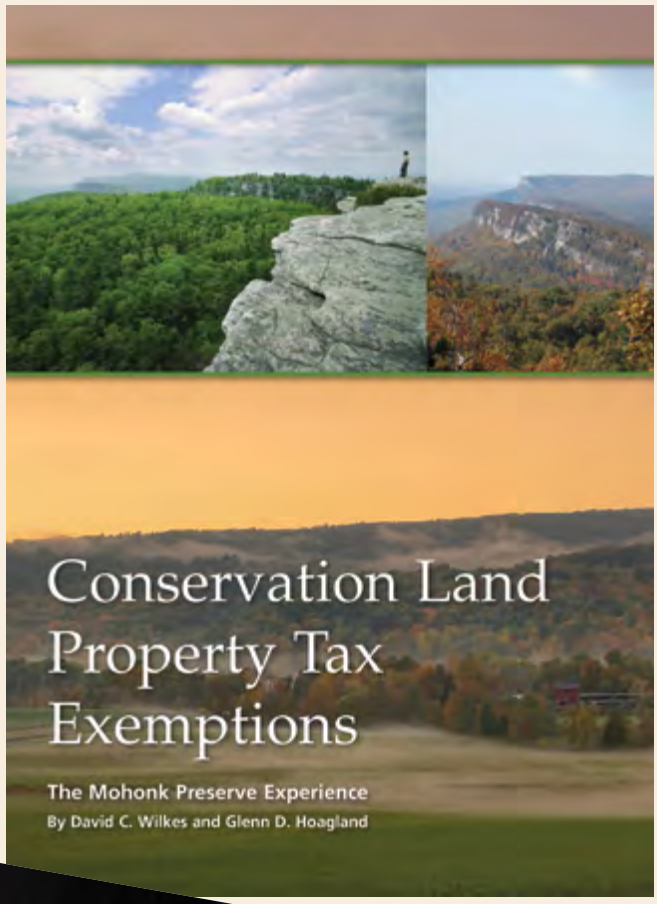
A Message to Our Readers



With the publication of the first issue of the NYSBA *Journal* for 2018, we are taking this opportunity to express our appreciation to a former editor-in-chief who helped shape the *Journal* into the quality publication that it is today, and to announce a new direction in editorial oversight.

Our debt of gratitude is owed to David C. Wilkes, who was named editor-in-chief in 2004. Drawing on his extensive publishing experience, including serving as an editor for *Litigation News* and *Real Estate Review*, he incorporated design and graphics changes recommended by NYSBA's graphics staff, as well as a shift to four-color format throughout the publication. He also expanded the range and quality of topics included in each issue. Beginning in 2011, the *Journal* was made available in replica and turn-style formats and is emailed to all NYSBA members. It is also available on the NYSBA Periodicals App.

With the *Journal* now well positioned for the future, NYSBA staff and the *Journal* Board will be assuming editorial responsibility of the *Journal* and welcome any comments from our members. ■



Conservation Land Exemptions in New York: The Mohonk Preserve Experience, Wilkes, D.; Hoagland, G., Mar./Apr. 2015, p. 10

Interview With Ken Feinberg, An, Wilkes, D., Oct. 2010, p. 10

Hilarie Bass is President of the American Bar Association and Co-President of the international law firm Greenberg Traurig. She is a prolific trial attorney, based in Miami, with a highly successful career of more than 30 years. She previously served as national chair of Greenberg Traurig's litigation department and founded the firm's Women's Initiative.

Promoting the Rule of Law at Home and Abroad: The Role of the ABA

By Hilarie Bass

Promoting the Rule of Law at home and around the world is one of four core goals of the American Bar Association (ABA), and in many ways, this goal is at the center of everything the association does. In strengthening the skills of legal professionals, advocating for legal services for the poor, combating discrimination, accrediting law schools, setting ethics standards, reviewing the qualifications of judicial nominees, and myriad other activities and initiatives, the ABA works to advance the Rule of Law.

Our interest in the Rule of Law does not stop at our borders. In our globalized world, gaps in the Rule of Law reverberate around the globe. Corruption, marginalization and human rights abuse in other countries are drivers of extremism, conflict and mass migration, the effects of which we feel here at home. Weak Rule of Law abroad also affects U.S. commercial interests, creating instability and untenable risk for U.S. foreign investment and supply chains as well as an uneven competitive playing field for U.S. manufacturers and workers. In the face of these international realities, the ABA sees its Rule of Law mission as a global one, and it works to promote these principles in more than 50 countries as well as in the United States.

The following highlights some examples of work carried out around the world by the ABA's Rule of Law Initiative (ABA ROLI), its impact, and its relevance to American lawyers.

Rule of Law Approaches to Combating Violent Extremism

Since 9/11, combating terrorism has been a singular priority of U.S. security policy, and the more we learn about the drivers of extremism and terrorism, the more important the Rule of Law appears to be. Experts have found military responses to terrorism insufficient and even counterproductive, so attention has turned to preventive approaches that address underlying grievances.[1] Whether these grievances are the effects of corruption, disenfranchisement or gross violations of human rights, they stem from gaps in the Rule of Law, and legal responses can provide critical, peaceful solutions.[2]

I recently had the opportunity to visit Morocco, where ABA ROLI programs take this approach, educating citizens about their new rights and remedies under the 2011 Constitution and facilitating civil society engagement with local government to address grievances through policy initiatives. Keenly aware of the turn to violence in other countries in the region, representatives of local governments and civil society organizations are working to find another path to change for their country. In a similar vein, an ABA ROLI program in Libya is giving citizens opportunities to contribute to and gain a stake in the ongoing constitutional reform process there. And in Mali, ABA ROLI works with youth organizations that have successfully engaged young people about their grievances, dissuaded them from planned violence, and channeled their energies more productively, through sports, legal action and advocacy.

Each of these programs uses Rule of Law approaches to nip extremism in the bud.

Rule of Law Responses to Forced Migration

As the world strains at the record 60 million people forced to flee their homes, the ABA is advancing Rule of Law responses – in countries from which they are fleeing, transit countries, and destination countries alike.[3]

Many ABA ROLI programs seek to address the violent crime, conflict, and systematic human rights violations that are at the root of the mass migration. Thus, for example, in the Democratic Republic of Congo, ABA ROLI combats impunity for widespread sexual assault, a residue of that country's two decades of conflict. In El Salvador and Guatemala, ABA ROLI helps develop the capacity of law enforcement and the judiciary to curb the murderous criminal gangs who have forced hundreds of thousands of adults, families and unaccompanied children to flee north through Mexico to the United States.

There is no one-size-fits-all Rule of Law, and the work to develop and reinforce the Rule of Law is never done.

In transit countries, such as Turkey, ABA ROLI is working with local lawyers to provide critical legal information to Syrian refugees, helping them realize their rights to housing, health care and schooling for their children. Similarly, in the United States, a destination country, the ABA's Commission on Immigration works through its ProBAR[4] program in south Texas to provide legal representation to immigrants and asylum-seekers crossing the U.S. southern border.

Promoting Labor Rule of Law

Labor Rule of Law demands labor laws that are compliant with international standards and their effective administrative and judicial enforcement. Globally, labor Rule of Law is endemically weak. In many countries, domestic labor laws often fall short of international standards, failing to adequately protect workers' rights. Administrative and judicial sector authorities often lack the capacity to effectively enforce labor protections. And workers often do not fully understand their rights or have sufficient resources to claim them. As a result, employers in these countries violate workers' rights with impunity, posing significant challenges to U.S.-based multinational corporations dedicated to responsible supply chain management, and putting U.S. workers and employers at a competitive disadvantage.

To address such Rule of Law gaps in Mexico, ABA ROLI is developing a new program that, in its initial phase, will help establish labor law clinical programs at three leading Mexican law schools. The clinics will support application of Mexican labor law, including the historic constitutional labor justice reforms adopted in early 2017, by providing workers with educational programming about their rights and pro bono legal representation and guidance to realize them. Long term, the clinics will help inspire the next generation of Mexican lawyers to engage in labor lawyering in the public interest. Appreciating the relevance of this program to her work and to the law students and Buffalo community she serves, Nicole Hallett, assistant clinical professor of law at the University at Buffalo School of Law and director of the school's Community Justice Clinic, will serve as a pro bono legal specialist for the program, contributing her valuable time and expertise.

The foregoing examples of the ABA's international Rule of Law development efforts highlight ways in which these programs address problems abroad that may impact the United States and its security and commercial interests. These consequences in turn challenge our own Rule of Law, giving rise to proposed policy responses that would undermine civil liberties or back away from our international refugee commitments. In this way, the Rule of Law truly is interconnected globally; our success supporting it abroad affects our ability to maintain it at home.

We do this work around the world with a mix of pride and modesty – pride in the U.S. Rule of Law tradition but cognizant that our system is neither perfect nor necessarily a perfect fit for other contexts. Indeed, as the articles in this issue reflect, there is no one-size-fits-all Rule of Law, and the work to develop and reinforce the Rule of Law is never done. Rather, the Rule of Law is a system of checks and balances that needs constant and perpetual testing, nurturing and strengthening. Bar associations such as the ABA and the New York State Bar Association have a critical role to play in developing and sustaining the Rule of Law, and it is that experience that we seek to share and develop together with our justice sector colleagues around the world. ■

1. *See, e.g.*, Center for Strategic and International Studies Commission on Countering Violent Extremism, *Turning Point: A New Comprehensive Strategy for Countering Violent Extremism, 8* (2016); United Nations General Assembly, *Plan of Action to Prevent Violent Extremism: Report of the Secretary-General*, A/70/674, December 2015.

2. For a survey of such Rule of Law approaches, *see* Nicholas Robinson & Catherine Lena Kelly, *Rule of Law Approaches to Countering Violent Extremism*, American Bar Association Rule of Law Issues Paper (May 2017).

3. The United Nations High Commissioner for Human Rights has also drawn attention to the Rule of Law dimensions of the refugee crisis; *see* Executive Committee of the High Commissioner's Program, *Note on International Protection*, EC/66/SC/CRP.10, June 2015.

4. https://www.americanbar.org/groups/public_services/immigration/projects_initiatives/south_texas_pro_bono_asylum_representation_project_probar.html.

From the Star Chamber to the Separation of Powers

Origins of U.S. Judicial Independence and the Rule of Law

By Justice Cheryl E. Chambers

As Americans, we tend to take for granted certain base assumptions about our system of government, including judicial independence. It is a concept seldom discussed in the news, but myriad elements of our modern lives should compel otherwise. As the past is an excellent predictor of the future, we need not look broadly to understand the necessity for an independent judiciary. At the time of the American Revolution, the very real perils stemming from the absence of an independent judiciary were present in the minds of our nation's founders, who pointedly sought to learn from the mistakes of the past. In this regard, the founders succeeded admirably. But today, do we rest on our laurels?

Our modern digital world and the accompanying social dialogue have fostered a dynamic that would make our ancestors scratch their heads or shudder in fear. Many of our institutions, including the judiciary, are the subject of growing criticism. Unlike in previous times, those criticisms can get picked up in social media and "go viral." However, we must remind ourselves that an independent judiciary, resolving disputes in accordance with the rule of law, remains a cornerstone of our democratic system of government.

The World Justice Project[1] provides a useful working definition of the rule of law in terms of four universal principles: the *accountability* of government and private actors under the law; *laws* that are clear, publicized, stable, and just; an *open government* that sheds light on

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the processes by which laws are enacted, administered, and enforced; and an accessible and impartial *judiciary* to resolve disputes.[2] This article focuses on the last principle of an accessible and impartial judiciary, examining its historical underpinnings in the U.S., and considering opportunities to embrace its continued relevance in our modern society and to foster its vitality going forward.

Defining Judicial Independence

U.S. Supreme Court Justice Ruth Bader Ginsburg wrote of judicial independence:

> "Judges [are] not under the thumb of other branches of government, and therefore equipped to administer the law impartially."[3]

U.S. Supreme Court Justice Clarence Thomas said:

> "Our judicial system is built on a belief that those who judge will do so impartially, and in accordance with the law," and that it is "this ability to render judgment without concern for anything but the law that should distinguish judges from members of the legislature or the executive branch."[4]

Despite the ideological differences between these jurists, both descriptions are remarkably similar.

Judicial independence exists not to elevate the judiciary above the other two branches of government, but rather as a fundamental element that allows for the functionality of all three branches of government. Maintaining judicial independence is paramount, not only to protecting the judiciary from undue pressures, but also to protecting the rule of law from unscrupulous judges who might act in their own interest.

Genesis of American Judicial Independence

In drafting the Constitution, the founders set forth to create a constitutional framework that incorporated the best attributes of the English system, while making a number of important changes.

From English philosopher Thomas Hobbes, whose own writings were deeply influenced by his experience during the English Civil Wars, the founders drew upon the theory of the social contract, and the importance of creating a central government that was robust enough to preserve peace among the various states and defend itself against outside forces.[5]

From French lawyer and philosopher Baron de Montesquieu, the founders embraced the concept of separation of powers,[6] though not in the limited form practiced in England, which Montesquieu had extolled in his seminal work, *De l'Esprit des loix*.[7]

Finally, from English philosopher John Locke, the founders adopted the simple yet powerful idea that all individuals are endowed with inalienable rights, and that the only legitimate government is one ordained by the will of people.

Influenced by Montesquieu, Locke and Hobbes, among others, and informed by English history as well as the vicissitudes of living under colonial rule, the founders drafted the U.S. Constitution. A debatable idea at that time, the U.S. Constitution created an overlapping and interdependent power structure, with each branch relying on the others to fully execute its responsibilities. Then and now, it is precisely that system of checks and balances that allows an independent judiciary to protect personal rights and civil liberties.

Protecting the Judiciary from the Influence of Executive Power

The founders understood that the Constitution could only protect the rights and privileges of the people with empowered and independent judges – free from the influence of the other branches – to assert individual freedom and enforce its terms. The founders were particularly keen to purge the executive branch of anything resembling the royal prerogative, which had caused considerable turmoil in 17th century England.[8]

The 17th century Star Chamber offers an object lesson in the dangers of placing judicial authority at the mercy of an autocratic leader.

Historically, sovereignty in England was concentrated in the Crown, which largely exercised all the powers of the state. Over the centuries, however, those powers, which were collectively known as the royal prerogative, were reduced as a parliamentary democracy and the rule of law developed. A series of statutes enacted in the late 17th century, including the Bill of Rights 1688/9 and the Act of Settlement 1701, were of particular significance for the definitive establishment of the rule of law in England.[9]

Following the promulgation of the Act of Settlement 1701, judges in England enjoyed life tenure, with protection against removal except by impeachment. It is worth briefly recalling some of the events leading up to the Act of Settlement 1701 in order to fully appreciate its historical significance to the English as well as to the founders, who were determined not to repeat the mistakes of the past.

During the 17th century, an English court known as the Star Chamber came to epitomize the pitfalls of

executive influence over the judiciary. According to the Records of the Federal Convention of 1787, "[a] primary goal that emerged in Constitutional debates was preventing the judiciary from devolving into 'America's Star Chamber.'"[10]

Conceived as a supervisor of lower courts in England, the Star Chamber operated from 1487 until 1641. It was comprised of privy counselors (advisors to the king), two judges of the courts of common law, lords (both spiritual and temporal) and no jury. It was considered an honorable and distinguished court for most of its history, but fell into disrepute during the 20-year period immediately preceding its abolition by the Long Parliament in 1641.

In light of the increased propensity of the Star Chamber to act where the crown had a direct interest, and perhaps exacerbated by the vague nature of its jurisdiction, there was always a strong potential for the Star Chamber to be wielded as a political weapon.[11]

One of the most fascinating opponents of the royal prerogative was a jurist named Edward Coke. Coke asserted the supremacy of common law and refused to concede power over the law to the king. While history has softened Coke's edges, mostly portraying him as a courageous advocate of individual rights who stood up to a tyrannical monarchy, the reality is a bit more complicated.

Many narratives on Coke omit his early career as an advocate for the crown as he moved up through Parliament. Coke eventually served on a variety of courts, such as the Court of Common Pleas, the King's Privy Council and the Star Chamber itself. However, as his career progressed, Coke positioned himself more firmly in opposition to the royal prerogative. Coke's criticisms of the Star Chamber and support for judicial independence became cornerstones of the U.S. system of judicial independence.

The *Case of Commendams* (1616) includes King James's rebuke to Coke's claims of supremacy of the rule of law. That case concerned the king's power to grant special rights and privileges to individuals of his choosing. Although the case was assigned to common law judges, the king ordered the court to consult with him before reaching a decision.

The judges, including Coke, balked at such an intrusion into their authority. King James ominously proclaimed the supremacy of the royal prerogative over the law and removed Coke from the bench: "[A]s for the absolute prerogative of the Crown that is no subject for the tongue of a Lawyer, nor is it lawful to be disputed."[12] King James went on to say that "[i]t is a presumption and Treason in a Subject to dispute what a King can do . . .The Judges ought to check and bridle such impudent Lawyers and to disgrace them."[13]

That was a clarion call for courts acting on the king's behalf to silence lawyers who opposed his authority. With the judiciary now firmly in the Crown's grip, in 1629, King James' successor, Charles, set his sights on the legislative branch, adjourning Parliament and effectively placing all three branches of government within his control from 1629–1640. That period was referred to as the Personal Rule, or the Eleven Years Tyranny. Eventually King Charles had to call a Parliament to raise funds for war, and the ensuing conflict between Parliament and the king eventually led to the English Civil Wars and, ultimately, the triumph of the Rule of Law.

Thus, the 17th century Star Chamber offers an object lesson in the dangers of placing judicial authority at the mercy of an autocratic leader. That history, which led, in England, to the promulgation of the Act of Settlement 1701, also caused the founders to write similar protections into the U.S. Constitution, namely a clause enshrining the idea of service during good behavior (i.e. life tenure) for federal judges, as well as provisions protecting judicial salaries against reduction, and calling for the removal of federal judges by no method less than impeachment for criminal conduct.

Our modern society, with a 24-hour news cycle, appearance of fake news and constant charges of bias, presents a significant and new challenge to judicial independence.

As an aside, it is interesting to note that while judges in England had enjoyed life tenure since 1701, their counterparts in the colonies enjoyed no such privileges. In fact, the Declaration of Independence was written as a rebuke of the many abuses of King George III against the colonists, among them his control of the colonial judges through the continued exercise of the royal prerogative.[14]

Although the merits of life tenure for the federal judiciary are still debated today by scholars and politicians, the founders were quite clear in the purpose of such a constitutional provision. In the *Federalist No. 79*, Alexander Hamilton wrote:

> The want of a provision for removing the judges on account of inability has been a subject of complaint. … An attempt to fix the boundary between the regions of ability and inability would much oftener give scope to personal and party attachments and enmities than advance the interests of justice or the public good.

Consequently, the founders conceived that there must be a place in government where being right is more important than being popular or powerful, and where fairness trumps strength. And in the United States, that hallowed place resides within the judicial branch.[15]

Separating the Judiciary from the Legislature

Although the British system included a separate judiciary composed of judges having life tenure, the decisions of the judiciary could be appealed to the House of Lords, which meant that the jurisdiction of the legislative branch straddled the jurisdiction of the judiciary.[16] The drafters of the U.S. Constitution, by contrast, did not allow such oversight of the judiciary by the legislature. Instead, they created a Supreme Court that had ultimate appellate jurisdiction over all federal courts.

The decision to establish an independent federal Supreme Court was not without controversy. In defending the decision, Hamilton, in *Federalist No. 78*, reasoned that the judiciary, by the limited nature of its functions, would always be the "least dangerous to the political rights of the Constitution" because it held neither the sword of the executive nor the purse of the legislature.

The *Federalist Papers* were written as a response to Antifederalists who – in writings attributed only to Brutus – opposed the establishment of a Constitution that might give rise to a tyrannical federal government. Though Brutus' identity was never officially confirmed, scholars believe the writings to be the work of N.Y. Supreme Court Justice Robert Yates. Brutus' thesis was that the judiciary, like the other branches of government, must ultimately be accountable to the people. However, by creating a federal Supreme Court completely independent of the two other branches of government and consisting of justices having life tenure, the element of accountability was lacking.

The crux of the disagreement between Brutus and Hamilton was not about judicial independence per se, but rather about the proper role of an independent judiciary within our constitutional system. Specifically, who should have the final word in determining whether state or federal legislation is consistent with the terms of the Constitution? Interestingly, Brutus did not dispute that the judiciary ought to have the power to strike down laws that are contrary to the Constitution. Rather, he advocated that if judges are given the power of judicial review, the United States should implement a system similar to the one in England, where the decisions of the judiciary ultimately remain subject to review by the legislature. Brutus reasoned that there is nothing that makes judges inherently more qualified than legislators in interpreting the meaning of the Constitution. The key difference is that elected legislators are accountable to the people, whereas judges are not. Thus, if the legislature interprets the Constitution in a manner that is unpopular with the people, the legislature can be voted out of office. [17]

Judicial Review

The final element of the U.S. version of judicial independence is the power of judicial review, which does not appear anywhere in the Constitution. Although the text of the Supremacy Clause clearly implies that only laws made "pursuant" to the Constitution are valid, the Constitution does not provide which branch of government has the authority to make that critical determination. As noted earlier, the Antifederalists contended that the final word on matters of constitutional interpretation should rest with the legislature. In response, Hamilton, in *Federalist No. 78*, argued that the newly created Supreme Court should be entrusted with this task.

It was not until 1803, when Chief Justice John Marshall penned *Marbury v. Madison*,[18] that judicial review formally became part of our constitutional jurisprudence. To be sure, *Marbury* has had its detractors over the years.[19] Judge Learned Hand famously said that the opinion "will not bear scrutiny."[20] Nevertheless, given the founders' predisposition to view the English Parliament as an instrument of colonial oppression,[21] it was perhaps inevitable that the ultimate power to interpret the Constitution would fall upon the newly created Supreme Court rather than the legislature.

