

TRAINING YOUNG LAWYERS TO BE CONSERVATORS OF LEGAL INSTITUTIONS & THE RULE OF LAW

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2012 MICH. ST. L. REV. 567

Who or what should serve as conservator of the rule of law? In this Essay, I will explore the role that several different actors and institutions currently play. I conclude—based on my experience in the federal courts—that lawyers can and do conserve the rule of law, and focus on the work that must be done in law schools to ensure that new lawyers are equipped to continue playing that role.

To begin with, I would like to congratulate Professor Daniel Barnhizer, Dean Joan Howarth, and the *Michigan State Law Review* for a timely, meaningful, and well organized symposium. In so doing, I recognize a source of great pride in legal education: the Michigan State University College of Law. The Law College's dean has done an extraordinary job to elevate the school in a short period. This year the Law College's applications are up by 8% at a time when law school applications are down by an average of 9.5% across the country.¹ At the heart of the Law College are bright and engaged students who, on average, score in the top twenty-fifth percentile on the LSAT.² These students are supported by first-class faculty members, who not only shine in American Association of Law Schools writing competitions and are named Fulbright Scholars, but who also remain involved in the “real world” by regularly supplying expert testimony in high-stakes litigation.³ The fact that the MSU College of Law has helped to initiate the conversation undertaken by this symposium is evidence that the in-

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1. MICH. STATE UNIV. COLL. OF LAW, FACT SHEET (Sept. 2011), *available at* <http://www.law.msu.edu/MSULaw-FactSheet.pdf>.

2. *See id.*

3. *See, e.g., MSU Law Kelley Institute Co-Directors Win Scholarly Paper Competitions*, MICH. STATE UNIV. COLL. OF LAW (Nov. 7, 2011), <http://www.law.msu.edu/news/2011/releases/Knake-Brenner-Papers.html>; *Law Professor Named Fulbright Scholar*, MICH. STATE UNIV. (Dec. 21, 2010), <http://news.msu.edu/story/8722/>; *MSU Law Professor Testifies in \$5 Billion Russian Oligarch Case*, MICH. STATE UNIV. COLL. OF LAW (Dec. 9, 2011), <http://www.law.msu.edu/news/2011/releases/Bean-ExpertWitness.html>.

stitution intends to be part of the solution—a catalyst for the training of lawyers who respect and preserve the rule of law.

I come at the questions presented by this symposium from several angles. My background is somewhat unique in that I have had twenty years of experience in private practice, then I was a United States District Court judge for thirteen years, and now I have been on the United States Court of Appeals for six years. I have been teaching at Michigan State University College of Law for fourteen years. And for the last five years, I have served as a trustee. I will freely admit that my experience with attorneys as a federal judge is not necessarily representative of the current posture of our profession. In the Federal Courts, and particularly in the Circuit Courts, we have high standards for attorneys. And in my experience, if you set a very high standard, explain what the standard is, and make it clear you are serious about it, lawyers will rise to the occasion. Problems generally arise when expectations are not set.

Although I am quite sure that very few people outside of this symposium are giving serious thought to its topic, I am not discouraged. Rather, I am encouraged that anyone is discussing it at all, and I hope this will serve as a starting point for further discussion. In particular, I would like to make seven points with regard to the question of whose job it is to protect legal institutions—Congress, state legislatures, federal or state courts, national and state bar associations, attorneys, or law schools? Perhaps the answer should be all of the above. In my view, lawyers are generally living up to this duty right now, at least in the federal courts. But my concern is that many challenges to legal education and the profession right now could change that for the worse. So, I offer some observations from my experience in legal education so that law schools can continue to instill a duty to conserve the rule of law in a new generation of lawyers.

Starting with Congress, many in Congress view the Judiciary as a priority and understand our Constitutional responsibilities. However, many others are so singularly focused on the national debt and reducing the budget that this interest could outweigh their interest in protecting the rule of law. Allow me to provide a graphic example. As a member of the federal judiciary, we are governed by something called “The Judicial Conference.” The Conference has committees. I was privileged to be appointed by the Chief Justice to the court’s Budget Committee, which is charged with developing the federal judiciary budget that is presented to Congress each year. I also serve on the Budget Committee’s Economy Subcommittee. It is charged with cost containment efforts throughout the judiciary, and it attempts to identify and achieve savings so as to enable the federal courts to live within the means that Congress grants the courts. This year (fiscal year 2012), the judiciary received a one percent increase over fiscal year 2011. While this sounds good in an era of deficit reduction and controversy over the debt ceiling, and is certainly better than other agencies fared, it still re-

sults in a significant problem for the judiciary, including a shortfall in our salaries and expense accounts. Consider what that means in the context of the courts, and in turn, in the context of legal institutions and the rule of law. The courts do not have programs, so to speak. We do not have a bridge that we can decide not to build or some new entitlement program that we can postpone for a year. We handle cases. Lawyers file them. We deal with them. That is all. We are entirely reactive in what we do.⁴