Moreover, even before the American Revolution, the colonists had access to the writings of Edward Coke, whose bold, new ideas about the Rule of Law had more influence on colonial lawyers than in England. In particular, Coke's celebrated dictum in *Dr. Bonham's Case (1610)*, in which he wrote that "the Common Law doth control Acts of Parliament, and sometimes shall adjudge them to be void: for when an Act of Parliament is against Common right and reason, or repugnant, or impossible to be performed, the Common Law will control it, and adjudge such Act to be void."[22] Although the dictum in *Dr. Bonham's Case* was never viewed in England as reflecting an accepted proposition of English law,[23] it had a profound influence in the colonies, and was the fundamental premise of James Otis' argument, before the Superior Court of Massachusetts, in *The Writs of Assistance* Case in 1761, that a court could void an act promogulated by the legislative assembly when the court found that the law had transgressed its boundaries.[24]

Today, the authority of the federal judiciary to interpret the Constitution remains firmly established, permitting no serious criticism. "Notwithstanding the deference each branch must accord the others, the 'judicial Power of the United States' vested in the federal courts by Art. III, s 1, of the Constitution can no more be shared with the Executive Branch than the Chief Executive, for example, can share with the Judiciary the veto power, or the Congress share with the Judiciary the power to override a Presidential veto."[25]

Learning from History

While the concept of American judicial independence is centuries old, it is certainly not static. From its origins during the days of our nation's founding, the lessons learned from the hard-fought battles over the rule of law continue to resonate today.

> A more inclusive judiciary is broadening and deepening our jurisprudence for the better.

For example, in *Doe v. United States*, the legacy of the Star Chamber was recognized as the basis for the Fifth Amendment: "[t]he fundamental purpose of the Fifth Amendment was to mark the line between the kind of inquisition conducted by the Star Chamber and what we proudly describe as our accusatorial system of justice."[26]

In *United States v. Jones*, Justice Scalia acknowledged the role that England's rejection of the Star Chamber played in creating the Fourth Amendment, citing the 1765 English case of *Entick v. Carrington*, which rejected search and seizure performed by the Crown in an effort to crush dissenters, as a "'monument of English freedom undoubtedly familiar to every American statesman at the time the Constitution was adopted.'"[27] *Entick* decried the judicial corruption plaguing the Star Chamber, vowing "'to demolish this monster of oppression, and to tear into rags this remnant of Star Chamber tyranny.'"[28] *Entick* is often cited by scholars as a pillar of the search and seizure laws.

The 1963 Supreme Court decision in *Gideon v. Wainwright* ensured all defendants in criminal proceedings would be guaranteed an attorney, ending the practice of trying defendants without counsel as they did in the Star Chamber.[29]

Youngstown Sheet & Tube Co. v. Sawyer set clear limits on the president's executive authority during wartime, a marked departure from the king's ability to commandeer donations from wealthy landowners to wage wars with other European powers.[30]

Hamdan v. Rumsfeld ensured that prisoners of war would receive fair trials under the Constitution, the Uniform Code of Military Justice, and the Geneva Conventions.[31]

As illustrated in the cases above, the modern era has served as a catalyst to drive even more transformative changes to the concept of judicial independence. Moreover, in a country with an increasing diversity of population and viewpoints, and unprecedented access to raw information broadcast through social media, the judiciary may be more vulnerable than ever to criticism intended to undermine its independence. Thus, it is an opportune time to identify and evaluate what makes for a strong and independent judiciary with legitimacy in the eyes of the public.

Whither Judicial Independence?

According to the World Justice Project's 2016 Rule of Law Index, the United States ranks 18th overall out of 113 data reporting countries. The World Justice Project conducts over 110,000 surveys of the general population and 2,700 legal experts on their perception of the rule of law in their respective countries. For some perspective, the United Kingdom ranked 10th, with Denmark, Norway and Finland topping the list in the first three positions, respectively.

These rankings serve as a useful reminder that the strength of the rule of law depends not only on the robustness of underlying institutions, but also how those institutions are perceived by populations they serve. Our modern society, with a 24-hour news cycle, appearance of fake news and constant charges of bias, presents a significant and new challenge to judicial independence. In the 21st century, the judiciary must be responsive to these dynamic changes in our society. The information revolution ushered in by internet interconnectivity creates new opportunities for government transparency and citizen engagement. A strong rule of law relies on public trust in the faithful and fair execution of the laws and the swift administration of justice.

Three specific areas of critical importance to judicial independence in the internet era: education, finance, and diversity.

Education: More than at any other time in U.S. history, people today have the tools to be informed about the legal process. This is an opportunity for bench and the bar to inform, educate and advocate for intellectual curiosity.

In former Chief Judge Judith S. Kaye's 1996 lecture, *Safeguarding a Crown Jewel*, she emphasized the role of lawyers, legal educators and journalists in educating the public about how our legal system functions.[32] A well-informed population can better interpret and evaluate the jurisprudence coming out of judicial decisions. Judge Kaye called on members of the bar to communicate to the public the importance of the judiciary, while also clarifying its role.

Twenty years later, the widespread availability of legal decisions online — as well as access to statutes and government regulations — bridge the gap between the public and the judiciary and promote greater transparency.

Finance: As it stands, the judicial branch operates on two-tenths of one percent of the federal budget.[33] This paltry sum does not align with the importance and significance of the judicial branch. While the judicial branch should not advocate for lavish spending during a fiscal

crisis, proper funding of the judiciary is vital to judicial independence for two primary reasons:

1. It allows courts to better manage their dockets, settle grievances and process convictions for both the safety of the public and to ensure preservation of the rights of the accused; and
2. It affords courts the resources to write clear, thoughtful and consistent opinions that form the common-law foundation of the U.S. jurisprudence. A slow or dysfunctional judiciary undermines public confidence in the judicial system and, by extension, in the rule of the law itself.[34]

Diversity: A key component of public trust and confidence in our institutions is underpinned by the idea that institutions serving the public should reflect the composition of the general population. Indeed, constituents who are underrepresented in the judicial ranks may feel excluded or that the legal system is working against them. Just as large corporations and academia strive for diversity to fight groupthink and encourage independence, the judiciary must be committed to diversity for the same reasons.

As the nation has become more diverse, so too have the judges sitting on benches across the country. American jurisprudence is designed to be responsive to the changing faces and realities of our nation, and a more inclusive judiciary is broadening and deepening our jurisprudence for the better.

Without vigilance, transgressions against judicial independence chip away at public perception of the judiciary's role. History revealed this danger to the founders, who took steps to protect judicial independence in the written Constitution. Today, the threats to judicial independence in the United States do not come in the form of a tyrannical king seeking to exert his will over the law. Nevertheless, there are other challenges from public officials, political pundits, lobbyists and those seeking a political advantage in the judicial system.

Protecting judicial independence is not a partisan issue; it transcends political ideology. It is an undeniable duty that falls upon each of us. What is more, history has taught us that an independent judiciary is vital to the rule of law and democracy. Education, robust funding, and increased diversity all contribute to readying judicial independence for a bright and challenging future. The vision of our founders to keep the judiciary free from outside influence is a full-time pursuit that requires our undivided attention. Today, do we rest on our laurels? The answer should be a resounding "no." ■

1. The World Justice Project is a multi-disciplinary, multi-country non-profit focusing on improving the rule of law throughout the globe. Founded by former president of the American Bar Association William H. Neukom, the Rule of Law Index compiles data on 113 countries from surveys of 110,000 citizens and 2,700 legal experts.

2. *See* World Justice Project, (Nov. 7, 2017), https://worldjusticeproject.org/about-us/overview/what-rule-law (accessed on 11/7/2017).

3. Ruth Bader Ginsburg, *Judicial Independence: The Situation of the U.S. Federal Judiciary*, 85 Neb. L. Rev. 1 (2006).

4. Clarence Thomas, *On Judicial Independence*, an address to the Federalist Society's Annual National Convention Banquet on November 12, 1999, http://fedsoc.server326.com/pdf/Judicial%20Independence%20-%20Clarence%20Thomas.pdf.

5. *See*, in particular, The Federalist No. 6 (Alexander Hamilton).

6. *See* Sam J. Ervin, *Separation of Powers: Judicial Independence*, 35 Law & Contemporary Problems 108, 108-9. (1970).

7. *See* The Federalist No. 47 (James Madison).

8. *See generally*, The Federalist No. 69 (Alexander Hamilton).

9. *See R (Miller) v Secretary of State for Exiting the European Union*, [2017] UKSC 5, at paragraphs 40 *et seq.*, http://www.bailii.org/uk/cases/UKSC/2017/5.html.

10. James F. Ianelli, *The Silence: Eligibility Qualifications and Article III*, 6 Seton Hall Cir. Rev. 55, 61-2 (2009) quoting *The Records of the Federal Convention of 1787*, at 635 (Max Farrand, ed., 1911).

11. *See* Daniel L. Vande Zande, *Coercive Power and the Demise of the Star Chamber*, 50 Am. J. Legal Hist. 326, 334 (2010).

12. Ryan Patrick Alford, *The Star Chamber and the Regulation of the Legal Profession 1570-1640*, 51 Am. J. Legal Hist. 639, 700 (2011), quoting The Political Works of James I 333 (Charles McIlwain ed., Harvard Univ. Press 1918).

13. Alford at 700, quoting *British Library*, Hargrave MS 132, f. 68b. (2009).

14. *See* Robert Reinstein, *Limits of Executive Power*, 59 Am. U. L. Rev. 259.

15. Nina Totenberg, *Justice O'Connor Criticizes Campaign Finance Ruling*, NPR, All Things Considered Transcript, Jan. 26, 2010, https://www.npr.org/templates/story/story.php?storyId=122993740.

16. In fact, it was not until October 2009 that the UK established its own Supreme Court, which assumed the judicial functions of the House of Lords and finally ended parliamentary oversight of judicial decisions.

17. *See generally*, Shlomo Slonim, *Federalist No. 78 and Brutus' Neglected Thesis on Judicial Supremacy*, 23 Const. Comment. 7 (2006).

18. 18(5 US 137 [1803]).

19. *See generally*, Samuel R. Olken, *The Ironies of Marbury v. Madison and John Marshall's Judicial Statesmanship*, 37 J. Marshall L. Rev. 391 (2004).

20. Alexander M. Bickel, *The Least Dangerous Branch* 2 (Yale Univ. Press, 2nd ed. 1986).

21. *See* Francisco Fernández Segado, *James Otis and The Writs of Assistance Case (1761)*, in *Common European Legal Thinking* (H. J. Blanke et al. eds., 2015).

22. *Id*. at 3.

23. *See* A.E. Dick Howard, *Magna Carta's American Adventure*, 94 N.C. L. Rev. 1413, 1416 (2016).

24. *See* Segado, *supra* note 21.

25. *United States v. Nixon*, 418 U.S. 683, 704 (1974).

26. *Doe v. United States*, 487 U.S. 201, 220.

27. *United States v. Jones*, 565 U.S. 400, 405, quoting *Brower v. County of Inyo*, 489 U.S. 593, 596 (1989).

28. Ianelli, *supra* note 10, at 61 n.32, quoting 19 Howell's State Trials 1029 (1765).

29. *See Gideon v. Wainwright*, 372 U.S. 335 (1963).

30. *See Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

31. *See Hamdan v. Rumsfeld*, 548 U.S. 557 (2006).

32. *See* Judith S. Kaye, *Safeguarding a Crown Jewel: Judicial Independence and Lawyer Criticism of Courts*, 25 Hofstra L. Rev. 703 (1997).

33. *See* Robert Barnes, *Chief Justice John Roberts warns of a not-so-wonderful life for judiciary amid budget cuts*, Wash. Post, Politics, Dec. 31, 2013, https://www.washingtonpost.com/politics/chief-justice-john-roberts-warns-of-a-not-so-wonderful-life-for-judiciary-amid-budget-cuts/2013/12/31/40dd7bdc-7255-11e3-8b3f-b1666705ca3b_story.html?utm_term=.cc656bf7b76e.

34. *See* Chief Justice John Roberts, *2013 Year-End Report on the Federal Judiciary* at 9-10, https://www.supremecourt.gov/publicinfo/year-end/2013year-endreport.pdf.

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Defending Judges, Standing Up for the Rule of Law

By Mark H. Alcott

There is nothing wrong with criticizing a judge's decision. Law professors do it, appellate courts do it, even bar associations do it. It is a healthy – indeed, essential – part of our legal process, and the ensuing dialogue strengthens the rule of law.

But when the criticism goes beyond the merits of the decision and degenerates into a personal attack on the judge's competence, integrity, patriotism or the like, it undermines the rule of law and becomes a threat to our democratic institutions. Judges have no weapons, no armies; they depend on their moral authority. Personal attacks undermine that moral authority and weaken our legal system, to our peril.

In any other context, the targets of such an attack would respond with a vigorous, robust defense of their conduct and the challenged decision. But judges don't. They can't. Why not? Because they are prohibited from doing so by their ethical code, as well as by custom and tradition.

The New York Code of Judicial Conduct provides, in Rule 100.3(B)(8):

> A judge shall not make any public comment about a pending or impending proceeding in any court within the United States or its territories. The judge shall require similar abstention on the part of court personnel subject to the judge's direction and control.[1]

This rule has been interpreted by the New York State Bar Association as preventing judges from responding to criticism of their behavior on pending or impending matters.[2]

The obligation to respond on judges' behalf lies with the organized bar. Recognizing that judges cannot engage in rough and tumble civic debate, and cannot defend

themselves in the public square, the organized bar does so on their behalf.

The comments to Model Rules of Professional Conduct explicitly urge the bar to do so, saying in Comment 3 to Rule 8.2(a):

> To maintain the fair and independent administration of justice, lawyers are encouraged to continue traditional efforts to defend judges and courts unjustly criticized.

The role of lawyers in defending judges and courts derives from a combination of their role as officers of the court and the inability of judges to defend themselves. As the late Chief Judge Judith Kaye put it:

> [T]he fact is that judges today cannot and do not answer back, but hold up the banners of judicial dignity, judicial impartiality and judicial independence, and look to the bar to hold up the other end of those banners. The prevailing view is that a judge's defenses are "best left to the objectivity of a local, county or state bar association."[3]

> Moreover, even assuming that one or more of the males ran from the corner once they were aware of the officers' presence, it is hard to characterize this as evasive conduct. Police officers, even those travelling in unmarked vehicles, are easily recognized, particularly, in this area of Manhattan. In fact, the same United States Attorney's Office which brought this prosecution enjoyed more success in their prosecution of a corrupt police officer of an anti-crime unit operating in this very neighborhood. Even before this prosecution and the public hearing and final report of the Mollen Commission, residents in this neighborhood tended to regard police officers as corrupt, abusive and violent. After the attendant publicity surrounding the above events, had the men not run when the cops began to stare at them, it would have been unusual.[4]

These words quickly went viral – or the pre-internet equivalent thereof. A tidal wave of criticism engulfed the judge. Louis Materazzo, the president of the Patrolmen's Benevolent Association, suggested that Judge Baer "should be investigated," adding: "As long as there are judges like that, criminals will be running in the streets." Police Commissioner William J. Bratton said Judge Baer should recuse himself from cases involving police in the future.[5] Federal officials, including President Bill Clinton, joined these criticisms. White House Press Secretary Michael McCurry suggested that "if [Baer] did not reverse a widely criticized decision throwing out drug evidence, the President might ask for his resignation."[6] Bob Dole went further, saying "He ought to be impeached instead of reprimanded . . . If he doesn't resign, he ought to be impeached."[7]

Personal attacks undermine that moral authority and weaken our legal system.

The American Bar Association, the New York State Bar Association and state and local bars throughout the country have repeatedly stepped forward to perform this important duty – even when doing so has embroiled them in controversy. Some of the episodes have been widely publicized, including the following:

In 1996, Judge Harold Baer of the U.S. District Court for the Southern District of New York presided over what should have been a relatively routine suppression hearing. The defendants, observed late at night in a desolate part of Manhattan, were acting suspiciously, in the judgment of police officers. The suspicion was compounded when, after noticing the police officers, the defendants ran away. They were quickly apprehended. The officers then engaged in a search, found contraband and arrested the defendants.

The question before Judge Baer was whether the defendants' conduct – especially their rapid flight when approached by the police – was suspicious enough to constitute probable cause for the warrantless search of their car; or whether, on the other hand, the police engaged in an unreasonable search and seizure in violation of the Fourth Amendment, requiring suppression of the contraband they found.

Judge Baer found the search unreasonable. Fair enough. No one but those involved would have noticed. But his written opinion caused a sensation. Judge Baer opined:

Judge Baer was not allowed to give any public explanation or defense of his decision. His written opinion stood alone against the verbal onslaughts of the politicians, pundits and publicists. Although he ultimately vacated this decision, referencing briefly and obliquely the controversial language, he was unable to respond directly to his critics even then.[8]

But Judge Baer did not stand completely alone. The organized bar quickly stepped into the fray.

The Association of the Bar of the City of New York released a statement calling such personal attacks on a judge writing an opinion "pernicious."[9]

In addition, 26 bar associations released a full-throated statement of the profession's obligation to reject such attacks.

> We believe that in a democratic society fair, open and vigorous debate and criticism of judges and judicial

> decisions is necessary and appropriate. But these recent attacks have gone well beyond the criticism from which no judicial decision or judge should ever be immune. Rather they have been both intemperate and personal in nature. The corrosive effects of these attacks upon the judicial system and the society it serves cannot be overstated.
>
> The leaders of this profession must resist the propagation of misinformation concerning the law and the legal process. We must be no less vigilant in resisting efforts to undermine the independence of the judiciary. To utilize the threat of sanction or removal solely to punish a judicial decision which is unpopular or, in retrospect, turns out to have been unwise, is unacceptable and incompatible with the preservation of a co-equal judicial branch of government.
>
> Efforts by either the executive or the legislative branches of government to intimidate judges and thereby diminish the independence of the judiciary must not be permitted. Enhanced vigilance is particularly necessary under the New York State governmental structure wherein judges do not enjoy life tenure during good behavior, but rather must periodically submit to a process of reappointment or reelection.
>
> It is a responsibility of the members of this profession to act as guardians of those liberties which form the bedrock of a free society. We must, by our collective actions, show that liberty depends upon keeping separate the power of judging from the legislative and executive powers.[10]

The leaders of the bar did not feel compelled to defend the merits of Judge Baer's decision, with which many disagreed. But some did use the opportunity as a teaching moment, to explain the role of the courts, the separation of powers and the importance of an independent judiciary.

The American Bar Association assembled the ABA Commission on Judicial Independence and Separation of Powers. It released an extensive report that stressed the importance of judicial independence and included early suggestions about how bar associations can defend judges when attacked.[11]

Judge Shira Scheindlin, also of the Southern District of New York, became a target of comparable vitriol because of her involvement in a case of somewhat greater consequence: *Ligon v. City of New York*.[12] The *Ligon* case involved a constitutional challenge to the NYPD's controversial "stop and frisk" policy. Proponents of the policy said it substantially reduced crime and removed a large number of guns from the street; opponents said it unfairly targeted minorities and infringed their constitutional rights.

In January 2013, Judge Scheindlin granted the plaintiffs' motion for a preliminary injunction against the practice, finding that they had established a clear likelihood of success in proving the city's deliberate indifference to the unconstitutional practice.[13] (She later stayed this relief given the possibility of irreparable harm.[14])

Many hailed Judge Scheindlin's decision as a triumph for civil liberties. But the injunction also led to sharp personal criticism of the judge. A *New York Post* article claimed to have found a study prepared by the Bloomberg administration alleging that Judge Scheindlin was biased, ruling against law enforcement more often than any other judge in the district.[15]

The *New York Times* also ran an article highlighting that issues involving frisking were almost all directed to Scheindlin, suggesting that this was improper.[16] Judge Scheindlin was also criticized as biased because of statements she made to the press and in open court.

The issue became more complicated, however, when the Second Circuit stayed her order and criticized Judge Scheindlin in unusually harsh terms. And the court went further; it removed Judge Scheindlin from the case, a rarely imposed rebuke. The Court stated, "[u]pon review of the record in these cases, we conclude that the District Judge ran afoul of the Code of Conduct for United States Judges, Canon 2 (A judge should avoid impropriety and the appearance of impropriety in all activities.); *Ligon* v. *City of New York*, 538 F. App'x 101, 101–03 (2d Cir.), *superseded in part*, 736 F.3d 118 (2d Cir. 2013), *vacated in part*, 743 F.3d 362 (2d Cir. 2014), and *vacated in part*, 743 F.3d 362 (2d Cir. 2014).

The obligation to respond on judges' behalf lies with the organized bar.

That presented a serious problem to the bar leaders. Should they defend Judge Scheindlin and thereby implicitly criticize the Second Circuit? Or should they remain mute, thereby forgoing what many regarded as their obligation to support the judiciary [but which branch of the judiciary?] at a time when it was under severe attack.

The bar associations as such did not act. However, after the initial ruling in the Second Circuit, several lawyers and law professors filed a curative motion challenging the order as having "breach[ed] . . . the norms of collegiality and mutual respect that should characterize interactions between District and Circuit judges."[17]

This had the desired effect. The Second Circuit backtracked. It explained the basis for its earlier order and clarified that it "did not intend to imply in our previous order that Judge Scheindlin engaged in misconduct cognizable either under the Code of Conduct or under the Judicial Conduct and Disability Act."[18]

After these episodes Judge Baer and Judge Scheindlin continued to serve as respected members of the bench.

An extreme manifestation of this problem occurred during the 2016 presidential election. Judge Gonzalo Curiel issued an opinion adverse to Trump University.

Donald Trump, then on the brink of obtaining the Republican presidential nomination, furiously denounced the decision and the judge's impartiality, because of the judge's Mexican-American ethnicity. Trump described Judge Curiel as "very biased and unfair" and "totally biased" on Twitter, before saying on CNN, "I've been treated very unfairly by this judge. Now, this judge is of Mexican heritage, I'm building a wall!" and "He's a member of a society where – you know – very pro-Mexico and that's fine, it's all fine, but I think – I think – he should recuse himself."

As President, Mr. Trump has criticized courts generally and specifically on several occasions, including during the legal battles regarding the travel ban and U.S. District Judge William Orrick III's grant of a preliminary injunction that blocked the implementation of the President's executive order withholding federal funds from "sanctuary cities." In particular, he has criticized the Ninth Circuit as having a "terrible record" before the Supreme Court. He has also called the decision to enjoin the travel ban "terrible" and having been made by a "so-called judge."[19]

The Trump attacks presented unique problems to bar associations because of their partisan political nature. The organized bar is – and must always be – non-partisan, as non-profit entities which purport to speak for the entire legal community. In mandatory bar states in particular, where lawyers must join and pay dues to the state bar association, partisan political activity is unacceptable. In this instance, therefore, bar leaders had to walk a narrow path: protecting the independence of the bar and rejecting Mr. Trump's remarks without straying into partisan territory. They did so.

Among the many parties who criticized then-candidate Trump's comments, several bar associations released statements. ABA President Paulette Brown, speaking for the organization, said:

> The strength of our democracy and the maintenance of the rule of law lie in the independence and impartiality of our judiciary. While publicly criticizing judicial decisions is every person's constitutional right, levying personal criticism at an individual judge and suggesting punitive action against that judge for lawfully made decisions crosses the line of propriety and risks undermining judicial independence. Anyone running for the highest office in the land should understand that the independence of the judiciary is essential for an effective and orderly government and justice system.[20]

The New York State Bar's statement expressed disapproval but did not mention Trump specifically, saying:

> The New York State Bar Association has consistently advocated for a highly qualified, independent and diverse judiciary. Judicial independence is essential to maintaining the rule of law and protecting individual rights.
>
> While it is fair to criticize judicial rulings on the merits, it is not fair to attack a judge personally, because of disagreement with the judge's ruling. The recent attack on Federal District Court Judge Gonzalo Curiel's integrity and impartiality based on his ethnicity is improper.
>
> No litigant can justify such criticism by asserting that the judge's adverse rulings may have been influenced by the litigant's own prior derogatory statements about that ethnic group. We must reject and speak out against an argument that would undermine our independent judicial system and the rule of law.[21]

The New York State Bar Association issued another statement after Mr. Trump, as President, made his critical remarks.

> The New York State Bar Association has long supported judicial independence as essential to maintaining the rule of law and protecting individual rights. An independent judiciary, able to make rulings based upon the law, rather than under pressure from the legislative or executive branch, is a vital part of our system of checks and balances.
>
> This requires that our judges be treated with respect, regardless of whether parties to a litigation agree with the court's judgments and orders. It also requires compliance with orders of our courts, consistent with the rule of law.
>
> Personal denigration of judges is improper and demeans the respect for the co-equal third branch of government that our Constitution requires.[22]

A number of other bar associations made similar statements, catalogued at https://www.americanbar.org/groups/bar_services/resources/resourcepages/immigrationstatements.html.

Bar associations are large and somewhat bureaucratic organizations. Moreover, their leadership turns over frequently. It is hard for them to act nimbly and consistently, especially in the modern era of the 24-hour news cycle and the lightning speed of the internet, but that is what this issue requires. Recognizing these limitations, major bar associations have developed guidelines and procedures enabling them to discharge this responsibility efficiently and effectively.

The American Bar Association's Standing Committee on Judicial Independence has created and distributed a pamphlet, available online, entitled, *Rapid Response to Unfair and Unjust Criticism of Judges*.[23] This document, designed to reflect the bar's "special responsibility to ensure that judges remain highly respected leaders of our legal system and communities," outlines recommended steps that bar associations can take in response to unfair personal attacks on judges and the judiciary that are "consistent with the American Bar Association's various model provisions governing the conduct of lawyers and judges."[24] The ideal response will be able "to provide the public with information to help them better understand the legal issues related to a specific situation, including the role of judges, the application of the law, and the

restrictions and responsibilities placed on judges in the canons and rules."[25]

The ABA's recommended process involves having a system in place before any attacks are launched, to enable rapid response. This involves the creation of a rapid response team that is "authorized to determine whether a response is appropriate and, if so, determine the extent of the response."[26]

The New York State Bar Association has noted this guide, as well as others, in an ethics opinion addressing the issue.[27] The Philadelphia Bar Association, the Nebraska State Bar Association, the Bench and Bar of Minnesota and the American Board of Trial Advocates have each issued similar guidelines.

This is not an issue that will go away, but we can take comfort in the organized bar's ongoing effort to defend judges and preserve the independence of the judiciary. Now more than ever, this is a crucial responsibility. ■

1. Interestingly, this rule has not always been in place. In a 1997 speech, Chief Judge Judith Kaye explained that "while judges are bound to silence when facing their critics about particular cases, that was not always so." Judith S. Kaye, *Safeguarding a Crown Jewel: Judicial Independence and Lawyer Criticism of Courts*, 25 Hofstra L. Rev. 703, 714 (1997). She noted that Justice Marshall published two rebuttals to criticisms of *M'Culloch v. Maryland* and that Justice Holmes once gave an hour-long interview to a reporter about a recent opinion, essentially dictating the ultimate article. *Id.*

2. See New York State Bar Association Committee on Professional Ethics Opinion 1040 (12/9/14) (recognizing that "it is unethical for judges to answer criticism of their actions regarding pending or impending matters.").

3. 25 Hofstra L. Rev. 703, 715 (1997).

4. *United States v. Bayless*, 913 F. Supp. 232, 242 (S.D.N.Y.).

5. *Judge's Rejection of Evidence Is Criticized*, N.Y. Times (Jan. 26, 1996), https://nyti.ms/2zwKGBd.

6. *Clinton Pressing Judge to Relent: President Wants a Reversal of Drug Evidence Ruling*, N.Y. Times, Mar. 22, 1996.

7. *A Get-Tough Message at California's Death Row*, N.Y. Times (Mar. 24, 1996), https://nyti.ms/Bar2zxd9.

8. *See United States v. Bayless*, 921 F. Supp. 211, 217 (S.D.N.Y. 1996).

9. As described in Maria L. Marcus, *Is There a Threat to Judicial Independence in the United States Today?*, 26 Fordham Urb. L. J. 1, *available at* http://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=1724&context=ulj.

10. Daniel Wise, *26 Bar Groups Join to Defend Judiciary: Intemperate, Personal Attacks Criticized*, N.Y. L.J., Mar. 8, 1996, at 1.

11. https://www.americanbar.org/content/dam/aba/migrated/2011_build/government_affairs_office/indepenjud.pdf.authcheckdam.

12. 736 F.3d 118, 124–25 (2d Cir. 2013), *vacated in part*, 743 F.3d 362 (2d Cir. 2014).

13. *Ligon v. City of New York*, 925 F. Supp. 2d 478.

14. *Ligon v. City of New York*, 2013 WL 227654.

15. Ginger Adams Otis & Greg B. Smith, *Judge vs. the NYPD*, N.Y. Daily News, May 15, 2013, at 8.

16. Joseph Goldstein, *A Court Rule Directs Cases Over Friskings to One Judge*, N.Y. Times, May 5, 2013, at A16. https://nyti.ms/2h2ryUC.

17. Request for Leave to File Motion to Address Order of Disqualification, *Floyd v. City of New York*, No. 13-3088 (2d Cir. Nov. 8, 2013), ECF No. 261.

18. *Ligon* v. *City of New York*, 736 F.3d 118, 125 (2d Cir. 2013), *vacated in part*, 743 F.3d 362 (2d Cir. 2014).

19. President Trump's remarks illustrate another troubling aspect of such attacks. They are often made by government officials in cases in which the government itself is a party. As such, they constitute a disturbing effort by a litigant to coerce a court into reaching a favorable result. The same, of course, can be said of Mr. Trump's remarks in the Trump University case.

20. https://www.americanbar.org/publications/litigation_journal/2016-17/fall/when_attacks_judges_go_beyond_pale.html.

21. http://www.nysba.org/JudIndStatement/.

22. http://www.nysba.org/CustomTemplates/SecondaryStandard.aspx?id=70693.

23. https://www.americanbar.org/content/dam/aba/administrative/judicial_independence/rapid_response_pamphlet.pdf.

24. *Id.* at 1.

25. *Id.* at 2.

26. *Id.*

27. *See* New York State Bar Association Committee on Professional Ethics Opinion 1040 (12/9/14) (*available at* http://www.nysba.org/CustomTemplates/Content.aspx?id=53801).

Always in the Direction of Liberty

The Rule of Law and the (Re)emergence of State Constitutional Jurisprudence

By Albert M. Rosenblatt

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What homeowner in his or her right mind would place all design plans in the hands of two architects with competing visions? By way of analogy this is federalism, the American enterprise housing two legal systems – state and federal – under one roof. For better or worse (mostly for the better, I submit) federalism is an American birthright and a cornerstone of our Rule of Law, integral to our allocation of powers. We might define it as a manual of how we get on with our government.

Often, and inevitably, the federal and state systems bump into one another and we have robed referees to make the calls and keep the peace.

Since our founding, states' rights and federal rights have each taken turns in ascendancy. My point in this article is that we may be entering an epoch in which states' constitutional rights will increasingly offer expanded liberties not accorded under the U.S. Constitution. Under federalism, state courts can expand rights under state constitutions when federal courts restrict or contract them. This state constitutional role is not only compatible with the Rule of Law but is indeed one of federalism's strengths.[1]

At the Founding: The Scope of Federal Power

Had we a clean slate when we created ourselves politically in 1788, a unitary system with some accommodation for home rule would have been more orderly. But the slate had a lot of history on it, given that we consisted of separate colonies with different cultures and ideas of governance.

When breaking free we at first saw ourselves more as Virginians or New Yorkers, or the like, than as "Americans." Our newborn experience was exclusively with state government; after all, state constitutions were not thrust on us by some alien or higher authority. With no template to speak of, state citizens created founding documents under which we lived for a decade through the Articles of Confederation before undertaking union. In fashioning a national Rule of Law the federal Constitution's framers would naturally look to their state constitutions as models.

Meshing our state and national character lies at the heart of federalism. We retain our dual identities, now and again placing one above the other as a manifestation of our Rule of Law. This has gone on for well over two centuries. As long as we are the United States it will continue.

In creating a national Constitution the framers well understood the need for horizontally separating powers within a single federal government as a foundation for a workable Rule of Law. This accounts for the Constitution's three main articles separating powers under legislative, executive, and judicial branches.[2]

Separating powers into three branches within a single government is difficult enough, but allocating powers as between two governments – state and federal – adds another layer of complexity.

When starting out after the Revolutionary War, the citizenry had become used to seeing their state governments as keepers of the Rule of Law. The population proved willing to unite under one polity but unwilling to endanger the Rule of Law by allowing an unfamiliar entity – a national government – to win too much power. If there was any question about that, the framers made their objective clear in the Tenth Amendment to the U.S. Constitution: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." This is the essence of states' rights – and with it, federalism.

It is also no accident that the First Amendment begins with the words: "Congress shall make no law . . . ." Further Amendments follow, constituting a Bill of Rights – conceived as a vehicle to keep the federal government

from stripping away rights that grew up under common law, state statutes, and state constitutions. As an element of our Rule of Law, if federal rights or constitutional interpretations cramp freedoms, the state constitutions have offered, and will continue to offer, expanded recourse in state courts. Judicial decisions grounded on adequate and independent state constitutional grounds have unreviewable finality.[3]

This of course applies when state courts employ their own constitutions to accord rights greater than those afforded under comparable federal constitutional provisions.[4]

The Historical Background: State Constitutional Powers Under the Rule of Law

States' rights have been a part of American political discourse from the outset.

The phrase is often and aptly associated with slavery but has recurrently been invoked as a vehicle for the very opposite: protections under the Rule of Law beyond those afforded under the U. S. Constitution.

The Brennan Article as Promoting a New Era of State Constitutional Rights

A century later we saw a similar resurgence in states' rights. One powerful writing, U.S. Supreme Court Justice William Brennan's 1977 article, often is credited with playing a prime role in the movement. He wrote:

> State courts cannot rest when they have afforded their citizens the full protections of the federal Constitution. State constitutions, too, are a font of individual liberties, their protections often extending beyond those required by the Supreme Court's interpretation of federal law.

And why is this necessary? He explained:

> These state courts discern, and disagree with, a trend in recent opinions of the United States Supreme Court to pull back from, or at least suspend for the time being, the enforcement of the Boyd principle [Boyd v United States, 116 U.S. 616 (1886)] with respect to application of the federal Bill of Rights and the restraints of the due process and equal protection clauses of the fourteenth amendment.[7]

We may be entering an epoch in which states' constitutional rights will increasingly offer expanded liberties not accorded under the U.S. Constitution.

Early in our history it became clear that the Bill of Rights was obligatory on the federal government but not the states. The Supreme Court made the point in 1833, in *Barron v. Baltimore*.[5]

That condition did not change until the Fourteenth Amendment declared that "[n]o *State* shall . . . deprive any person of life, liberty, or property, without due process of law." From that moment forward, it was the federal Constitution that courts relied on to interdict errant state practices. Slowly several protections under the federal Bill of Rights were absorbed by the states under the Fourteenth Amendment.

But federalism is a two-way street. States looked to their own courts and constitutions for protection, not only at our founding but in later eras. The federal Constitution's Fugitive Slave Clause (Art. IV, §2) contemplates the return of runaway slaves to their owners. Congress implemented that provision, enacting the Fugitive Slave Acts for the capture and return of runaway slaves. In the name of states' rights, northern states passed "personal liberty laws" or "anti-kidnapping laws," using jury trials and habeas corpus remedies to protect formerly enslaved people from overzealous or forcible federal law enforcement.[6]

Further supporting Justice Brennan's thesis, states have constitutional rights with no federal counterpart. Considering that the U.S. Constitution is in a sense a "negative document,"[8] which is to say, restraining government, there are state constitutional rights that accord positive protections. In New York, for example, there are actionable state constitutional rights concerning environment conservation (Article XIV), the right to a sound basic education (Article XI), and care of the needy (Article XVII).[9]

In the succeeding 40 years, state courts, taking a cue from Justice Brennan, have come to rely increasingly on state constitutions to compensate for what they see as shortcomings in the federal Constitution or its interpretation. That is not to suggest that most state courts casually reject federal constitutional law in favor of their own. But a remarkable state court jurisprudence has emerged. Consider:

With respect to every one of the two dozen rights listed in the first 10 amendments, some state court at some time has under its own state constitution given one of the rights a broader or more protective application than under federal law.

State Constitutional Rulings According Broader or More Protective Rights Than Under Federal Law: A Sampling

It would take a large volume to list and discuss every ruling in which a state court has relied on its own constitution to accord broader protection than under federal constitutional law. A few examples from New York will make the point.

First Amendment Cases

The First Amendment free press provision is a good place to start. The N.Y. Court of Appeals explained its stance in the case of *O'Neill v. Oakgrove Constr., Inc.*:

> The expansive language of our State constitutional guarantee (*compare*, NY Const, art I, § 8, *with* US Const 1st Amend), its formulation and adoption prior to the Supreme Court's application of the First Amendment to the States . . . and the consistent tradition in this State of providing the broadest possible protection to "the sensitive role of gathering and disseminating news of public events". . . all call for particular vigilance by the courts of this State in safeguarding the free press against undue interference.[10]

In other cases, the Court of Appeals accorded expanded rights under the state Constitution, affirming that "protection afforded by the guarantees of free press and speech in the New York Constitution is often broader than the minimum required by the Federal Constitution."[11] Moreover, as held in *Branzburg v. Hayes*,[12] the First Amendment of the U.S. Constitution does not shield the confidential sources of reporters. New York's Constitution does.[13] The same broader protection in New York exists in obscenity prosecutions and in free exercise of religion involving prisoners.[14]

Criminal Law

A good many of the state constitutional cases that broaden rights enunciated or interpreted under the federal Constitution involve criminal law. The Fourth, Fifth, Sixth, and Eighth Amendments to the U.S. Constitution enunciate important rights and protections in criminal law. Respectively, they protect against unreasonable searches and seizures, double jeopardy, and self-incrimination. They provide for grand jury, speedy and public trials by jury, a right of confrontation against witnesses, compulsory process, a right to counsel, protection against cruel and unusual punishment, and bail.

And yet, in each of these domains, state constitutional application, by one state or another, has broadened these fundamental constitutional protections.

New York has had its share of these cases.

In *People v. Bigelow*,[15] the Court of Appeals departed from the U. S. Supreme Court's good-faith exception to the warrant requirement. In *People v. Scott*,[16] the Court declined to adopt the U.S. Supreme Court's holding that areas outside a home's curtilage enjoy no Fourth Amendment protection.

The N.Y. Court applied similar protections beyond those afforded by the Fourth Amendment in criminal cases involving automobile searches, closed containers, the plain touch doctrine, canine sniffing, and Payton violations (requiring a warrant to make an arrest at one's home).[17]

The same holds true for New York's broader constitutional freedom from self-incrimination concerning un-Mirandized statements, post-arrest silence, double jeopardy, as well as those under state due process.[18]

New York has also invoked the state constitutional right to counsel in hosts of cases going back to 1885 through the present, often emphasizing its historical and more expansive roots,[19] and affirming recently that it offers more expansive application than the federal test.[20]

As for jury trials in criminal cases, the U.S. Supreme Court has interpreted the Sixth Amendment as allowing six-member juries in felony trials,[21] whereas New York calls for 12.[22] Also, New York constitutionally requires unanimity in criminal case jury verdicts,[23] while under federal law a state may, compatibly with the Sixth Amendment, authorize non-unanimous verdicts.[24]

Due Process in "Takings" Cases

The Takings Clause of the Fifth Amendment limits the power of eminent domain by requiring that just compensation be paid for private property taken for public use. Some states have interpreted comparable clauses in their own state constitutions as providing more protection to owners and requiring compensation not required by federal precedents.[25]

Beyond the rights listed in the first 10 amendments to the U.S. Constitution, there are other species of rights that state courts have expanded upon by way of state constitutional interpretation, notably in the realm of equal protection.

Equal Protection

The Rule of Law, however defined, must include equal protection, which limits how governments can classify people or groups of people. Uttering the word "classification" seems almost antithetical to equal protection and immediately sets off constitutional alarms. The "*Carolene Products* footnote," now 80 years old, cautions us to be extra vigilant when dealing with a classification based on race, alienage, or national origin or ethnicity. Be on guard, the footnote warns, for "prejudice against discrete and insular minorities." It calls for a "correspondingly searching judicial inquiry" when it comes to classification.[26]

Thirty-five years later the Supreme Court began using the phrase "suspect class" to describe a politically weak minority. What began as a caution modestly expressed has grown into an elaborate equal protection protocol with levels of scrutiny gauged to the powerlessness of

the group. To survive strict scrutiny – reserved for the most vulnerable class – a law must be narrowly tailored to further a compelling governmental interest.[27]

Under federal law, gender classification calls for "intermediate scrutiny"[28] and most other non-race, religion or ethnicity-based classifications (the "rational basis" category) will be upheld if there is a rational relationship between the disparity of treatment and a legitimate governmental purpose.[29]

> We retain our dual identities, now and again placing one above the other as a manifestation of our Rule of Law.

These classifications and scrutiny levels have not been lost on state courts.

State constitutions typically contain provisions guaranteeing equal protection using language much like the Fourteenth Amendment. One commentator has catalogued state court decisions throughout the country, tallying the large number of state court rulings explicitly holding that their states' equal protection affords greater protections than under federal law.[30] This is a vast area of jurisprudence, enough to fill a large volume.

Illustrative is a Minnesota case in which the court found that crack cocaine is used predominantly by blacks and cocaine powder predominantly by whites. The penalties for crack cocaine were harsher, leading to an equal protection/discriminatory impact challenge. The Supreme Court of Minnesota began by announcing that "[n]othing prevents this court from applying a more stringent standard of review as a matter of state law under our state constitutional equivalent to the equal protection clause."[31] It continued:

> To harness interpretation of our state constitutional guarantees of equal protection to federal standards and shift the meaning of Minnesota's constitution every time federal case law changes would undermine the integrity and independence of our state constitution and degrade the special role of this court, as the highest court of a sovereign state, to respond to the needs of Minnesota citizens.[32]

This case provides powerful reaffirmation of state courts' conception and application of the rule of law through their own state constitution.

Gender Classification

Another important facet of equal protection deals with gender. Some state courts have treated gender classification to a higher level of scrutiny than accorded under federal law. This is true, for example, in Maryland, drawing on its state Equal Rights Amendment.[33] The Supreme Court of New Mexico explained its justification for applying the higher (strict) standard of scrutiny in gender cases, also citing its state Equal Rights Amendment.[34] The state of Washington's Supreme Court, too, has interpreted its Equal Rights Amendment to prohibit classifications based on gender.[35]

As early as 1977 the Supreme Court of Massachusetts put it plainly in an opinion to its legislature, applying strict scrutiny to invalidate exclusion of girls from state-approved contact sports: "We believe that the application of the strict scrutiny-compelling State interest test is required in assessing any governmental classification based solely on sex."[36]

Illinois also applied strict scrutiny to invalidate a statute that permitted 17-year-old boys to be charged as adults but precluded like treatment of 17-year-old girls.[37] The Pennsylvania Supreme Court has stated that gender can no longer be accepted as an exclusive classifying tool.[38]

Conclusion

The Rule of Law has a great many definitions but there are some basic ingredients on which most people would agree: fairness (both substantive and procedural), consistency, equality, decency, and a predictable adherence to established universal norms, in recognition of our common humanity and morality.

In employing federalism as the prime vehicle in carrying out the rule of law, the framers could not have imagined every turn in the road. In shaping the contours of our rule of law, federalism – given its dual personality – has shown itself to be adaptable rather than static. Restraint of government, be it state or federal, is an essential ingredient to the rule of law. Our history reveals that when either the state or federal government acts as to restrict liberty, the other gains strength to defend liberty.

A recent chapter in federalism played out in the 1990s when the Supreme Court restrained the federal government for overstepping its bounds by passing legislation properly within the realm of the states[39] and when Congress sought to require states to act as agents in carrying out federal initiatives.[40]

This latter jurisprudence may empower the states in current times in dealing with what they may regard as federal inaction or adverse actions when it comes to the environment or immigration enforcement, for example. These will be interesting cases for students and scholars of federalism to watch.