The more serious threat comes from the Budget Control Act,⁵ which will require significant budget reductions across the government, including the judiciary, given the failure of the “Super Committee” to reach agreement. The Act requires spending cuts designed to achieve \$1.2 trillion in savings between fiscal years 2013 and 2021.⁶ These cuts are scheduled to take effect in January 2013, in the form of across-the-board cuts to all non-exempted programs—a process known as sequestration.⁷ The Congressional Budget Office estimates the across-the-board cuts to non-defense programs under sequestration to be 7.8% below the 2012 appropriation.⁸ Our preliminary analysis indicates the judiciary could be forced to reduce staffing in clerks of court, probation, and pretrial services by as many as 5,500 court staff, which is more than one-fourth of the courts’ workforce in these areas. Such a scenario would cripple the courts’ ability to perform its essential functions. We would also have to suspend payments to private attorneys appointed under the Criminal Justice Act⁹ for a substantial period and reduce security at federal courthouses, and we would lack sufficient funds to pay jurors, which would require us to suspend civil jury trials for a significant part of the fiscal year.

The problem is that the federal courts amount to less than one percent of the entire federal budget—rendering them too small to be noticed by the public and easy to overlook by Congress. There is no question that the proposed cuts will seriously compromise the entire judiciary. While the Judiciary’s staff in Washington thinks that Congress will ultimately take steps to avoid the Budget Control Act sequestration, it is still a possibility. Plus, the fix required to avoid sequestration may still require significant overall cuts to the federal budget that could have a severe impact on Judiciary funding.

4. See *Judiciary Warns of Impact of Deep Cuts in 2012*, THIRD BRANCH (Apr. 2011), http://www.uscourts.gov/News/TheThirdBranch/11-04-01/Judiciary_Warns_of_Impact_of_Deep_Cuts_in_2012.aspx.

5. Budget Control Act of 2011, Pub. L. No. 112-25, 125 Stat. 240.

6. *Id.* § 302(a).

7. See *id.* §§ 101, 302(a).

8. CONG. BUDGET OFFICE, ESTIMATED IMPACT OF AUTOMATIC BUDGET ENFORCEMENT PROCEDURES SPECIFIED IN THE BUDGET CONTROL ACT 2 (Sept. 12, 2011), available at <http://www.cbo.gov/sites/default/files/cbofiles/attachments/09-12-BudgetControlAct.pdf>.

9. 18 U.S.C. § 3006A (2006).

If those in Congress who view the Judiciary as a priority are not able to adequately fund the federal courts, then I believe that Congress cannot be counted on to protect our legal institutions and the rule of law.

Turning secondly to state legislatures, there is a lot of attention being given to merit selection of judges, as opposed to elections. That is something that directly affects the dignity of legal institutions. But it seems misguided to think that relying on a political body to select judges would remove politics from judicial selection. The same applies to limitations and restrictions on election speech and spending. Although it may be an interesting academic exercise to discuss what legislatures could do in this area, the decision in *Citizens United v. Federal Election Commission*¹⁰ has foreclosed pragmatic discussion about legislative action, because most regulation of campaign spending is likely to be considered unconstitutional.

Third, courts have an obvious stake in the rule of law. We are charged with enforcing the rules. Allow me to articulate some observations from my experiences as a District Judge and then as a Circuit Judge. When I was a District Judge, the quality of both the writing and oral advocacy was, overall, fairly good. We set high standards and most attorneys met them. In addition, we saw the same lawyers fairly regularly. If we had problems, we discussed any shortcomings with lawyers. But on the Court of Appeals, we only see lawyers for fifteen minutes. And we have fewer repeat customers. As a result, in my experience, there is very little time spent at the Circuit Court level in addressing lawyers who do subpar work. It seems to follow that the more contact a judge has with attorneys, the better his or her position is to serve as a conservator of the profession.

Ultimately, in my estimation, one of the actors within the federal court system that can best serve as a bulwark for the rule of law would be magistrate judges—not the circuit court judges or the district court judges. This may seem odd, but the magistrates deal with all the major day-to-day conflicts between lawyers. They handle almost all discovery disputes. They have an important stake in improving civility and ethics, and within the federal courts, magistrate judges are simply in the best position to make a difference.

Fourth, what about state supreme courts? Professor Weinstein will address the state supreme courts' role in regulating the legal profession. To me, it seems that if the state grants a license to practice law, the public then has a right to expect an adequate level of competence and there has to be some system that deals with those that fail to measure up. Some suggest that a client reporting mechanism will make a difference. Where big cases—with big firms and big dollars—are involved, that may be realistic. But the majority of disciplinary proceedings involve simple cases with solo practi-

10. See *Citizens United v. Fed. Elec. Comm'n*, 130 S. Ct. 876 (2010).

tioners and small dollars. Pragmatically speaking, that client has neither the means, nor the time, nor the wherewithal to pursue a grievance. And, even more importantly, what do we do about lawyers who engage in misconduct that doesn't involve the client? What do we do about lawyers that commit a crime? For all of these reasons, a client-enforced regulatory mechanism appears to me to be insufficient.