Our federalist system means that the U.S. Constitution demarcates the "floor" below which no state may go, when it comes to rights and liberties established under federal law. On the other hand, neither the federal government nor its courts may construct a "ceiling" for the states. They are free to design their own, however high.

It is in effect, a one-way street, always in the direction of liberty.

1. A computer search reveals heaps of definitions and types of "federalism":

> horizontal federalism, vertical federalism, new federalism, cooperative federalism, dual federalism, interstitial federalism, nonbinary federalism, preemptive federalism, competitive federalism, fifty-labs federalism, comparative federalism, dualist federalism (different from dual federalism), symbiotic federalism, corporate federalism, foreign relations federalism, antitrust federalism, democratic federalism, overlapping federalism, asymmetrical federalism, not to mention anti-federalism and uncooperative federalism.

I speak of the federalism involved in the reliance on state as opposed to federal constitutional law, often referred to as new judicial federalism.

2. Montesquieu is credited with describing the concept in his classic work. He wrote it in 1748, a mere three decades before our constitutions were composed. Montesquieu, The Spirit of the Laws 157 (Anne M. Cohler et al. eds. & trans., Cambridge Univ. Press 1989) (1748) ("All would be lost if the same man or the same body of principal men, either of nobles or of the people, exercised these three powers: that of making the laws, that of executing public resolutions, and that of judging the crimes or the disputes of individuals.").

3. *Michigan v. Long*, 463 U.S. 1032 (1983).

4. *Cooper v. California*, 386 U.S. 58, 62 (1967).

5. 32 U.S. (7 Pet.) 243, 247.

6. Thomas D. Morris, Free Men All, The Personal Liberty Laws of the North (1780-1861), Johns Hopkins University Press (1974).

7. William J. Brennan, Jr., State Constitutions and the Protection of Individual Rights, 90 Harv. L. Rev. 489 (1977). *See also* William J. Brennan, Jr., The Bill of Rights and the States: *The Revival of State Constitutions as Guardians of Individual Rights*, 61 N.Y.U. L. Rev. 535 (1986). For a thoughtful discussion on point, see Justin Long, *Intermittent State Constitutionalism*, 34 Pepp. L. Rev. 41 (2006).

8. *DeShaney v. Winnebago County Dep't of Social Services*, 489 U.S. 189 (1989).

9. *See, e.g.*, Helen Hershkoff, *Positive Rights and State Constitutions: The Limits of Federal Rationality Review*, 112 Harv. L. Rev. 1131, 1135 (1999).

10. 71 N.Y.2d 521, 528–29 (1988).

11. *See, e.g.*, *Immuno AG v. Moor-Jankowski*, 77 N.Y.2d 235, 249 (1991) (involving state constitutional protection for pure opinion) and *Chapadeau v. Utica-Observer Dispatch, Inc.*, 38 N.Y.2d 196 (1975) (holding that a defamed party could recover only by showing that the publisher acted with gross irresponsibility, a broader protection of speech than the negligence standard required by the Supreme Court).

12. 408 U.S. 665 (1972).

13. *Holmes v. Winter*, 22 N.Y.3d 300, 320 (2013) (noting that Article I, § 8 of the N.Y. Constitution was adopted in 1821, well before the First Amendment became obligatory on the states). The drafters chose not to model the provision after the First Amendment, deciding instead to adopt broader language:

> Every citizen may freely speak, write and publish his or her sentiments on all subjects . . . and no law shall be passed to restrain or abridge the liberty of speech or of the press. (NY Const, art I, § 8)

14. *People v. P.J. Video, Inc.*, 68 N.Y.2d 296 (1986); *People ex rel Arcara v. Cloud Books, Inc.*, 68 N.Y.2d 553, 557–58 (1986) (obscenity cases). For a seemingly more expansive ruling than the federal interpretation under the Free Exercise clause, see *Rivera v. Smith*, 63 N.Y.2d 501(1984) (involving the claim of a Muslim prisoner to be free from a search by a female guard).

15. 66 N.Y.2d 417, 426–27 (1988).

16. 79 N.Y.2d 474 (1992).

17. *See People v. Class*, 67 N.Y.2d 431 (1986); *People v. Torres*, 74 N.Y.2d 224 (1984); *People v. Marsh*, 20 N.Y.2d 98 (1967) (automobile searches); *People v. Jiminez*, 22 N.Y.3d 717 (2014) (closed containers); *People v. Diaz*, 81 N.Y.2d 106 (1993) (plain touch doctrine); *People v. Dunn*, 77 N.Y.2d 19, 25–26 (1990) (canine sniffing); and *People v. Harris*, 77 N.Y.2d 434 (1991) (Payton violation consequences).

18. *People v. Bethea*, 67 N.Y.2d 364 (1986) (un-Mirandized statements); *People v. Pavone*, 26 N.Y.3d 629 (2016) (post- arrest silence) and double jeopardy claims in *People v. Michael*, 48 N.Y.2d 1 (1979), as well as those under state due process protection in *People v. Isaacson*, 44 N.Y.2d 511, 519 (1978) (police conduct) and *People v. LaValle*, 3 N.Y.3d 88 (2004) (capital case jury deadlock instructions).

19. The Court of Appeals drew on its history in *People v. Witenski*, 15 N.Y.2d 392, 413 (1965):

An eloquent 1885 Special Term opinion [giving citation] sets out the historical data proving that, even "While the territory now embraced by the State of New York was a colony of Great Britain, it was a part of the common law that counsel should be assigned by the court for the defense of poor persons accused of crime" and that before there was any applicable statute it was the practice and the duty of the courts to make such assignments.

20. "Moreover, our state standard . . . offers greater protection than the federal test, we necessarily reject defendant's federal constitutional challenge" (*People v. Clark*, 28 N.Y.3d 556, 565 (2016)).

21. *Williams v. Florida*, 396 U.S. 78 (1970).

22. N.Y. Const. art. VI, § 18a.

23. *People v. DeCillis*, 14 N.Y.2d 203 (1964).

24. *Apodaca v. Oregon*, 406 U.S. 404 (1972).

25. *See, e.g.*, *R & Y, Inc. v. Municipality of Anchorage*, 34 P.3d 289, 293 (Alaska 2001) (recognizing that the Alaska Constitution offers property owners broader protection than under the U.S. Constitution); *Avenal v. State*, 886 S.2d 1085, 1103–08 (La. 2004) (recognizing that the Louisiana Constitution requires compensation for property "damaged" as well as "taken"); *Gilich v. Miss. State Highway Comm'n*, 574 So.2d 8, 11, 12 (Miss. 1990) (holding that the Mississippi Constitution offers broader protection than the U.S. Constitution for property "taken or damaged"); *Krier v. Dell Rapids Twp.*, 2006 S.D. 10, 709 N.W.2d 841, 846 (S.D. 2006) (recognizing that the South Dakota Constitution imposes stricter "public use" requirements than the U.S. Constitution and requires compensation when property is "taken" or "damaged").

26. *United States v. Carolene Products Co.*, 304 U.S. 144, 152,153 n. 4 (1938).

27. *Johnson v. California*, 543 U.S. 499 (2005).

28. *Craig v. Boren*, 429 U.S. 190 (1976).

29. *Clark v. Jeter*, 486 U.S. 456, 461(1988).

30. For the full catalogue of states and cases, see *Randall S. Jeffrey: Equal Protection in State Courts: The New Economic Equality Rights*, 17 Law & Ineq. 239, 254 (1999). For a fine textbook, see Robert A. Williams and Lawrence Friedman, State Constitutional Law: Cases and Materials. Equal protection and scrutiny levels are covered expansively in Shaman, Jeffrey M., Equality and Liberty in the Golden Age of State Constitutional Law, New York: Oxford University Press (2008).

31. *State v. Russell*, 477 N.W.2d 886, 888 (Minn. 1991) (citing *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 461, 66 L. Ed. 2d 659, 101 S. Ct. 715 n.6 (1980)).

32. *Id.* at 889.

33. In Maryland, courts will review classifications based on sex under a *strict* scrutiny standard of review. Md. Decl. of Rts. Art. 46; *State v. Burning Tree Club, Inc.*, 315 Md. 254, 294–96, 554 A.2d 366, *cert. denied*, 493 U.S. 816, 110 S. Ct. 66, 107 L. Ed. 2d 33 (1989); *Murphy v. Edmonds*, 325 Md 342, 357 n.7, 601 A.2d 102 (1992); *Conaway v. Deane*, 401 Md. 219, 276 n.38, 932 A.2d 571 (2007).

34. *N.M. Right to Choose/Naral, Abortion & Reprod. Health Servs., Planned Parenthood of the Rio Grande v. Johnson*, 1999-NMSC-005, ¶ 37, 126 N.M. 788, 800–01, 975 P.2d 841, 853–54.

35. *Darrin v. Gould*, 85 Wash.2d 859, 540 P.2d 882 (1975); *Welfare of Jeffrey Lee Hauser*, 15 Wash. App. 231, 548 P.2d 333 (1976).

36. *Op. of Justices to House of Representatives*, 374 Mass. 836, 839–40, 371 N.E.2d 426, 428 (1977).

37. *People v. Ellis*, 311 N.E.2d 98, 101 (Ill. 1974).

38. *Commonwealth v. Butler*, 458 Pa. 289, 328 A.2d 851 (1974).

39. *See, e.g.*, *United States v. Lopez*, 514 U.S. 549, 551 (1995).

40. *See, e.g.*, *Printz v. United States*, 521 U.S. 898, 933 (1997); *New York v. United States*, 505 U.S. 144, 188 (1992).

Dr. Juan Carlos Botero is the Executive Director of the World Justice Project.

The Rule of Law Index: A Tool to Assess Adherence to the Rule of Law Worldwide

By Juan Carlos Botero

The rule of law is the foundation for communities of equity, opportunity and peace – it is the predicate for the eradication of poverty, violence, corruption, pandemics, and other threats to civil society.

— William H. Neukom, founder and CEO of the World Justice Project

The term Rule of Law is central to our understanding of rights, freedoms and democracy. "Unquestionably, it is important to life in peaceful, free and prosperous societies."[1] It provides a keystone for democratic theory on a number of levels, transcending the divide between the legal and the political. Traditionally, the Rule of Law has been viewed as the domain of lawyers and judges. But everyday issues of safety, rights, justice, and governance affect us all; everyone is a stakeholder.

Despite this, all over the world, people are denied basic rights to safety, freedom, and dignity because the Rule of Law is weak or non-existent. When pollution laws are disregarded and inspectors are bribed, the environment suffers. Women fall victim to abuse when their rights are ignored and when their access to justice is limited. Families suffer when parents are coerced into paying bribes to get their children into health clinics and even schools. Local and international businesses avoid investing in communities where there is a lack of stable rules and regulations, leading to excessive amounts of risk. Rule of Law means better public health, economic development, and political participation. It is the necessary ingredient to all forms of human endeavor, especially in communities of greatest need.

Data on governance and the Rule of Law was scarce two decades ago. Analysis at the global, regional, and national levels was largely based on purely anecdotal evidence, or a few crude indicators. In contrast, there are more than 100 systems of measurement in this field today. These tools stem from rigorously collected data at the country level or across countries. While there is enormous variation in quality among these measurements, data is no longer scarce. Some of these measurements are built upon systematic analysis of qualitative information, others on highly sophisticated aggregation of existing indices, and yet others on extensive quantitative data collection efforts in particular regions or around the world.[2]

Better data may lead to better planning and evaluation of government programs and institutional reform; better targeting of donor resources; more accurate assessment of political risk by the business community; and increased ability of civil society organizations to hold governments accountable to their citizens. Yet, while data is available, misuse of indicators among government officers and reformers appears to be common. Government agencies collect large amounts of data but they rarely use these data effectively. Moreover, there appears to be a fundamental confusion between raw data and an effective system of indicators. Data may be easily manipulated and misused.[3]

The World Justice Project's Rule of Law Index

The WJP Rule of Law Index is a quantitative assessment tool designed to offer a detailed and comprehensive picture of the extent to which countries adhere to the Rule of Law in practice.

The World Justice Project's definition of the Rule of Law is comprised of the following four universal principles:

1. Accountability: The government as well as private actors are accountable under the law.

2. Just Laws: The laws are clear, publicized, stable, and just; are applied evenly; and protect fundamental rights, including the security of persons and property and certain core human rights.

3. Open Government: The processes by which the laws are enacted, administered, and enforced are accessible, fair, and efficient.

4. Accessible and Impartial Dispute Resolution: Justice is delivered timely by competent, ethical, and independent representatives and neutrals who are accessible, have adequate resources, and reflect the makeup of the communities they serve.

These four universal principles constitute a working definition of the Rule of Law. They were developed in accordance with internationally accepted standards and norms. Originally articulated by WJP's founder, William H. Neukom, they were tested and refined in consultation with a wide variety of experts worldwide over the past 10 years.

Based on this definition, the WJP Rule of Law Index presents a portrait of the Rule of Law in 113 countries and jurisdictions by providing scores and rankings organized around eight factors: 1) constraints on government powers, 2) absence of corruption, 3) open government, 4) fundamental rights, 5) order and security, 6) regulatory enforcement, 7) civil justice, and 8) criminal justice.

The Index rankings and scores are built from more than 400 variables drawn from two new data sources: (i) a general population poll (GPP), designed by the WJP and conducted by leading local polling companies using a probability sample of 1,000 respondents in the three largest cities of each country; and (ii) a qualified respondents' questionnaire (QRQ) completed by in-country experts in civil and commercial law, criminal law, labor law, and public health.

The GPP includes 207 questions pertaining to citizens' experiences with and perceptions of the government, the police, and the courts, as well as the openness and accountability of the state, the extent of corruption, and the magnitude of common crimes. The QRQ features more technical questions on a variety of Rule of Law dimensions, which require legal expertise to answer properly. To date, more than 300,000 people and 7,500 experts have been interviewed in more than 300 cities around the globe.

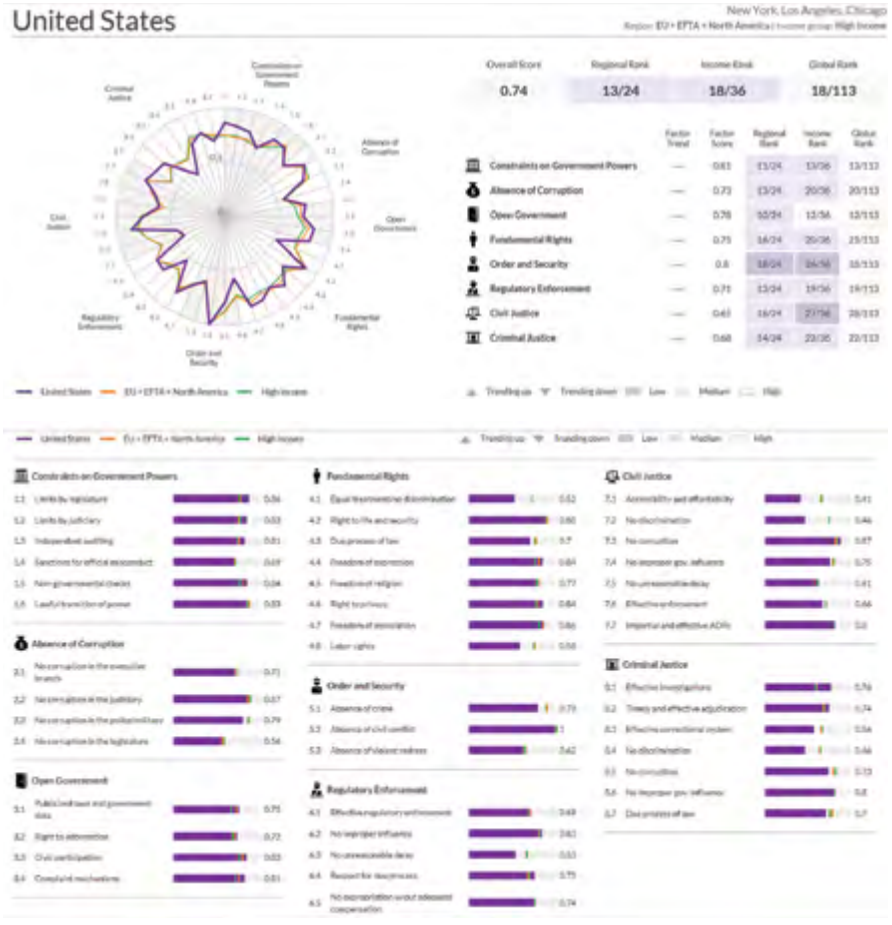
The WJP Rule of Law Index is the most comprehensive index of its kind, and it reflects the actual conditions experienced by the population. It has stimulated discussion and actions on the Rule of Law around the world. Its findings have been cited by heads of state, chief justices, legal experts,

business leaders, government officials, and citizens from around the world as supporting evidence of the need to advance Rule of Law reforms. Leading newspapers in more than 120 countries have reported on or referenced the Index, resulting in more than 2,000 media mentions, including The Economist, The New York Times, and El País, among others.

The Rule of Law Index in the United States

Chart 1 presents the findings of the 2016 iteration of the Rule of Law Index for the United States:

Chart 2 presents the results of the 44 Rule of Law factors for the United States in 2016:



The United States ranks 18th overall, with a relatively uniform performance across all dimensions of the Rule of Law. Areas that appear comparatively strong include judicial independence (sub-factor 1.2), citizens' access to complaint mechanisms (sub-factor 3.4), and the effectiveness of criminal justice investigations (sub-factor 8.1); comparatively weak areas include perception of corruption in the legislature (sub-factor 2.4), affordability and accessibility of the civil justice system (sub-factor 7.1), and perception of discrimination in the criminal justice system (sub-factor 8.4).

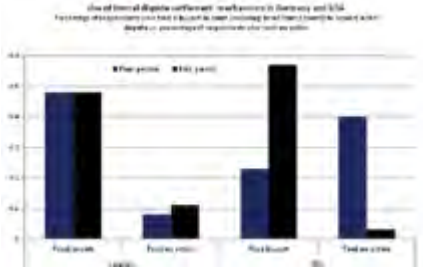
Access to Civil Justice in Europe and North America: A Case Study on the Use of the Index for Cross-Country Analysis

The Rule of Law Index measures outcomes rather than inputs. More specifically, the aim of the Index is to provide a picture of where countries stand with regard to a number of widely accepted goals that Rule of Law societies seek to achieve, rather than a snapshot of the institutional means to attain these social goals. People's use of formal dispute-settlement mechanisms to resolve a civil dispute in Europe and North America provides an example of how the Index may be employed to consider a Rule of Law problem in a new light.

Several reputable organizations have found that fewer than one in five low-income persons in America obtain the legal assistance they need.[4] The Rule of Law Index confirms these findings and provides a new comparative perspective on this problem.

We asked 1,000 randomly selected individuals per country whether during the past three years someone in their household had a conflict with someone who refused to fulfill a contract or pay a debt. For those who answered affirmatively, we enquired about various dispute-settlement mechanisms employed to solve the dispute.

The following chart disaggregates these results for Germany and the U.S. by top and bottom income quintile of the respondents. Results remain constant if the sample is divided above and below the median.



Facing a common civil dispute, low-income and high-income individuals in Germany behaved in the same way. In both groups, most people used the formal dispute-resolution channels to enforce the contract or to collect the debt, while a few chose to take no action. High-income Americans behaved just like Germans – most of them filed a lawsuit in court (including small-claims court), while a few chose to take no action. Yet, low-income Americans acted very differently – only a few filed a lawsuit, while most of them took no action to enforce the contract or to collect the debt.

The different patterns of behavior among high and low-income indi-

viduals in the U.S. are also present in Canada and the U.K., while not in other western European countries. Poor and rich individuals facing a commercial dispute in Belgium, the Netherlands, Norway or Spain, behaved in the same way as their German counterparts.

Why This Matters

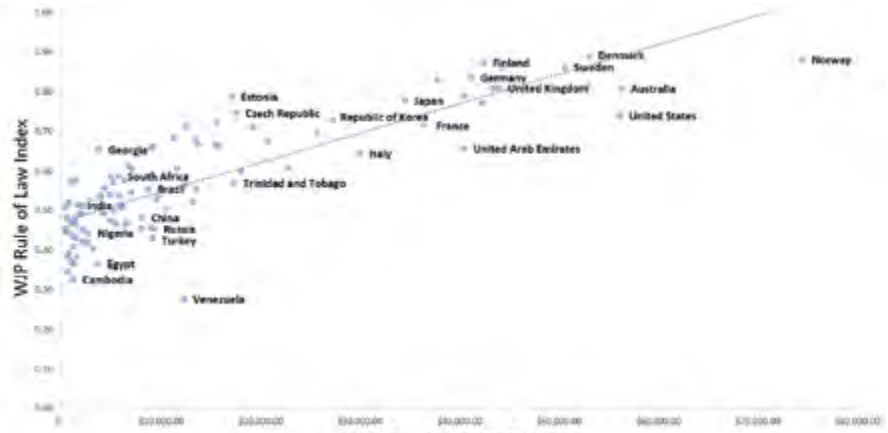
As the following charts show, adherence to the Rule of Law is highly correlated with key indicators of economic and socio-political development:

More importantly, the Rule of Law appears to be associated with key public health outcomes, independently of economic development and other likely confounders. The following chart shows the association between Rule of Law and infant mortality rate: A recent paper published in a top medical journal explored this association further, with the following findings:[5]

"Our results can be simply put: the more that a country adheres to the rule of law, the more likely it is that it has a healthy population, whether defined by lower [infant mortality rate, maternal mortality rate, and cardiovascular disease and diabetes mortality rate, and higher life expectancy], all of which are central to the UN's Millennium Development Goals or the WHO's Non-Communicable Disease Action Plan.

Further . . . the rule of law is associated with health in its own right, independent of the associations between countries' health status and their level of economic development, their health expenditures, their political freedoms, their economic inequality or the status of women. [And] these findings are robust in the sense that they were not dependent on any particular data set.

Do the correlations observed in this study evince an underlying causality, where development of the rule of law somehow improves health outcomes? The design of the study does not permit causality to be inferred, but we propose here three plausi-



ble causal mechanisms, borne out in other studies, that lead us to believe the answer to this question is yes: (1) Corruption; (2) Enforcement of Health Rights and (3) Equity or Social Justice.

. . . we believe this study requires a re-evaluation of the relationships between economic development and good health – is law actually a determinant of both? As already mentioned, studies associate the rule of law with economic development, in some cases so powerfully that, as Rodrik et al write, 'the quality of institutions trumps everything else.' If that is right, the received wisdom of other studies that 'macro' economic development is itself a correlate of good health, and 'micro' economic inequality is itself a correlate of poor health, may be missing a third dimension, for both of these associations might depend on the rule of law shaping the economic conditions. That possibility, regrettably, is actively discounted in the studies cited here: none used the rule of law as a control variable. Therefore, caution must be exercised to avoid the fallacy that if economic development correlates with both health and the rule of law, then it must be paramount and determine both."

In sum, the Rule of Law is not simply an abstract concept for political theorists; it is a living reality for ordinary people, which affects not only their livelihood, but also their health. The Rule of Law is an underappreciated concept, which requires more attention not only from the academy, but also from ordinary citizens worldwide. We are all stakeholders of the Rule of Law. ■

1. Carothers, T., The Rule of Law Revival, (1998) p. 3, available at http://www.carnegieendowment.org/files/CarothersChapter11.pdf.

2. Botero, J, et., al., "The Rule of Law Measurement Revolution: Complementarity Between Official Statistics, Qualitative Assessments, and Quantitative Indicators of the Rule of Law" In Botero et al., Innovations in the Rule of Law. Washington DC: HiiL and The World Justice Project, June 2012.

3. Ibid.; Botero J., et al., "How, when and why do governance, justice and rule of law indicators fail public policy decision making in practice?" Hague Journal on the Rule of Law, pp 1-24. Springer International Publishing, January 2016, available on-line at: http://link.springer.com/article/10.1007%2Fs40803-015-0020-8.

4. Legal Services Corporation, 2005, 2009 and 2017; Institute for Survey Research and American Bar Association, 1994; National Center for State Courts, 2006; American Bar Association, 2010, among others.

5. Pinzon, A.M., et al., "Association of rule of law and health outcomes: an ecological study," in BMJ Open. Volume 5, Issue 10. October, 2015. Available on-line at: http://bmjopen.bmj.com/content/5/10/e007004.full.

Teaching the Rule of Law to Its Next Generation of Advocates

By Lesley Rosenthal

> Assignment #1: Reflect upon your personal strengths and the levers you uniquely can pull – artistry, persuasive writing, scientific/technical knowledge, political background, social media savvy, data analytics, religious learning and inspiration, experience in education – in advocating for the Rule of Law. In the form of a 2-3 page blog post (or vlog post of equivalent length) declare a set of Rule of Law goals and chart a course for your personal involvement in attaining those goals.

Thus began an experimental new course I piloted at Harvard Law School in the fall of 2017. It was called "Advocating for the Rule of Law: A Practical Approach." Together, 11 students and I explored how a new generation of students can learn the skills necessary to be the guardians of this fundamental tenet of our democracy.

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The goal was to produce future lawyers who know how to advocate for, assess and strengthen the Rule of Law, promoting a stable social and civic order, citizen engagement, and a positive climate for economic investment.

At this inflection point in our nation's history, I developed the course to provide students with historical and doctrinal bases as well as practical learning opportunities about the Rule of Law in the domestic context. Themes we explored lined up with the eight factors of the World Justice Project's Rule of Law Index,[1] including constraints on government powers, anti-corruption/avoidance of conflicts of interest, open government, fundamental rights, order and security, regulatory enforcement, civil justice, and criminal justice.

Through study of texts from Plato and Cicero to Aquinas and Locke, students learned about the roots of the Rule of Law. In successive weeks the class drilled down into the individual Rule of Law factors and subfactors, reading cases and articles and hearing from expert guest

speakers who helped them identify sources of Rule of Law strengths and challenges in this country.

Guest speakers from different parts of the legal profession and different parts of the political spectrum provided perspectives as well as networking opportunities. Among the guests were the Executive Director of the World Justice Project, the Chief Ethics Officer of President George W. Bush's White House team, the former head of the Congressional Budget Office, the Chief Judge of the United States Circuit Court for the Second Circuit, the Deputy General Counsel of the *New York Times*, and a former ABA President.

The course also engaged students through subthemes of personal empowerment, leadership skills, strategic planning, leveraging of technology, and the encouragement of artistic voices to extend Rule of Law conversations across the whole spectrum of human experience, from the intellectual to ethical to the emotional.

Each class ended with a simulation, where students would take on the role of a legal practitioner tasked with perfecting Rule of Law adherence. They turned in 2–3 written pages the next day. Final projects of 10–15 pages involved a more extended inquiry into a topic covered during the semester, or a realization of one of their stated goals from Assignment #1.

Here are some of the topics we tackled, together with readings, discussion topics and simulation assignments.

Constraints on Government Powers; Absence of Corruption

In terms of formal constraints on governmental powers, we focused on the effectiveness of the institutional checks on government power by the legislature, the judiciary, and independent auditing and review agencies, as well as by the media and civil society.[2] Our examination of the formal bases of separation of powers included both federal and state constitutions.

Absence of corruption in government encompasses bribery, improper influence by public or private interests, and misappropriation of public funds/resources.[3] For this topic we reviewed anti-corruption statutes, cases, and informal materials such as *Legal Professionalism by White House Counsel*,[4] the White House Counsel's Office Transition Project outline for peaceful transition of power. We considered the extent to which state attorneys general[5] provide a check on federal powers. We also looked at the functions and limitations of the U.S. Office of Government Ethics. We considered the checking powers and political environment of the legislative branch upon the executive branch, for example through the House Oversight Committee. Even within one branch – the executive branch, which encompasses both executive and prosecutorial functions – we considered self-imposed policies[6] limiting White House contacts with the Department of Justice.

We explored these topics with guest speaker Richard W. Painter, the S. Walter Richey Professor of Corporate Law at the University of Minnesota Law School. Professor Painter served as Chief White House Ethics Lawyer for President George W. Bush, 2005–2007.

Students participated in a simulation that placed them in his footsteps but in a state context. I challenged them to envision themselves in the counsel role in the governor's mansion in their state, faced with a sticky conflict-of-interest problem, trying to interpret the state's anti-corruption codes and culture:

> Congratulations, you have been appointed Counsel to the Governor in your state, where a businessperson, Sosumi Coi, has just been elected Governor. She and her family have substantial business interests, which she is loath to divest unless she has to. Look up your state's conflict of interest disclosure requirements and enforcement laws as applicable to the governor: is disclosure of tax returns voluntary or mandatory? Is there an exception for the governor? Is there an independent government body tasked with oversight (*e.g.*, an office of governmental ethics), and if so, does it have investigation and enforcement powers or is it merely advisory? Is its leadership appointed by the governor or are there staggered terms across governorships? Is the state Attorney General appointed by the governor or independently elected? Do private individuals or nonprofit "good government" organizations in your state have access to information, standing to sue? Prepare a 2–3 page memo (or vlog post of equivalent length) to Governor Coi, outlining the results of your research – how much information will she have to disclose, will she be required to divest, what consequences if she doesn't – legally, politically, from a public relations perspective, from a business perspective, for the state's economy? Include a thoughtful discussion of the risks and benefits from a Rule of Law point of view.

Although issues like these get a great deal of attention at the federal level in the Trump Administration – including two pending Emoluments Clause lawsuits and a great deal of national press – this assignment focused students on parallel issues at the state level. Because of our federalist system, our citizens' experience of democracy in this nation is oftentimes only as good as the realities and perceptions at the local level. The assignment also brought to the students' attention that Rule of Law issues transcend individual politicians and specific political parties.

Also, drawing from my own in-house counsel experiences, I purposely put the students in a position as counsel to the governor where they may need to find a tactful way to deliver unwelcome news to their boss, or sensitize them to optical as well as strictly legal considerations.

Open Government

Our inquiry into the openness of government focused on three aspects: the quality and accessibility of government data, whether basic laws and information in legal rights are publicized, and the effectiveness of civic participation mechanisms, including voting mechanisms, gerryman-

dering, voter participation and election integrity.[7] The class read the complaint and answer in *Protect Democracy Project v. Office of Management and Budget*, in which a nonprofit organization sued OMB under the Freedom of Information Act to ascertain whether that office, under the auspices of the Trump White House, sought to undermine the independence of the Congressional Budget Office.

We also studied the interstate voter registration Crosscheck[8] program, in which more than half the states are enrolled, and a critique of that program based on alleged inaccuracy and racially disparate impacts.[9] We read the Presidential Advisory Commission on Election Integrity Kobach Voter Data Demand Letter sent to the 50 states[10] and the state-by-state responses.[11]

The simulation required students to explain this swirl of circumstances regarding government data to a general audience. Here's the catch: the students were to play the role of a Bar leader and they were to make their explanations in the form of a tweetstorm, threads of micro-blogs of 140 characters or fewer:

> Congratulations, you have been elected President of the American Bar Association! Prepare a tweetstorm to your members and the general public, explaining and commenting on the *Protect Democracy Project v. OMB* complaint from a Rule of Law perspective.

Students submitted plain-English explanations of these complex and weighty Rule of Law matters in the lingua franca of handles and hashtags, for example:

STUDENT TWEETSTORM:

- If I want to buy a @SpeedyTM car, I ask for estimates of its #fuel #efficiency prepared by an #expert body. I do not rely only on Speedy's website.
- Similarly, if I want to know whether #government proposals benefit the country. I use expert forecasts of the proposals' impacts. Where do I get them?
- The Congressional Budget Office (@CBO) provides #independent #budget and #economic information to @USCongress.
- Data from the CBO tells me the impacts of proposed #legislation.
- E.g. 14 million low income Americans are likely to lose health care with the Republicans' heath care plan- https://tinyurl.com/y9r5voql.
- The CBO's cost estimates and budget analysis are #nonpartisan, #objective and #transparent. Why is this important?
- So that we have a reliable source of information. This is especially helpful when @POTUS gives us wrong #math.
- The Office of Management and Budget (@OMB) from the Trump administration gives us an economic-growth forecast of 3% a year. The CBO's? 1.9%.
- Using the 3% estimate (wrong math!) in budgeting will result in huge budget #deficits when the economic growth never materializes.
- But the Trump administration does not want us to know any of this. It wants us to buy the car without consulting #independent experts.
- The Protect Democracy Project (@PDP) is a non-profit which issued Freedom of Information Act (#FOIA) requests to OMB.
- The PDP requested for records that relate to means of stopping the CBO's work, including #defunding, #privatizing, changing its function, etc.
- The OMB has refused to comply with these requests. Thus PDP has brought a complaint against OMB, in a bid to compel the OMB to comply.
- To see the full case, please see: https://tinyurl.com/ya9ush2f.
- Despite the complaint, the OMB has still refused to cooperate.
- It is crucial that all of us defend the ability of CBO to do its work. We need experts to tell us the truth.
- Buying a car makes a difference to my life. Legislation impacts ALL OUR LIVES. Help us protect the CBO!

Fundamental Rights – Focus on Freedom of the Press

For this discussion, again we took contemporary issues that are much-discussed in the national context but often ignored at the regional or local level: access to the tools of investigative reporting on government officials, *ad hominem* attacks or even threats to journalists, the proliferation of fake news, alleged bullying of journalists and more. Guest speaker David McCraw, *New York Times* in-house counsel who represents its journalists, illuminated contemporary issues and challenges.

After an engaging question and answer session, students were challenged to play the role of counsel in their (simulated) local newsroom:

> Congratulations, you have been hired as counsel to your hometown's local news outlet! The reporters in the newsroom are complaining even more loudly than ever about the Mayor's refusal to hold press conferences or grant interviews, secret negotiations in the city council, gamesmanship in responding timely (or at all) to Freedom of Information requests, and their sources' fears that their communications are being monitored. The mayor has been vocal in his criticism of individual reporters and specific news outlets whose editorial point of view he doesn't like or which carry articles critical of his administration. Also, some women journalists in your newsroom allege that they are targeted for special ire by the Mayor, his allies and supporters, to the point that these reporters receive hateful and personally disparaging comments in the news site's comment boxes and social media feeds far disproportionately to male reporters. Draft a questionnaire for your clients that will help measure these circumstances and develop some legal and advocacy strategies for addressing their concerns. Factors to consider include access to government sources, the business model of for-profit journalism, techniques for identifying and addressing public humiliation/intimidation, protection of sources, articulating and reinforcing/improving norms of cooperation and transparency between government actors and journalists.
> Bonus Assignment: Attach a tip sheet for the local journalists wishing to file valid requests under your state's Freedom-of-Information law.

The students devised an excellent series of questions to assess the accessibility and transparency of government, both as a snapshot and over time. They also made recommendations as to strategies that management could pursue to address the most significant roadblocks they identified.

Civil and Criminal Justice

As a class we studied the United States civil and criminal justice system in Rule of Law terms. Following the lead of the World Justice Project, on the civil side, we examined whether our civil justice is accessible and affordable, free of discrimination, corruption, and improper influence by public officials. On the criminal side, we examined whether the criminal investigation, adjudication, and correctional systems are effective, and whether the criminal justice system is impartial, free of corruption, free of improper influence, and protective of due process and the rights of the accused.

Considering the overall remarkable strength of our judges and courts, it is surprising to learn that the United States performed only moderately well on this factor in the WJP index 2016, scoring 0.65 out of 1.00 and ranking 27 out of the 36 nations in our income cohort. The picture is only slightly better for criminal justice, scoring 0.68 out of 1.00 and ranking 22 of the 36 high-income countries.

The issue is not with corruption or improper government influence, as in other places; on these factors, the U.S. court systems performed well. But a careful look at our poorest performing subfactors reveals the following:

- For accessibility and affordability of civil justice, the U.S. scores just 0.41 out of 1.00, placing us just one notch above Afghanistan, just below Zimbabwe.
- For lack of discrimination, the U.S. scores just 0.46, tied with Russia, just below Egypt and Ghana, a couple of notches above Peru.

Although much of the course focused on immediate issues regarding the Rule of Law that have come into common parlance following the recent presidential election, these particular weaknesses are entrenched and of long duration.

One eye-opening statistic shared by guest speaker Dr. Juan Carlos Botero (elaborated upon in his article in this edition) was that Americans in the lowest income group are only half as likely as those in the highest income group to file a small claims matter. In Germany, the numbers are just about even, regardless of income stratum.

With an eye on these issues, I assigned students to visit courthouses in the vicinity – ranging from state courts handling small claims and misdemeanors to the federal district courthouse. I challenged them to focus their visits on the Rule of Law subfactors of effectiveness, impartiality, lack of corruption, freedom from discrimination, affordability, timeliness, etc., and to take a strategic view of how the courts they visited were performing well and where they could improve. Here was their assignment:

> Congratulations, you've just been hired as Chief Strategy Officer by the Chief Judge of the court you visited. Draft a 2–3 page First Day Memo with your initial observations. What strengths, weaknesses, external opportunities, and external threats do you note? Be sure to comment not only your observations from your live visits, but also on the website/other public information published by the court you visited. For example, were there resources at the courthouse (pamphlets, law books, pro bono help tables, a pro se office, etc., that were not evident from the website? If your memo contains criticisms or concerns, provide constructive suggestions to help address.

Students' memos picked up on some very important points, with one recurring theme of justice not only being done but being seen to be done. A number of them remarked on the cleanliness, sightlines, acoustics and accessibility (or lack thereof) of the physical facilities. Several remarked on the wide variety of helpful information and material at both the courthouses and on their websites, although many noted some discrepancies between materials available in one place versus another, and also the sense that some of the websites were designed more from an insider's perspective and not with the uninitiated in mind. A few noted some lapses in decorum that marred the overall experience, such as glad-handing between the prosecutor (and even the appointed defense attorney) and the magistrate, or the judge appearing dressed in street clothes rather than robes. Quite a few also noted the lack of diversity they saw, among the judges and courtroom personnel, among the attorneys, and even in the portraiture on the walls. Notwithstanding the overall high quality of the judging and lawyering that they noted, a few felt that the courts could do a better job reaching out beyond their four walls to make sure that people realized the courts are there for them: to public libraries, schools, even barbershops and laundromats. One student suggested expanding the hours of small claims courts so that people who worked during the day could seek justice at night.

Although the memos were simulations, the visits – and the conditions observed – were real. I encouraged the students to send their suggestions to the actual chief judge of the court they visited.

Arts, Artifacts, and the Rule of Law

Universities often have more resources than their law students take advantage of – particularly libraries and art museums – and Harvard Law School is no exception. Its rare books collection is unexcelled and includes four copies of the Magna Carta, among many other treasures. In three years of attendance there and 30 years of affiliation since, I had never visited them nor even known they were there. The library's Manager of Historical & Special Collections treated us to a private viewing of them in a special class visit:

- **Magna Carta, 1298**, the "Sheriff's Magna Carta" – abbreviated versions of the full text, copied and

distributed to sheriffs; ordered to be read aloud so citizens would know their rights. View online: https://iiif.lib.harvard.edu/manifests/view/drs:49364859$1i.

- **Statuta Vetera with Tracts, ca. 1300** – A small volume, designed to be carried in a lawyer's or judge's sleeve as they rode on circuit. View online: https://iiif.lib.harvard.edu/manifests/view/drs:49849590$1i.
- **Statuta Vetera, Registrum Brevium and Tracts, late 13th or early 14th century** – includes a tract written in Law French: "Cy poet un juvenes houme ver coment il deyt sotylment parler en court," translated as "Here may a young man see how he should speak subtly in court." View online: https://iiif.lib.harvard.edu/manifests/view/drs:48660497$1i.
- **Magna Carta and Statutes, ca. 1325** – a beautiful illuminated manuscript. An early owner illustrated several of the statutes, including Charter of the Forest and Statute of Merton. Also includes an illustration of an homage ceremony. View online: https://iiif.lib.harvard.edu/manifests/view/drs:43031625$1i.

Harvard Law School's entire collection of 43 manuscript Magna Cartas and English statutes is viewable online: https://listview.lib.harvard.edu/lists/hollis-014294028.

I also took my students to view an object held by Harvard Art Museums, fragments of a 4,000-year-old Cuneiform tablet that is one of the world's first written legal documents. This fragment was excavated from Kultepe, an archaeological site in central Turkey. It dates back to the 20th century B.C. Most of the tablets found at that site were administrative in nature, i.e., recording trades, although this one appears to be a legal document, and has been coded as such by the Harvard Art Museums. Its text records the payment of refined silver to an individual and payment of tax due.

My students reported feeling moved by being in the presence of these items of our legal patrimony. It is one thing to talk about the importance of writing down laws and maintaining transparency, in fulfillment of Rule of Law ideals, but quite another to have a tangible reminder of that value from our forbears 150 generations ago. They also discussed how empowered they felt, knowing that these documents were created by people just like them.

We have also looked and discussed works of visual art that illustrate or exemplify Rule of Law values, including Titus Kaphar's Jerome Project, and a mural[12] at the Supreme Court of Mexico. I have referred students to works of performing arts or performing arts programs that also resound with Rule of Law themes: Opera in Attica; Scalia v. Ginsburg – The Opera; Arts Encouragement at Louisiana State Penitentiary,[13] Alaska's Female Inmate Orchestra,[14] and Act V.[15]

NextGen Rule of Law Advocates

My students rose marvelously to the challenges of this course and this milieu. Notwithstanding the ungodly hour (8 to 10 a.m. on Mondays), attendance was perfect throughout the semester. Through these experiences and simulations, they learned how to spot Rule of Law issues in contemporary society and were empowered to address them. A number of them have applied to the school to form a Rule of Law club so that they may continue the work together after the semester.

The variety and ambition of their personal Rule of Law goals were breathtaking. Here's a sampling:

> I will **connect with and learn from other students** who are concerned about the rule of law, **especially those on the opposite side of the political spectrum**. I will push myself to separate political beliefs from beliefs in the rule of law. I will consistently think about the rule of law in each course that I take, especially in light of the United States' weak scores on access to fair civil and criminal justice systems. I will **reconnect to my hometown, Richmond, VA,** to study what institutions in the city facilitate the rule of law and which hamper it.
>
> ***
>
> I plan to organize ROL-themed speaker and panel events **on campus. I aim to co-sponsor with other student organizations** to bring in speakers and students with a variety of perspectives. This will demonstrate that the **rule of law must be carried out by people across the political spectrum working together**. My metric of success: 2–4 events per semester with at least 60 attendees.
>
> ***
>
> Choosing to **live the rule of law out loud** – spreading its message of economic inclusiveness, government accountability, public safety, and substantive fundamental rights to improve the lives of real people on the ground – I declare these commitments. Goal 1: The rule of law will be **freed from its academic and philosophical shackles**. By 2020, the term "rule of law" will have catapulted into mainstream popular discourse with such force and diffusion that even those without a law degree will be able to articulate its central idea. I will **write, film, and edit a short video** for YouTube that conveys the importance of the rule of law by analogy in a manner that is creative, clear, and "sticky" with **moms and middle school children**. I will share my observations on current affairs on social media to highlight cracks in the rule of law's foundation. I will highlight those stories in which a journalist is personally attacked for his or her reporting, which has a dangerous chilling effect on free speech norms.
>
> ***
>
> In the future, as a **federal prosecutor**, I will enforce the law but also seek to use my position to advocate for practices and procedures that will strengthen the rule of law. As a **Latter-day Saint (Mormon)** I will encourage respect for the rule of law by participating in and initiating service activities related to the rule of law,

such as voting initiatives and faith-based correctional programs. Using the leadership roles and speaking opportunities I am given, I will emphasize values underlying the rule of law, such as civic engagement, equal treatment of all persons, and integrity.

***

Painting is a special skill I've been developing my whole life, and art is a very powerful way to communicate. My goal is to paint **two to three pieces per year** that highlight the importance of the Rule of Law. I would like to show the **Rule of Law as the value that creates harmony in society** by joining together the left and the right, Republicans and Democrat. To begin with, I might do a piece that displays the various thinkers who have thought about Rule of Law: Aristotle, Plato, Cicero, Thomas Aquinas, and the framers of the U.S. Constitution.

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My goal in supporting the rule of law is to **encourage participation in democratic institutions** and to hold democratic institutions accountable to their limitations as well as their highest possible outcomes. My objectives are to participate and encourage participation in [Colorado] state and local government; **bring attention to government ethics and oversight issues** and encourage people to get involved in calling them out; **support good journalism** and access to information; and improve access to justice for **refugees** and undocumented individuals, as well as anyone else being disproportionately targeted by the federal government.

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I will introduce **civics education in local high schools**, including Rule of Law concepts. Currently ours do not offer a civics education as part of the high school curriculum. This may well be a contributing factor to the low **voter turnout** among young people in local and national elections; youth may not feel they have enough information to participate, and may not understand the importance of doing so.

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Most of my family never received their high school diploma, and no one had ever gone to college. The expectations in my neighborhood were even lower. There was a higher likelihood that my friends would drop out or end up in jail than graduating . . . . **Low-income people do not use the civil justice system. I believe education will fix that.** Not only will education increase their earning potential, but **understanding the system better will increase the likelihood that they'll use the system** when they've been wronged. **(This may also have an impact on the crime rate.)** My connecting with **at-risk students** from low-income neighborhoods will have an indirect – but substantial – impact on the Rule of Law.

The "Advocating for the Rule of Law: A Practical Approach" course has armed its participants with practical knowledge about how to bring the Rule of Law to life, in their legal practice as well as in their home communities, the pages of their local news and opinion outlets, high school civics classrooms, state legislatures and professional associations. Following this pilot semester, I will consider course evaluations and other feedback as I strive to scale it up, covering more law students, experimenting with online forms, modifying it for undergraduates, and perhaps creating a version for lifelong learners as well. ■

1. https://worldjusticeproject.org/sites/default/files/documents/RoLI_Final-Digital_0.pdf (WJP Rule of Law Index 2016).
2. JP Rule of Law Index 2016, pp. 28, 163.
3. WJP Rule of Law Index 2016, pp. 30, 163.
4. http://whitehousetransitionproject.org/wp-content/uploads/2016/03/WHTP2017-29-Counsel.pdf.
5. http://www.politico.com/magazine/story/2017/02/eric-schneiderman-donald-trump-new-york-214734.
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8. http://www.ncsl.org/Portals/1/Documents/Elections/Kansas_VR_Crosscheck_Program.pdf.
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12. https://yalealumnimagazine.com/articles/3010-object-lesson.
13. https://www.nytimes.com/2017/07/28/arts/music/opera-in-attica-bringing-arias-to-a-maximum-security-prison.html?mc_cid=709baeb3b5&mc_eid=95497f9652.
14. http://www.prisoneducation.com/prison-education-news/2013/1/9/hiland-mountain-womens-correctional-center-orchestra.html.
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Just Keep Stirring

What *Finding Dory* and Whole Foods Have in Common with the Rule of Law

By Agathon Fric

When Pixar's animated film *Finding Nemo* premiered in 2003, a forgetful blue reef fish voiced by Ellen DeGeneres stole the show.

"Just keep swimming, just keep swimming," Dory sung in her characteristically chipper tone. Her devil-may-care attitude endeared her to audiences and other fish in the sea. But Dory's short-term memory loss did not give her much choice. For her, repetition meant survival.

Recent political developments have caused some to question whether our own survival is at stake. Such doomsday predictions are probably overstated, but the Rule of Law's fate is much less certain. Protecting it starts by understanding what the Rule of Law means in 2017.

The World Justice Project tries to quantify the Rule of Law by measuring its outcomes. The result – the Rule of Law Index[1] – is an insightful, if imperfect, tool. But defining the Rule of Law by its outcomes is a bit like defining a thunderstorm by the rainbow it produces: it tells us why the Rule of Law is desirable, but it doesn't tell us what the Rule of Law *is*.

Then, there's the U.S. Army's preferred definition:

> a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced, and independently adjudicated, and which are consistent with international human rights norms and standards. It requires, as well, measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness and procedural and legal transparency.[2]

This is as good and comprehensive a description as one could hope to find for a concept that eludes easy characterization. However, it too lacks explanatory power. How is it that this magical principle prevails in some countries and not others? What is the Rule of Law's special sauce?

The answer, it turns out, tastes a lot like satay. Let me explain.

In Ancient Greece, Aristotle emphasized that the emergence of the city-state was an *organic* development, born out of man's *natural* inclination toward civic existence in partnership with his neighbors. The Rule of Law, like the city from which it arose, also developed organically throughout history, the product of hard-fought battles for individual rights against some distant, tyrannical king.

If the Rule of Law were a commodity, it would be sold at Whole Foods and come in a jar of all-natural peanut butter. The peanuts are people; the jar, our state. Unlike the stuff you used to eat as a kid, real peanut butter sepa-

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rates over time: its natural oil floats to the top, causing the peanut butter to dry out and harden. This layer of oil – this *liquid gold* – is to peanuts what the Rule of Law is to society. Each binds the other and gives it its stickiness.

When it's all mixed together, it's easy to forget that the oil exists and to take it for granted. When it's working well, it's invisible to the naked eye. Without it, the stuff in the jar goes chunky; it ceases to spread smoothly.

But natural peanut butter can taste bland. So, companies change the flavor by adding sugar to the mix and inventing new, no-stir formulations. We call them "leaders." The result might taste better. It might even look better. However, by changing its flavor and appearance, we artificially extend the jar's shelf life. We mask the telltale signs that our peanut butter has gone rancid. We deprive our bodies of the natural food – whole food – that they need to survive.

And so it is with our democracy. The process of separation is not the problem. Like the city and the Rule of Law, the separation is natural; it occurs only as quickly as we allow it to. The separation is a symptom of our failure to vigorously and regularly stir Rule of Law norms back into our society.

We all have a role to play. For example, you can:

- film a Rule of Law-themed video and share it with your friends on social media;
- visit classrooms to teach schoolchildren about the importance of civic participation;
- write letters to your state and federal representatives when they do something you don't agree with;
- start your own Rule of Law blog;
- volunteer as a wayfinder or legal information provider at your local courthouse;
- speak for those who don't have a voice;
- write a letter to the editor of your local newspaper; and/or
- file a request for government information under the Freedom of Information Act.[3]

The Rule of Law needs crusaders, stirrers, and taste testers – people who believe in its value and who seek to bring its all-natural benefits to more people around the world. We cannot afford to sit around and wait for others to do the heavy lifting. We must have the fortitude to stir our own peanut butter and to make sure that as many people can taste it as want to.

I don't use this nutty metaphor to be cute. I use it to illustrate the central point of the Rule of Law and the lessons of our modern times: 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 keep the people well-lubricated with Rule of Law norms, to remind them of what the Rule of Law has done for them lately – securing political accountability, fundamental rights, order, and security.

Our survival, like Dory's, depends on repetition: "Just keep stirring, just keep stirring." It won't be easy.

But it helps if you use a chipper tone. ■

1. *WJP Rule of Law Index 2016*, World Justice Project, https://worldjusticeproject.org/our-work/wjp-rule-law-index/wjp-rule-law-index-2016 (last visited Dec. 20, 2017).

2. Conor Friedersdorf, *America Fails the 'Rule of Law' Test*, The Atlantic, Jul. 11, 2014,https://www.theatlantic.com/politics/archive/2014/07/how-america-fails-the-rule-of-law-test/374274.

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BY LISA E. DAVIS

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The Lawyer's Oath and the Rule of Law

The Rule of Law dates back to at least the Magna Carta of 1215. It is the foundational principle of our Republic, best expressed by Thomas Paine, who said, "For as in absolute government the King is law, so in free countries the law ought to be king; and there ought to be no other."[1]

In the United States, the principle of adherence to the Rule of Law is expressed in our Constitution, the architecture from which the edifice of our democracy was built. Although the Constitution was decidedly imperfect at its inception, in denying African Americans any measure of humanity or women the full rights of citizenship, its enduring strength is evidenced by the fact that brilliant lawyers used the selfsame tool to correct those glaring oversights and push our country to live up to its credo that "all men are created equal."

The articles and amendments of our Constitution are the guardrails of our civil society. We must recognize that challenges to the legitimacy or universal applicability of our Constitution are challenges to the Rule of Law itself and treat them as such. We have treated the Rule of Law as something unchangeable that we don't have to work to maintain. The events of the last year should have shaken us all out of our complacency.

Last November, for the first time in modern history, the United States elected as president a non-lawyer who has never demonstrated an understanding of, or a reverence for, the Constitution or the Rule of Law. To the contrary, Donald Trump's constant derision of the press as "fake news" is evidence of his antipathy to the First Amendment.

Despite having taken an oath to "preserve, protect and defend the Constitution of the United States,"[2] Trump routinely displays what could most charitably be framed as ignorance of the protections afforded to citizens by our Constitution. Many have argued that Trump violated the "Emoluments Clause" of Article II since his first day in office.[3] His intemperate calls to send accused terrorists to Guantanamo evince his ignorance of the Sixth and Eighth Amendments. What stands out most during Trump's tenure, though, is his relentless attack on the rights guaranteed by the First and Fourteenth Amendments.

Trump's fundamental lack of understanding of the relationship between a free press and a functioning democracy was evident in his very first press conference after the election. Trump refused to take a question from CNN's Jim Acosta, calling the network, "fake news."[4] Trump berated the "dishonest media" for accurately reporting his equivocation on the character of the Nazis who marched in Charlottesville.[5]

In its brief duration, the Trump administration has also promoted policies that make a mockery of the Fourteenth Amendment guarantee of equal protection of the laws. Virtually every policy initiative has involved singling out categories of Americans for differential and punitive treatment under the law. From the travel ban that numerous courts found to be a fig leaf for anti-Muslim animus, to the transgender military ban, to the withdrawal of protection from the Dreamers, the policy agenda of this administration seems to be to establish classes of Americans entitled to less legal protection than others, in direct contravention of the Fourteenth Amendment.

As Americans, this should unnerve us. As attorneys, this should spur us to act. Regardless of our practice area, or whether we serve in public office, each of us took an oath to "support the Constitution and the laws of the State of New York." Although few of us have probably thought about the meaning of those words since we recited them with raised right hands many years ago, now is the time for us to recognize that the words we affirmed to become members of the bar are more than a talismanic phrase devoid of meaning. They confer an obligation.

Whether by responding to the Muslim ban by flooding the airports armed with nothing more than laptops and Lexis passwords[6] or volunteering at clinics to assist DACA recipients with the documentation required to remain in the only country they have ever known, New York lawyers have been answering the call and showing that we understand that to "support" the Constitution means to "uphold or defend" it as "valid or right."

Benjamin Franklin famously quipped that the Founders had created "a republic, if you can keep it." As lawyers, we must recognize our pivotal role in answering Franklin's challenge. At a time when those in government abandon their obligation to uphold the Constitution, lawyers must step into the breach and advocate, not only for our clients, but for the Rule of Law itself. ■

1. Thomas Paine, Common Sense.
2. U.S. Const., art. I, § 1.
3. Eric Lipton and Adam Liptak, *Foreign Payments to Trump Firms Violate Constitution, Suit Will Claim*, N.Y. Times, Jan. 22, 2017, A18.
4. Dylan Byers, *Donald Trump attacks press, conflates CNN, BuzzFeed reporting at news conference*, CNNmedia, Jan. 11, 2017, http://money.cnn.com/2017/01/11/media/sean-spicer-mike-pence-donald-trump-press-conference/index.html.
5. Brian Naylor and Tamara Keith, *Trump Defends Charlottesville Comments At Phoenix Rally*, by NPR.org, Aug. 22, 2017, https://www.npr.org/2017/08/22/545226284/trump-heads-to-arizona-to-push-border-wall-funding-rally-supporters.
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What I Learned at Deposition Boot Camp

Introduction

In the fall I participated in NYSBA's CLE "Deposition Boot Camp" held in eight locations throughout the state. I went into the program confident in my knowledge of deposition rules and practice, yet at each location I learned something about deposition practice I did not know before, often in response to pointed questions from the audience. I share some of what I learned below.

"To Enforce a Limitation Set Forth in an Order of a Court"

One of the main goals of the deposition rules (22 N.Y.C.R.R. 202.21) was to curb improper directions to a witness not to answer a question.

The rules provide, in part:

> § 221.2. Refusal to answer when objection is made
>
> A deponent shall answer all questions at a deposition, except (i) to preserve a privilege or right of confidentiality, (ii) to enforce a limitation set forth in an order of a court or (iii) when the question is plainly improper and would, if answered, cause significant prejudice to any person.

At the same time, one of the most beneficial aspects of the deposition rules was the clarification that there are circumstances, albeit limited, where a deponent may be directed not to answer a question.

Audiences always ask for examples of the second provision, "to enforce a limitation set forth in an order of a court," and I have always had but a single example to offer. When one party to a litigation has had an opportunity to have an expert examine certain real evidence in the action, and that evidence is thereafter lost, destroyed, or altered, courts often fashion relief by ordering that the expert who examined the evidence be deposed, while limiting the deposition to the expert's factual findings (measurements, photographs, diagrams, etc.) and specifically baring questions to the expert about her opinions. The idea is that once the expert who did not examine the real evidence has access to all of the facts the examining expert memorialized, the non-examining expert is able to form his own opinions.

Thus, my example has always utilized this scenario, stating that the attorney can direct the expert not to answer any questions calling for an opinion based upon the prior order of the court.

At the program in Syracuse, an audience member offered the scenario where a party is granted partial summary judgment on one or more claim or item of damages, and thereafter a deposition is conducted. If the questioning attorney questions the witness about the claim(s) or damage(s) which are no longer part of the case because partial summary judgment has been granted, the defending attorney can, and should, object to those questions unless there is a surviving claim or item of damages to which the question applies.

At the Melville program an attorney raised the scenario where there is a

> One of the most beneficial aspects of the deposition rules was the clarification that there are circumstances, albeit limited, where a deponent may be directed not to answer a question.

confidentiality order in place and the questioning of the witness veers into areas covered by the order. Once again, a situation where the deponent may be instructed by the defending attorney not to answer the question. This is also a scenario where an attorney other than the one defending the deposition may need to take action "to enforce a limitation set forth in an order of a court" where the defending attorney is unaware of, or unwilling to act to enforce, the confidentiality order. In that case, it may be necessary to immediately contact the court or suspend the deposition to permit a motion for a protective order to be made pursuant to CPLR 3103.

"An Attorney Shall Not Interrupt the Deposition"

Another of the major goals of the deposition rules was to address improper communications between deponent and witness after commencement of the deposition.

The rules provide:

> § 221.3. Communication with the deponent
>
> An attorney shall not interrupt the deposition for the purpose of communicating with the deponent unless all parties consent or the communication is made for the purpose of determining whether the question should not be answered on the grounds set forth in section 221.2 of these rules and, in such event, the reason for the communication shall be stated for the record succinctly and clearly.

At the program in Westchester an attendee asked a question so simple and straightforward that I (having read the rules countless times) was completely flummoxed: "The rule reads '[a]n attorney shall not interrupt the deposition for the purpose of communicating with the deponent.' Is there any limitation on the witness's ability to interrupt the deposition to communicate with her attorney?"

This caused a "humunah, humunah" moment on my part (though I did not take the easy way out by turning to my co-panelists and asking "which one of you wants to tackle this?"). I candidly said I did not know the answer, had not seen a case where this scenario occurred, but based upon CPLR 3113(c), I thought not.

> The deposition rules and relevant CPLR provisions cover most eventualities, and are not things you want to waive, or even tamper with.

CPLR 3113(c) provides:

> **(c) Examination and cross-examination.** Examination and cross-examination of deponents shall proceed as permitted in the trial of actions in open court, except that a non-party deponent's counsel may participate in the deposition and make objections on behalf of his or her client in the same manner as counsel for a party. When the deposition of a party is taken at the instance of an adverse party, the deponent may be cross-examined by his or her own attorney. Cross-examination need not be limited to the subject matter of the examination in chief.

Because a witness at trial does not have the right to simply walk off the stand to confer privately with her attorney, and questioning "shall proceed as permitted in the trial of actions in open court," I feel comfortable in my answer. Of course, nothing prevents the witness saying to her attorney "can I talk to you for a minute," and then having the attorney make a determination as to whether or not he will take a break to talk to the witness.

I offer one aspect of my own deposition practice I changed some time ago with regard to the instructions I give a witness prior to my beginning questioning. For most of my career I would say something along the lines of:

> This is not meant to be a marathon, so if at any point you need to take a break, let me know and I will do my best to accommodate you. The only request I make is that you not make that request for a break while there is a question pending and you have not yet answered.

I then encountered the situation where I was in the middle of a critical line of questioning, the witness would answer a question, and then ask for a break. I would explain that I was in the middle of a line of questioning, and the witness would say, "but you told me I could take a break if I answered your question."

Now, I modify my instruction to "the only request I make is that you not make that request for a break while there is a question pending and you have not yet answered, or while I am in the middle of a line of questioning."

"The Usual Stipulations"

Every attorney, in every deposition, hears (often while stirring sugar in her coffee or perusing his newspaper) the court reporter ask, "Usual stipulations?" And all somnambulistically nod their heads affirmatively.

However, at a number of seminars in Western New York (no, Manhattan dwellers, that is not everything west of the West Side Highway) program attendees pointed out that the "usual stipulations" in their world include a provision that signing (and hence reviewing) of the deposition is waived by the deponent. Agreeing to this means that the provision of CPLR 3116(a) allowing the witness to review and make corrections to the deposition is waived. Not something I would consciously agree to.

So what exactly are we getting by agreeing to the "usual stipulations?" Most today parrot some version of the deposition rules and a number of CPLR provisions. However, you do not see the "usual stipulations" until

you get the transcript, at which point you have already agreed to them.

Asking the court reporter to read out the "usual stipulations" before stipulating is a possibility, but assumes that all of the attorneys are conversant with all of the depositions rules and relevant CPLR provisions (the triumph of hope over experience) and will catch something in that reporter's version of the "usual stipulations" that is unacceptable. So what to do?

I believe that the only CPLR provision that affirmatively requires waiver (so as not to drive court reporters or courts crazy) is the portion of CPLR 3116 (b) dealing with sealing and filing the transcript:

CPLR Rule 3116. Signing deposition; physical preparation; copies

> **(b) Certification and filing by officer.** The officer before whom the deposition was taken shall certify on the deposition that the witness was duly sworn by him and that the deposition is a true record of the testimony given by the witness. He shall list all appearances by the parties and attorneys. If the deposition was taken on written questions, he shall attach to it the copy of the notice and written questions received by him. *He shall then securely seal the deposition in an envelope endorsed with the title of the action and the index number of the action, if one has been assigned, and marked "Deposition of (here insert name of witness)" and shall promptly file it with, or send it by registered or certified mail to, the clerk of the court where the case is to be tried.* The deposition shall always be open to the inspection of the parties, each of whom is entitled to make copies thereof. If a copy of the deposition is furnished to each party or if the parties stipulate to waive filing, the officer need not file the original but may deliver it to the party taking the deposition. (Emphasis added).

With this single exception, the deposition rules and relevant CPLR provisions cover most eventualities, and are not things you want to waive, or even tamper with. So I plan, going forward, to make something along the lines of the following statement at depositions:

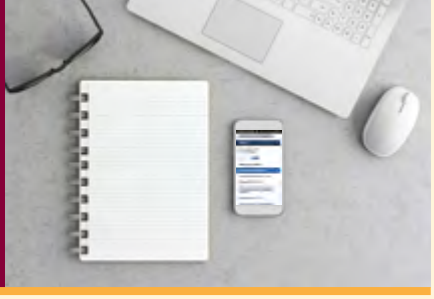
> I agree to waive the sealing and filing of the deposition transcript required by CPLR 3116(b), and otherwise acknowledge the application of the CPLR, deposition rules, and relevant case law.

I will then sit back and watch everyone else in the room go "humunah, humunah."

Conclusion

When the deposition rules were enacted in October 2006 the title of this column was *Can an Old Dog Learn New Tricks?* Well, this old dog has learned a few new tricks to use in 2018, courtesy of Deposition Boot Camp participants.

Speaking of 2018, I hope yours is off to a good start, and wish everyone a happy, healthy, and professionally satisfying New Year. ■



Attack of the Spoofers

By Anthony Hughs

Anthony Hughs is an award-winning technical writer. He has been working in computer science since 2000. His goal is to write articles that are easily digested by non-technical readers, while remaining scientifically sound for IT Professionals. In his free time, he enjoys the great outdoors.

While taking a moonlit walk in Napa, California, I found myself within earshot of two gentlemen standing near the road. They were talking about how they had been "hacked" on Facebook and how *nine of their friends had been hacked as well.* As I was strolling past them, I couldn't help but think about how often I've heard this very story. Seeing friends post "do not accept friend requests from so-and-so pretending to be me" is a semi-regular occurrence on social media. It struck me then how pervasive spoofing has become, as I had also recently witnessed an uptick in this behavior while on the job as a technical consultant for Kraft Kennedy. Upon closer inspection, I realized how often people confuse phishing, spoofing, and spear-phishing. Phishing has nothing to do with Ben & Jerry's ice cream, spear-phishing has nothing to do with diving in the ocean, and spoofing is a lot like it sounds.

If you ask around, you will be hard-pressed to find someone who doesn't at least know one person who has been "hacked" on Facebook, Instagram, LinkedIn, etc. We know that spoofing, or the practice of fraudulently imitating others online, exists. Yet we still find ourselves with the illusion of safety while at work or school. We feel protected by our IT department.

Most People Don't Know the Difference

According to the most basic explanation, spoofing is the method of delivery – a forgery of an email, website, or Facebook profile. Usually the spoof itself is very convincing. The spoof is not a person or an actual attack but rather a "magic show" that attempts to trick your eyes into believing it's all real. In staying true to the magic show analogy and for the purposes of this article, I will refer to these "magicians" as "Spoofers." I am choosing this term because you do not have to be a hacker to pull off a convincing email spoof and Spoofer has a nice ring to it.

One of the primary things a Spoofer will do when sending spoofed emails is change the "From" address on the email "envelope" so it appears to come from someone else. An analogy would be like sending a letter to someone through the postal service but changing the return address on the letter so it appears to come from someone else, or to reflect a new last name.

Phishing Is Less Personal Than Spear-Phishing

A successful phishing attempt will usually come in the form of a spoofed email from a corporate entity that asks you to go to a spoofed website and enter your username and password. This is impersonal as the only thing they might know is your name and email address. The same attempt might be made to thousands of other people simultaneously. The spoofed website will appear real to the untrained eye, largely dependent on the sophistication of the hacker. Entering your credentials gives them access to said account. In the blink of an eye, you are redirected to the real

website, none the wiser while they run off to the proverbial bank.

An All-Too-Real Threat

Spear-phishing is a personal, targeted ploy, devised to trick you, your coworkers, and those you love into giving up something extremely valuable. Spoofers take the time to construct an email, which appears to come from an associate of yours. Then they pretend to be the associate in order to leverage your trust. They always have a goal in mind, whether it's your privacy, your passwords, or your hard-earned cash. All the while, you believe you are actually conversing with *someone close to you*.

Recently, I've overseen multiple accounts of attorneys and law firm staff that were actively targeted by Spoofers. In these cases, the Spoofers seem to be getting better at email spoofing and closer to getting what they want – cold hard cash. For example, a law firm with about 75 people was recently the subject of a spear-phishing attempt. I'll call them Company X.

In the example of Company X, the email appeared *at first glance* to be from one internal employee to another. The subject line of the email read: "Financial Obligation." The body of the email was the *simple* request of "$11,986.90 USD due immediately." These are typical tactics that email Spoofers employ:

- An urgent subject line from a well-known associate
- Email signature appears legitimate
- Corporate logos in place
- From/Reply To: address is "spoofed"

Company X spares few expenses when it comes to technology. The firm actively protects itself with firewalls, anti-virus, email protection services, and by contracting a managed services provider for its IT needs. Spoofing, in contrast, can be done without fancy gadgetry. It entails bypassing IT security, no matter how big the budget allocated to it, through clever use of social engineering. The reason this works is because *it's not a virus or a direct hacking*; the risk is in the convincing nature of the ploy. From a security systems standpoint, the email appears legitimate. Spear-phishing is an example of why security awareness training is the most important aspect of a law firm's security program.

Let's Dissect a Spoof

How do you know if an email is legitimate or fake? In the previous example, the recipient of the fraudulent email rightly asked the IT department to check its legitimacy, stating that the address of the sender used the firm's defunct email suffix. She knew that the old email address had been retired some time ago, which made this seem especially odd. Still, she strongly considered sending the money before becoming suspicious. If it was an actual bill, of course she would have paid.

During my investigation, I reviewed the firm's email protection service (Mimecast) and confirmed that no one had sent an email to the recipient from inside the firm. Then, I took a closer look at the original email and found they had actually sent the message from Gmail. Once we knew for certain the email came from outside the firm, the spoof was averted. This is not to say that the Spoofer might not try to spear-phish this person again, but Company X is on higher alert now so it is less likely to happen.

No one wants to be the one who tells a hacker from the "dark web" that their publicly traded company is entering a merger, or be responsible for wiring large amounts of money to a fraudulent entity. However, with all the security measures our IT departments take, it's almost too easy to think we are impervious to attack. This is what makes spear-phishing effective. When it comes to spoofing, the human is the weakest link. Yes, that's right – you.

How to Defeat a Spoofer

Spoofers typically use several methods for trying to trick us into believing them, a few of which are described above. In the case of Company X, the hacker knew an email address currently in use and the name of its owner, as well as the name and email of someone no longer with the firm. Using this information, the Spoofer changed the envelope on the email to look like it was coming from the former employee's email address and sent the email. To build a compelling deception, Spoofers study you, your firm, your partners, etc.

If you receive an email from an entity requesting money, passwords or personally identifiable information, you should pause. Take a moment to consider if the message is real. Above all else, if the request is strange and "out of the blue" you should ask your IT department to review. If you can't do that (and you can't call the sender on the phone) you should compose a new email. That is, do not reply to the strange email. Composing a new email will use the email address already stored in Outlook, on your phone, in Gmail, etc. and is more likely to go to the correct recipient. If you reply to the spoofed email, your message will be routed to the attacker instead of who they are pretending to be. Whatever you do, you should not engage in a prolonged conversation with the Spoofers. This is akin to a fisherman feeling a tug on the line.

How Can You Protect Yourself

Protecting yourself during your personal time does help protect the firm. One way to do this is through the use of two-factor security on Facebook, Instagram, and LinkedIn. Enabling this adds an extra layer of security because it requires access to your cell phone or email account in order to access your social media accounts.[1]

When it comes to phishing, spoofing, and spear-phishing it is our awareness and ability to step back that is most effective against the attack of the Spoofers! ■

1. LinkedIn Two Factor, https://www.linkedin.com/help/linkedin/answer/544/turning-two-step-verification-on-and-off?lang=en; Facebook Two Factor, https://www.facebook.com/help/148233965247823; Instagram Two Factor, https://help.instagram.com/566810106808145?helpref=search&sr=1&query=two%20factor.

The Two Sides of Online Legal Documents

By James Kobak Jr.

Is the rapid proliferation of online legal documents and related information a bad thing – tantamount to the unlicensed practice of law? Or are these documents, referred to as OSPs, merely electronic versions of those printed legal forms that were sold in stationery stores long before there was an internet? Or do they fall somewhere in between?

To answer these questions, the New York County Lawyers' Association held a day-long forum that examined the growth and nature of online legal services. Contributing to the discussion were representatives of online legal providers, consumer advocates, online technology experts and experts in attorney ethics, along with David P. Miranda, a past president of the New York State Bar Association and New York Assemblyman Matthew Titone (D-Staten Island), as well as research and analysis by a NYCLA task force.[1] The result of that forum, held at NYCLA on September 30, is a report (the Report) that was adopted by the NYSBA House of Delegates at its November meeting. Several other bar associations around the state have also added their endorsements.

The Report notes that the growth of online legal services is impressive – a multibillion dollar market that continues to expand. It warns that such success cannot be ignored and clearly reflects a consumer need that is not being met for the indigent, the middle class and small businesses by traditional legal practice. But the Report also identifies a need for safeguards, and looks at ways to assure that those safeguards will be put into place.

The Report is limited to examining online documents and related information and does not examine in detail the extension of OSP platforms into the significant and lucrative – and potentially more complicated – area of recommending or otherwise providing access to lawyers. As will be discussed in a later article by a member of NYSBA's Law and Technology Committee, this broader scope of activity implicates prohibitions on referral services as well as fee-splitting with non-lawyers. These issues, particularly concerning Avvo, have been the subject of recent ethics opinions in New York and elsewhere[2] and may be the subject of further work or events at NYCLA. They will also be a focus for further work by the NYSBA Law and Technology Committee.

The Report concludes that a knee-jerk reaction to online documents as the unauthorized practice of law will be unproductive and is shortsighted and inappropriate. At their core, online documents and related information offered by the OSPs are the modern equivalent of form books and legal guides dating back hundreds of years, and to the legal forms once sold in stationery stores. The Bar's challenges to form books and other services have generally been unsuccessful as these products are protected by the First Amendment and efforts to eliminate them will likely founder on constitutional as well as other grounds. They may also raise antitrust concerns as old-fashioned, anticompetitive protectionism.

Moreover, in the opinion of the NYCLA task force that conducted the research and analysis into these issues, the growth of OSPs reflects a serious unmet need the legal profession must come to grips with in a responsible way. Properly monitored and regulated, the explosion of OSPs provides one way to narrow the justice gap faced by so many poor and middle class Ameri-

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cans, even if OSPs are not the ultimate or optimal solution.

While the Report recognizes the inevitability of the online service market, it also recognizes and discusses a number of attendant risks and limitations and possible ways to address them. The Report recommends three broad categories in which reform and recognition of obligations and standards of behavior should be required:

1. Disclosure of the limitations and risks of not consulting a lawyer, along with the need for transparency and improvement in terms of agreements, including warranties and duties to keep forms up to date and reliable.
2. Barring unfair and one-sided arbitration clauses.
3. Protecting the confidentiality and privacy of user information.

The Report expresses a preference for legislation or regulation to address the product quality and consumer protection issues it identifies, and lists 18 requirements that would ideally be included in any statute or regulatory regime (see sidebar). Recognizing that implementation of such an approach would face obstacles and, even if successful, would not take place immediately, the Report also suggests voluntary best practices for providers to adopt to gain a competitive advantage through recognition of the relative adequacy and reliability of their services.

The OSP market continues to grow and new services have proliferated, even in the short time after the Report was issued. Innovation in this area abounds, and poses both risks and benefits for lawyers and consumers alike. NYSBA's Law and Technology Committee, as well as bar associations like NYCLA, will be closely monitoring and reporting on future events.

1. NYCLA's Board of Directors established the task force at the recommendation if its then-president, Carol A. Sigmond. It was headed by Arthur Norman Field and members included NYSBA President-elect Michael Miller. Other members were Joseph J. Bambara, Vincent Chang, Sarah Jo Hamilton, James B. Kobak Jr. and Ronald C. Minkoff.

2. New York State Bar Association Comm. on Prof'l Ethics Op. 1132 (Aug. 8, 2017). *See also* Utah Advisory Committee Op. 17-05 (Sept. 27, 2017); N.J. Advisory Committee Op. 732 (2017); Pa. Op. 2016-2000 (2016).

What Every OSP Should Do

1. Provide clear, plain language instructions as to how to complete and use each form.
2. Either (a) warrant that the form of documents provided to customers will be enforceable in the relevant State, or (b) inform customers, in plain language, that the documents may not be enforceable and steps that can be taken to make them enforceable, including, if necessary, retaining a lawyer.
3. Keep documents up to date and account for changes in the law.
4. Assume legal responsibility for the proper recording or filing of the document if the online provider selects the service agent.
5. Use only clickwrap agreements with customers and require customer consent and express opt-in to any changes made to the customer agreement after initial registration.
6. Inform customers of any intended use or sharing of customer information and ask for consent and express opt-in authorization.
7. Inform customers, in plain language, that the information customers provide is not covered by the attorney-client privilege or work product protection.
8. Use "best of breed" data security practices to maintain the privacy and security of information provided by customers.
9. Protect customer information from unauthorized use or access by third persons and inform customers of any system breach.
10. Make all efforts to remedy and cure any harm a breach of customers' personal and legal information may cause.
11. Not sell, transfer or otherwise distribute customers' personal information to third persons without express opt-in authorization.
12. Retain customer information and any completed forms for a period of three years and make the form available for customer use during that period free of charge.
13. Inform customers, in plain language, of the importance of retaining an attorney to assist them with any legal transaction.
14. Not advertise their services in a manner that suggests that they are a substitute for the advice of a lawyer.
15. Disclose their legal names, addresses, and email addresses to which customers can direct any complaints or concerns about their services.
16. Submit to the jurisdiction of the courts in New York and permit customers to opt for arbitration of any disputes.
17. Not preclude their customers from joining in class actions or require shifting of legal fees to customers.
18. Make all notifications clearly legible and capable of being read by the average person and intelligible if spoken aloud. (In the case of OSP websites, the required words, statements or notifications should appear on their home pages.).

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List as of November 16, 2017

ATTORNEY PROFESSIONALISM FORUM

Dear Forum:

I am a partner in a small boutique law firm and we decided that it was time to update our website. In looking at other law firm's websites to get ideas, we realized that all of the firm's "branding" was outdated, especially since we are trying to develop business with small start-up companies in the technology sector. Now, instead of just updating our website, we decided to rethink every aspect of our branding including online attorney biographies, business cards, social media, and letterhead. We obviously want to retain a professional image and comply with the attorney advertising rules, but we really want to stand out to modern technology and social media savvy companies. I know there are a number of restrictions on attorney advertising. What issues should we consider with our rebranding? Are there any advertising or branding issues we should avoid?

Sincerely,
Ed G. Adman

Dear Ed G. Adman:

You are wise to be concerned with your ethical obligations when creating your firm's branding suite. In today's digital age, many of your colleagues and potential clients will research your services on the internet before even meeting you in person. Your new branding tools and their content will certainly affect how others perceive your firm. Attorneys can undoubtedly maintain a professional image and stand out to modern technology and social media savvy companies while complying with their ethical obligations. The Forum has previously addressed what constitutes attorney advertising when circulating newsletters (Vincent J. Syracuse, Jamie B.W. Stecher & Matthew R. Maron, *Attorney Professionalism Forum*, N.Y. St. B.J., September 2013, Vol. 85, No. 7) and use of social media and advertising in the context of attorney's personal social media pages. (Vincent J. Syracuse, Maryann C. Stallone & Hannah Furst, *Attorney Professionalism Forum*, N.Y. St. B.J., February 2016, Vol. 88, No. 2). Some of the rules that govern the use of social media by lawyers have attracted attention and have been viewed as an anachronism that may be due for an overhaul. *See* Carolyn Elefant, *Ethics opinions have to reflect the present and future – not the past*, A.B.A.J., December 2017, http://www.abajournal.com/magazine/article/legal_ethics_opinion_relevance.

Your question takes us to a subject that we have not previously addressed in this Forum and requires a discussion of several of the New York Rules of Professional Conduct (RPC). In determining which rules apply, one must first analyze whether the branding tools that you plan on using constitute attorney advertising within the definition offered by RPC. Rule 1.0(a), which tells us that an advertisement is "any public or private communication made by or on behalf of a lawyer or law firm about that lawyer or law firm's services, the primary purpose of which is for the retention of the lawyer or law firm." RPC 1.0(a). The advertising guidelines for lawyers are primarily set forth in Rule 7.1. Rule 7.1 is extensive and requires particular attention by all attorneys.

Website

First, the content on your website should be a truthful and accurate representation of your firm and the services provided, as attorney advertising may never be "false, deceptive or misleading." *See* RPC 7.1(a)(1). RPC 7.1(b) sets forth some of the permissible elements of attorney advertisements, including the attorneys' qualifications, names of clients who are regularly represented (provided they have given prior written consent), bank references, credit arrangements, and prepaid or group legal service programs in which the law firm participates. RPC 7.1(c) enumerates prohibited actions in attorney advertisements including paid endorsements or testimonials about the firm without disclosing that the person has been compensated, a portrayal of a fictitious law firm, and use of actors to portray the lawyer or members or the firm, or clients. Rule 7.1(d) states the information that a lawyer may include in the advertisement, but only if the communication complies with Rule 7.1(e). Rule 7.1(e) requires that the information contained in the advertisement be factually supported as of the date on which the advertisement is published or disseminated, contain the disclaimer "Prior results do not guarantee a similar outcome," and in the case of a testimonial or endorsement from a client for a matter still pending, the client must give informed consent confirmed in writing. *See* Rule 7.1(e). This means that if you plan on including statements about your services, which we anticipate you may, you must include the disclaimer required by Rule 7.1(e): "Prior results do not guarantee a similar outcome."

In addition, the home page of a law firm website should be marked "Attorney Advertising." RPC 7.1(f). RPC 7.1 Comment [5] explains that the purpose of the "Attorney Advertising"

The Attorney Professionalism Committee invites our readers to send in comments or alternate views to the responses printed below, as well as additional hypothetical fact patterns or scenarios to be considered for future columns. **Send your comments or questions to: NYSBA, One Elk Street, Albany, NY 12207, Attn: Attorney Professionalism Forum, or by email to journal@nysba.org.**

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label is to "dispel any confusion or concern that might be created when non-lawyers receive letters or emails from lawyers." The Comment further notes that the label is not necessary for advertising in newspapers or on television, or similar communications that are "self-evidently" advertisements, such as billboards. *Id.*

The required statements set forth in RPC 7.1(f) and 7.1(e) must also be clearly legible and capable of being read by the average person. *See* Rule 7.1(i). In designing your website, focus on being clear and unequivocal for the statements required under the RPC and don't let creativity get in the way of clarity.

We would also caution you against using phrases to advertise your firm that cannot be factually supported. Comment [3] to Rule 7.1 states in relevant part, "A truthful statement is misleading if it omits a fact necessary to make the lawyer's communication, considered as a whole, not materially misleading. A truthful statement is also misleading if there is a substantial likelihood that it will lead a reasonable person to formulate a specific conclusion about the lawyer or the lawyer's services or about the results a lawyer can achieve, for which there is no reasonable factual foundation." RPC 7.1 Comment [3]. The NYSBA Committee on Professional Ethics addressed the ethics of two attorney advertising phrases: "I Know How to Win for You" and "unsurpassed litigation skills." NYSBA Comm. on Prof'l Ethics, Op. 1005 (2014). The Committee opined that both of these advertising phrases are impermissible under Rule 7.1. *Id.* The Committee found that, "both statements are misleading in suggesting a result or skill level that cannot be factually supported as of the date on which the statements are published or disseminated, and therefore both statements violate Rules 7.1(a) and 7.1(e)." *Id.* Notably, the Committee opined that "[m]erely posting the disclaimer that 'Prior results do not guarantee a similar outcome' will not cure the ethical infirmity of the proposed advertising." *Id.* For these reasons, the Committee opined that a lawyer should not use words like "Best," Most Experienced," or "Hardest Working." *See* NYSBA Comm. on Prof'l Ethics, Op. 1021 (2014). Based upon the foregoing, we warn you against using any type of similar language on your website in describing your services.

RPC 7.1 Comment [12] states that "[d]escriptions of characteristics of the lawyer or law firm that are not comparative and do not involve results obtained are permissible even though they cannot be factually supported." This is permissible because these are considered general descriptions and are not claims concerning quality and are therefore not likely to mislead a potential client. *See* RPC 7.1 Comment [12]. Despite these exceptions, the safest way to proceed is to keep your statements factual in nature and insure any statement can be supported by facts and evidence.

Domain names are also governed by the rules affecting legal advertising and publicity. Roy Simon, *Simon's New York Rules of Professional Conduct Annotated*, at 1878 (2016 ed.), citing NYCBA Comm. on Prof'l and Jud. Ethics, Op. 2003-1 (2003). RPC 7.5(e) specifically addresses domain names, stating:

> (e) A lawyer or law firm may utilize a domain name for an internet web site that does not include the name of the lawyer or law firm provided:
>
> (1) all pages of the web site clearly and conspicuously include the actual name of the lawyer or law firm;
>
> (2) the lawyer or law firm in no way attempts to engage in the practice of law using the domain name;
>
> (3) the domain name does not imply an ability to obtain results in a matter; and
>
> (4) the domain name does not otherwise violate these Rules.

The comments to the rules and ethics opinions are instructive, providing examples of prohibited domain names. RPC 7.5(e) Comment [2] specifically notes that a personal injury firm cannot use the domain name www.winyourcase.com or www.settleformore.com because it does not comply with RPC 7.5(e)(3) and implies an ability to obtain results. The New York City Bar Association (NYCBA) Committee on Professional and Judicial Ethics in Formal Opinion 2003-01 opined that a lawyer or firm may utilize a domain name that does not include the names of the lawyers when: (1) the website clearly includes the actual name of the law firm; (2) the domain name does not include any statements that are false, deceptive or misleading; and (3) the domain name does not imply any special expertise or competence or suggest a particular result. NYCBA Comm. on Prof'l and Jud. Ethics, Op. 2003-1 (2003).

Although you may identify the areas of law in which your firm practices on the website, you should not use words that suggest that you are an "expert" or "specialist" in your firm's website domain name. RPC 7.4(c)(1) states that a lawyer can only be identified as a "specialist" in certain circumstances, such as through certification by a private organization approved for that purpose by the American Bar Association. In NYSBA Comm. on Prof'l Ethics, Op. 1021 (2014), the Committee addressed use of the term "expert" and opined that it is impermissible to use the word "expert" in a law firm domain name under RPC 7.5(e) or 7.4. *Id.*

Letterhead and Business Cards

Designing your firm's new letterhead and business cards can help in presenting a modern image; however, consider RPC 7.5 before sending your new paper goods to the printer. RPC 7.5(a) states, "a lawyer or law firm may use internet website, professional cards, professional announcement cards, office signs, letterheads, or similar professional notices or devices provided the same do not violate any statute or court rule and are in accordance with Rule 7.1." When you are designing your firm's suite of paper goods, it is imperative to consider the specific text included. According to NYSBA Comm. on Prof'l Ethics, Op. 1028 (2014), a law-

yer's letterhead or professional card may provide the name of the lawyer without adding "lawyer or "esquire" or a similar identifier. In addition, the lawyer's title within the firm, such as "partner" or "associate," is not required on a personal professional card. *Id.*, citing New York County Lawyers' Association Prof'l Ethics Comm., Formal Op. 682 (1990). Indeed, Rule 7.5(a)(1) provides a "non-exclusive list of the content of a lawyer's professional card." *Id.* However, the opinion notes that if a firm elects to list all partners and associates on firm letterhead, the firm must make a distinction between associates and partners. *Id.*, citing New York County Lawyers' Association Prof'l Ethics Comm., Formal Ops. 612 (1973) and 890 (1977). This distinction between partners and associates can be made by using a line to separate partners and associates or listing partners and associates on different sides of the letterhead. *Id.* The ethical requirements do require that the distinction be made specifically in the aforementioned ways, but only that a distinction between partners and associates is made evident. A failure to make the designation between partners and associates in letterhead where all names are listed would be misleading within the meaning of Rule 7.1 and would violate Rule 7.5(a). *Id.*

Attorney Biographies

When crafting your new attorney biographies there are many ethical traps an attorney can fall into. First, as noted above, RPC 7.4(a)–(c) prohibits an attorney from identifying himself or herself as a "specialist" or "specializ[ing] in a particular field of law" absent limited exceptions. *See* RPC 7.4(c). It is permissible for attorneys to discuss their specific experience in a certain field of the law, but they must be careful in identifying themselves a "specialist" in that field.

Attorneys frequently cite in their biographies the litany of their honors in lawyer's listings such as "Best Lawyers." Under Rule 7.1(b) an attorney advertisement may include information related to "bone fide professional ratings." Rule 7.1 Comment [13] states that, "a rating is not 'bona fide' unless it is 'unbiased and nondiscriminatory.'" A lawyer is permitted to advertise inclusion in these types of listings, provided that the methodology used to determine the inclusion of the lawyer in the listing is an "unbiased, nondiscriminatory and defensible process." *See* NYSBA Comm. on Prof'l Ethics, Op. 1007 (2014). Therefore, lawyers are not permitted to participate in rating services that are "pay to play" or subject to manipulation. Simon, *Simon's New York Rules of Professional Conduct Annotated*, at 1672. If you or an attorney at your firm elect to include these types of listings in your biographies, it is imperative that you research the process by which these ratings are developed in order to insure your compliance with Rule 7.1(b) before listing same on your website.

Social Media

Many law firms maintain Facebook, LinkedIn, and Twitter accounts to promote their services in addition to their websites. These social media sites are likely considered advertising pursuant to Rule 1.0(a) because their primary purpose is for the retention of the firm. Therefore, the social media accounts must comply with all of the elements of Rule 7.1. As we noted in our prior Forum, these social media accounts must include the Rule 7.1(f) disclaimer, including Twitter posts. Vincent J. Syracuse, Maryann C. Stallone & Hannah Furst, *Attorney Professionalism Forum*, N.Y. St. B.J., February 2016, Vol. 88, No. 2); *see also* NYSBA Comm. on Prof'l Ethics, Op. 1009 (2014) (concluding that tweets not subject to the exceptions in Rule 7.1(f) must include an "Attorney Advertising" label). The New York State Bar Association Committee on Professional Ethics has opined that these advertisement tweets are also subject to the Rule 7.1(k) retention requirement. *See* NYSBA Comm. on Prof'l Ethics, Op. 1009 (2014). RPC 7.1(k) states that "any computer-accessed communications shall be retained for a period of not less than one year" and all other advertisements must be retained for a period of not less than three years following its initial dissemination. *Id.*

A common question regarding social media for law firms is the permissibility of attorneys answering legal questions in "chat rooms" or other internet forums. The New York State Bar Association Committee on Professional Ethics has opined that "answering questions on the internet is analogous to writing for publication on legal topics." *See* NYSBA Comm. on Prof'l Ethics, Op. 899 (2011). The Committee reasoned that Rule 7.1(4) permits a lawyer to write for publications on legal topics without affecting the right to accept employment, as long as the lawyer does not give individualized advice. *Id.* The Committee also cited to Comment [9] of Rule 7.1 which states that a lawyer should "refrain from giving or appearing to give a general solution applicable to all apparently similar individual problems, because slight changes in fact situations may require a material variance in the applicable advice." *Id.* Although lawyers are permitted to provide general advice, the Committee cautioned lawyers against soliciting clients in chat rooms and other similar forums in violation of Rule 7.3(b) because these types of interactions are considered to be "real-time" or "interactive communications." *Id.* A lawyer may encourage a person to seek the advice of a lawyer in response to a question posed by a member of the public, but may not under any circumstances encourage his or her own retention, and the primary purpose of the response must be to educate the public by providing general answers to legal questions. *Id.*

As noted earlier, it has been suggested that some of the applicable rules are outdated and should be revised to reflect the realities on the use of modern social media outlets. *See* Elefant, *supra.* Whether the critics are correct may be a great subject for a future Forum. That said, lawyers are in the business of risk management which to us means that, at least for now, the rules are the rules. Divergences from

the rules create risks that are not worth taking.

Good luck with your firm's new branding. We believe you can create an image that is both attractive to modern and tech savvy clients and at the same time comply with the Rules of Professional Conduct.

Sincerely,

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QUESTION FOR THE NEXT ATTORNEY PROFESSIONALISM FORUM:

My firm has decided to host a business development event at which several clients and prospective clients who are small business owners will set up tables and booths to sell and promote their products and services. It's not only a chance to generate some new business for the firm, it's also an opportunity for the firm's attorneys, clients, and other business contacts to network with one another and do some holiday shopping. In the past, the event has been very successful. This is my first year serving as the chair of the committee organizing the event and I have a couple new ideas that I think will maximize our opportunity to promote the firm and generate business.

First, I'd like to organize a raffle for a few door prizes. The firm will purchase products from each of the vendors attending the event and wrap them in gift baskets with the firm's colors and logo. I'm thinking that we could even throw in a few attorney business cards or some pens or other small items with the firm's name. Instead of using traditional raffle tickets, however, attendees at the event will enter the raffle by "adding" the firm on various social media platforms (Facebook, Twitter, and LinkedIn) and using a special hashtag for the event. Are there any specific ethics rules or regulations implicated by conducting the raffle in this way, or by conducting the raffle at all?

In conjunction with the raffle, I'd really like to use the event as an opportunity to build up the firm's ratings and reputation online. Like many firms, we're listed on sites like Avvo and Lawyers.com, but we're a small firm and only have a handful of reviews at the moment. Therefore, I was thinking that we could offer our current and past clients who are present at the event a discount on future legal services if they leave us an online review. If we offer this type of promotion, are we violating any ethics rules?

Sincerely,

I. M. Hopeful

School, and 3. Syracuse University College of Law.
5. The witness, a nurse, said she recorded the plaintiff's vital signs, temperature, pulse, and blood pressure, as soon as the plaintiff arrived at the hospital.
6. All who enter the courthouse must go through a magnetometer for security reasons.
7. All electronics, cellphones, cameras, iPads, etc., must be turned off while in the courtroom.
8. Parentheses are usually too informal for legal writing.
9. Criminal Court theft cases are difficult to try.
10. Fordham University School of Law encourages its students and alumni to contribute their time and skill in the service of others.

Colons

A colon calls attention to the words that follow it. It introduces explanations, definitions, examples, series, lists, and quotations. A colon generates excitement. A colon also separates elements such as salutations in formal letters; hours, minutes, and seconds; and ratios. Capitalize the first letter in an independent clause if preceded by a colon. If a dependent clause follows the colon, then don't capitalize the first letter of the word. Colons always go outside quotation marks. Use one space after a colon.

Exercises: Colons

1. The defendant has two charges; possession of a firearm and robbery.
2. The defendant is remaining pro se due to the United States law, "Innocent until proven guilty."
3. The plaintiff is pro se, "on one's own behalf."
4. The case is scheduled to start at 230 p.m.
5. There was a 2 to 1 ratio of females to males in the interning class of summer 2018.
6. The new court attorney has many important qualities; organized, responsible, and patient.
7. According to the witness, the victim said only one thing, "HELP!"
8. Mary Shelley is the author of Frankenstein, The Modern Prometheus.
9. The plaintiff had two choices; fight or flee.
10. Never forget this point, think before you speak.

Apostrophes

Apostrophes show ownership or possession. An apostrophe and an s ('s) is added to all singular nouns to show possession, even if the nouns end in *s*, *k*, *x*, or *z*. If a plural word ends in *s*, add only an apostrophe (') to show possession. If a plural word doesn't end in *s*, add an apostrophe and an *s* ('s) to show possession. It's common to use an apostrophe alone with a singular word ending in *s* to show possession (Justice Thomas' opinion). This practice is not grammatically incorrect, but the *Legal Writer* suggests using an apostrophe and an *s* ('s) after singular words that end in *s*; this form is always correct.

Apostrophes are also used to omit a letter (or letters) in a contraction (although contractions are rarely used in legal writing; they're considered informal). One common error is *it's*. *It's* should only be used when you want to write *it is* or *it has*. To show possession, meaning "belonging to 'it,'" use *its*. Don't confuse contractions with possessive pronouns. Apostrophes aren't used with possessive pronouns such as *yours*, *hers*, *his*, *theirs*, *ours*, *whose*, and *its*.

Exercises: Apostrophes

1. The plaintiff sued. The plaintiffs' witness testified for three hours.
2. Charles' attorney was late for the trial.
3. The judges's interns were at the trial.
4. The mens suits were all black.
5. Judge Rodriguez' ruling remained unquestioned.
6. The court officer shouldn't allow the attorneys near the bench.
7. The law firm held it's annual company meeting last week.
8. Its the first day of trial.
9. The defendant was born in the 1960's.
10. Apostrophe's are confusing.

Now that you've completed the exercises (we hope you didn't peek at the answers!), study the given answers to see whether you edited the sentences correctly. The *Legal Writer* also suggests rereading your writing to practice your skills.

Answers: Semicolons

1. The two sentences are independent clauses that should be joined by a semicolon (or a period). *Corrected Version:* The court clerks instructed the jury not to speak about the case outside the courtroom; they want to assure jury integrity.
2. Because this series contains internal punctuation, use a semicolon to separate them. *Corrected Version:* The judge has traveled to Ottawa, Canada; Tokyo, Japan; and Bucharest, Romania.
3. Semicolons are used between independent clauses linked with a transitional expression. "In fact" (itself a trite and mostly unnecessary expression) is a transitional expression. *Corrected Version:* Many defendants choose Mr. Amato as their attorney; in fact, he was the lawyer for every case we had in court today.
4. The second clause presents a contrast to the first clause; a semicolon should be present. *Corrected Version:* Some parents deserve full custody of their children; others don't.
5. The second clause expands on the idea presented in the first clause. Put a semicolon between them. *Corrected Version:* The judge's ruling didn't surprise Margaret; the defendant's lawyer provided beneficial evidence for his client's case.

6. A semicolon should link independent clauses joined by adverbs like *therefore*, *however*, and *indeed*. Place a semicolon before *however*. *Corrected Version:* The witness was very professional; however, his story didn't match those of the other witnesses. Or begin a new sentence with *however*; or change *however* to *but*.
7. A semicolon is necessary in a series containing internal punctuation. *Corrected Version:* The victim is waiting for her brother, from Florida; her sister, from Ohio; and her uncle, from Denver.
8. Semicolons are used between independent clauses linked with an adverb. *Therefore* is an adverb. *Corrected Version:* Most court visits take all day; therefore, you should take off from work for the day. Or start a new sentence with *therefore*.
9. The second clause expands on the idea presented in the first clause. Place a semicolon between them. *Corrected Version:* The defendant gave up; he pleaded guilty to all charges. Or start a new sentence with "He."
10. Semicolons go between independent clauses linked with transitional expressions. Transitional phrases include *after all*, *in fact*, *for example*, and *in conclusion*. *Corrected Version*: I don't think the witness is an expert; for example, his testimony wasn't relevant to any fact in dispute.

Answers: Parentheses

1. *Corrected Version:* The judge called for a recess (of 15 minutes) when he realized that the defendant's lawyer overwhelmed the witness (if you want to deemphasize "of 15 minutes"). Or put "boisterous lout" inside commas, or inside a parenthetical, if you want to deemphasize those words less than they'd be emphasized inside an em dash.
2. Acronyms must be placed within parentheses. *Corrected Version:* The Rodriguez family is suing the New York City Police Department (NYPD).
3. The parentheses obscure Doe's age. *Corrected Version:* Investigators found the remains of Jane Doe, age 17, who was last seen with her boyfriend on June 14.
4. Numerals should be placed within parentheses. *Corrected Version:* The dean spoke at three law schools: (1) University at Buffalo School of Law, (2) Albany Law School, and (3) Syracuse University College of Law.
5. Vital signs are clarified as "temperature, pulse, and blood pressure." That clause should be placed within parentheses. *Corrected Version:* The witness, a nurse, said she recorded the plaintiff's vital signs (temperature, pulse, and blood pressure) as soon as the plaintiff arrived at the hospital.
6. "For security reasons" comments on what precedes it. Place the clause within parentheses. *Corrected Version:* All who enter the courthouse must go through a magnetometer (for security reasons).
7. The types of electronics should be placed within parentheses because they clarify the sentence. *Corrected Version:* All electronics (cell phones, cameras, iPads, etc.) must be turned off while in the courtroom.
8. In the author's discretion, *usually* may be placed within parentheses because it comments on the statement. *Corrected Version:* Parentheses are (usually) too informal for legal writing.
9. *Theft*, in the writer's discretion, may be put inside parentheses because it describes what kind of criminal act is difficult to try. *Corrected Version:* Criminal court (theft) cases are difficult to try.
10. In the author's discretion, *alumni* may be placed within parentheses to deemphasize this group, which, in turn, emphasizes the *students*. *Corrected Version:* Fordham University School of Law encourages its students (and alumni) to contribute their time and skill in the service of others.

Answers: Colons

1. A colon is necessary to introduce the charges. *Corrected Version:* The defendant has two charges: possession of a firearm and robbery.
2. Use a colon to introduce the law. *Corrected Version:* The defendant is remaining pro se due to the United States law: "Innocent until proven guilty."
3. Use a colon to introduce the definition of "pro se." *Corrected Version:* The plaintiff is pro se: "on one's own behalf."
4. Use a colon in time to separate the hour and minutes. *Corrected Version:* The case is scheduled to start at 2:30 p.m.
5. Ratios should consist of a colon. *Corrected Version:* There's a 2:1 ratio of females to males in the interning class of summer 2018.
6. A colon should introduce the important qualities. *Corrected Version:* The new court attorney has many important qualities: organized, responsible, and patient.
7. A colon after an independent clause must introduce a quotation. *Corrected Version:* According to the witness, the victim said only one thing: "HELP!"
8. Use colons to separate book titles from subtitles. *Corrected Version:* Mary Shelley is the author of Frankenstein: The Modern Prometheus.
9. One space divides a colon from what follows it. *Corrected Version:* The plaintiff had two choices: fight or flee.
10. Capitalize the first letter in the independent clause if it follows a colon. *Corrected Version*: Never forget this point: Think before you speak.

CONTINUED ON PAGE 60

BECOMING A LAWYER

BY LUKAS M. HOROWITZ

Lukas M. Horowitz, Albany Law School Class of 2019, graduated from Hobart William Smith in 2014 with a B.A. in history and a minor in political science and Russian area studies. Following graduation, he worked for two years as a legal assistant at Gibson, McAskill & Crosby, LLP, in Buffalo, New York, and with the New York Academy of Trial Lawyers hosting CLE programs. Lukas can be reached at Lukas.horowitz@gmail.com.

Halfway Home

What did I just write? What language were those questions written in? Did I just black out? Where am I? These are the natural questions that go through a law school student's head after every exam, myself included. Fortunately, I have figured out that I am sitting at my dining room table, looking at my computer. How exactly did I wind up here? Well, I am not quite sure about that. Another 16 credits toward the degree are on the books.

My last exam is done. I am exhausted and slightly delirious, yet the NYSBA *Journal* deadline looms. So this month I offer just a few, scattered thoughts on law school life, with the promise of full details, and greater reflection, in February's column.

The bad news is that time flies. The good news is that I'm the pilot. Handing in my last final exam today marked a successful landing for the first half of law school. Three semesters up, three semesters down.

As sick and twisted as this may sound, I am already looking forward to the start of next semester. I have been offered (and accepted) a field placement for the spring semester at the New York State Department of Environmental Conservation, working in the Office of Hearings and Mediation Services. More on this in the months to come.

So, as luck would have it, I am still flying. I've got enough gas to make it another three semesters, and in the event I have miscalculated, I can always make an emergency landing and pursue my career as an expressive dancer. ■

The Legal Writer
Continued from Page 59

Answers: Apostrophes

1. Only one plaintiff sued. The witness belongs to the plaintiff. An apostrophe and an *s* (*'s*) should be placed to show possession. *Corrected Version:* The plaintiff's witness testified for three hours.
2. The attorney belongs to Charles. An apostrophe and an *s* (*'s*) should be placed to show possession, even though Charles ends in *s*. It's common to use an apostrophe alone with a singular word ending in *s* to show possession (Justice Thomas' opinion). But the *Legal Writer* suggests using an apostrophe and *s* after singular words that end in *s*. Doing so is always correct. *Corrected Version:* Charles's attorney was late for the trial.
3. The interns belong to the judge. Possession needs to be evident in this sentence. *Corrected Version:* The judges' interns were at the trial.
4. If a plural word doesn't end in *s*, add an apostrophe and an *s* (*'s*) to show possession. *Corrected Version:* The men's suits were all black.
5. An apostrophe and an *s* (*'s*) are added to all singular nouns to show possession, even if the nouns end in *s*. *Corrected Version:* Judge Rodriguez's ruling remained unquestioned.
6. Apostrophes are used to omit a letter or letters in a contraction. But contractions are rarely used in legal writing; although perfect in emails and *Legal Writer* columns, they're considered too informal in most other forms of legal writing. *Corrected Version:* The court officer should not allow the attorneys near the bench.
7. *It's* means *it is* or *it has*. To show possession, meaning belonging to *it*, use *its*. *Corrected Version:* The law firm held its annual company meeting last week.
8. Contractions are used to write *it is* or *it has*. *Corrected Version:* It's the first day of trial.
9. Don't use an apostrophe in words that are plural but not possessive. *Corrected Version:* The defendant was born in the 1960s.
10. Don't use an apostrophe and an *s* ('s) to make a regular noun plural. Just add an *s*. *Corrected Version:* Apostrophes are confusing. ■

Gerald Lebovits (GLebovits@aol.com), an acting Supreme Court justice in New York County, is an adjunct at Columbia, Fordham, and NYU law schools. He thanks judicial interns Alexandra Dardac (Fordham University) and Rosemarie Ferraro (University of Richmond) for their research.

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Schwenker, Eric C.
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Wood, Jeremiah

Fifth District
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Gaal, John
Gensini, Gioia A.
†* Getnick, Michael E.
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LaRose, Stuart J.
McCann, John T.
Murphy, Hon. James P.
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†* Buzard, A. Vincent
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* Palermo, Anthony Robert
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* Vigdor, Justin L.
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Pajak, David J.
Smith, Sheldon Keith
Spitler, Kevin W.
Sullivan, Kevin J.

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Birnbaum, James M.
Bowler, Richard J.
Burke, Michael K.
Burns, Stephanie L.
Fox, Michael L.
Goldenberg, Ira S.
Goldschmidt, Sylvia
Gordon Oliver, Hon. Arlene
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Marcus, Robert B.
McCarron, John R., Jr.
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Welch, Kelly M.

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Burns, Carole A.
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Bruno, Frank, Jr.
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DeFelice, Joseph F.
Gingold, Hilary
Lee, Chanwoo
Samuels, Violet E.
Vitacco, Guy R., Jr.

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Millon, Steven E.
* Pfeifer, Maxwell S.
Weinberger, Richard

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Marangos, Denise
Marangos, John Z.
Martin, Edwina Frances
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Miller, Claire C.
Scheinberg, Elliott

Out-of-State
Jochmans, Hilary F.
Sheehan, John B.

† *Delegate to American Bar Association House of Delegates* * *Past President*

BY GERALD LEBOVITS

Legal-Writing Exercises: Part VI — Punctuation (Continued)

In the last issue of the *Journal*, you practiced your legal-writing and punctuation skills by completing exercises on quotations, hyphens, commas, question marks, exclamation points, and periods. This issue, in which the *Legal Writer* will discuss semicolons, colons, parentheses, and apostrophes, continues from the last issue. At the end of each section, you'll be tested on the concepts discussed and tasked with editing the sentences. You may change words, rearrange words, and add or delete words. After you've edited the sentences, go to the answers at the end of the article to see whether you've edited your sentences correctly.

This is the last column in our six-part legal-writing-exercises series. In the next issue of the *Journal*, the *Legal Writer* will begin a multipart series called the Worst Mistakes in Legal Writing.

Semicolons

Semicolons connect major sentence elements with equal grammatical rank. They go between independent clauses and, in the writer's discretion, closely related clauses. The clause after the semicolon either restates the idea expressed in the first clause or expands on, or presents a contrast to, the first clause.

To avoid a run-on comma splice, connect two independent clauses with a semicolon, not a comma. Semicolons join independent clauses linked with transitional expressions. Transitional expressions include conjunctive adverbs and transitional phrases. Conjunctive adverbs include *accordingly*, *finally*, *hence*, *however*, *moreover*, *similarly*, *therefore*, *and thus*. Transitional phrases include *after all*, *in fact*, *for example*, and *in conclusion*.

A semicolon also goes between items in a series containing internal punctuation. Inserting semicolons between each series makes it easier for readers to distinguish between the major groupings in the sentence.

Semicolons go outside quotation marks.

Exercises: Semicolons

Rewrite the following sentences by replacing commas and periods with semicolons.

1. The court clerks instructed the jury not to speak about the case outside the courtroom, the clerks want to protect jury integrity.
2. The judge has traveled to Ottawa, Canada, Tokyo, Japan, and Bucharest, Romania.
3. Many defendants choose Mr. Amato as their attorney in fact, he was the lawyer for every case we had in court today.
4. Some parents deserve full custody of their children others don't.
5. The judge's ruling didn't surprise Margaret, the defendant's lawyer provided beneficial evidence for his client's case.
6. The witness was very professional however his story didn't match those of the other witnesses.
7. The victim is waiting for her brother, from Florida, her sister, from Ohio, and her uncle, from Denver.
8. Most court visits take all day, therefore, you should take off from work for the day.
9. The defendant gave up, he pleaded guilty to all charges.
10. I don't think the witness is an expert, for example, his testimony wasn't relevant to any fact in dispute.

Parentheses

Parentheses are used to clarify, comment on, illustrate, or supplement other information in a sentence. The information within parentheses is usually minor or of secondary importance. Numbers, letters, abbreviations, and acronyms are placed within parentheses, as are citations according to some citation guides and publication information. If a parenthesis appears at the end of a sentence, all punctuation is placed outside the closing parenthesis. If the parentheses contain an independent clause, then the punctuation is placed inside the closing parenthesis.

Parentheses interrupt the text. Use them only when necessary.

Exercises: Parentheses

1. The judge called for a 15-minute recess when he realized that the defendant's lawyer – a boisterous lout – overwhelmed the witness.
2. The Rodriguez family is suing the New York City Police Department, NYPD.
3. Investigators found the remains of Jane Doe (17), who was last seen with her boyfriend on June 14.
4. The dean spoke at three law schools: 1. University at Buffalo School of Law, 2. Albany Law

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Periodicals

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