A fifth possibility would be national bar associations. Contrary to the negative influence that state legislatures and Congress play in the deterioration of the rule of law by underfunding the courts and indigent criminal representation, some bar associations have really been stalwart advocates for adequate funding for the courts, for access to the courts, and for the independence of the judiciary.¹¹ The American Bar Association (ABA) in particular has set one of its top goals as advancing the rule of law.¹² One of the ways that the ABA works to accomplish this is by bringing together diverse legal stakeholders—with interests as disparate as the Sierra Club and the Chambers of Commerce.¹³ Because regardless of their political perspective, all of these groups want a high-quality forum in which to get their claims adjudicated. This is something that the courts cannot do ourselves because we lack our own political voice, so I appreciate the efforts of bar associations to take positive steps in this regard. More action should be encouraged on this front, however, because it seems to me that the efforts of many state bar associations and task forces are going largely unnoticed by the public and without much practical effect.

On the other hand, as a law school trustee, I join in Professor David Barnhizer's concern about the ABA's role in accreditation of schools.¹⁴ In reviewing the recent evaluation of the Law College by the ABA, my impression is that the process most carefully protects professors, not students. In that sense, the ABA is not serving a terribly helpful purpose in guarding the rule of law within law schools.

Sixth, lawyers themselves have an obvious role to play in protecting legal institutions by maintaining ethics and civility. I submit that lawyers—at least in federal courts—generally have a good understanding of the rule

11. See, e.g., *Court Funding Crisis and Other Critical Legal Issues Explored at ABA Midyear Meeting in New Orleans, Feb. 1-6*, ABA (Jan. 18, 2012), <http://www.abanow.org/2012/01/court-funding-crisis-and-other-critical-legal-issues-explored-at-aba-midyear-meeting-in-new-orleans/>.

12. *Association Goals*, ABA, http://www.americanbar.org/utility/about_the_aba/association_goals.html (last visited May 26, 2012).

13. See, e.g., *Section of Litigation: Environmental Litigation*, ABA, <http://apps.americanbar.org/litigation/committees/environmental/news.html> (last visited May 26, 2012).

14. See David Barnhizer, *Redesigning the American Law School*, 2010 MICH. ST. L. REV. 249, 267-68, 292-95.

of law and their duty to uphold it. What I am concerned about is future generations of lawyers. And that is where law schools come in.

Seventh, law schools have the obvious potential to protect legal institutions and the rule of law. However, I am dubious about how well they are currently playing that role. It appears to me that most schools focus the bulk of their attention on the annual rankings released by *U.S. News & World Report*.¹⁵ As a general matter, encouraging law schools to recruit higher-quality students, maintain acceptable bar passage rates, and equip students with the skills to actually get a good legal job all seem to be pretty good things. Like it or not, this is simply the paradigm that schools are working within.

But another thing that has become clear to me is that a law school is not run by the board or the dean; it is run by its faculty. So what does that mean for the financial debt crisis that law schools and law students are currently facing? If we go where the money is being spent and try to reduce expenses, we will find significant expenses not just in faculty in general, but in subsidizing legal research activities as well. Arguably, those activities do not provide a direct benefit to students. So this leads me to consider the following: What would happen if *U.S. News & World Report*¹⁶ takes note that one reason for the extraordinarily high level of law student debt is that a lot of tuition is being charged in order to pay for faculty research? And what if the *U.S. News & World Report*¹⁷ starts to de-value academic research? Or count only that which seems to directly relate to the mission of the law school—training the next generation of attorneys. It would be fascinating to see how that would play out in law schools across the country.

Professor Patton will address a major challenge for law schools in this area—new business models for law firms. I am narrowly and parochially concerned about the trend towards using contract attorneys at domestic and foreign document review centers and what that will do for mentoring in the profession.¹⁸ When I talk with my former clerks, it is very clear to me that there is not the degree of mentoring that used to be available to new associates. And now, it would seem that attorneys working on a contract basis will get virtually no mentoring at all. That mentoring used to bridge the gap be-

15. See *Best Law Schools: Ranked in 2012*, U.S. NEWS & WORLD REPORT, <http://grad-schools.usnews.rankingsandreviews.com/best-graduate-schools/top-law-schools/law-rankings> (last visited May 26, 2012).

16. See *id.*

17. Robert Morse & Sam Flanigan, *Methodology: Law School Rankings*, U.S. NEWS & WORLD REPORT (Mar. 12, 2012), <http://www.usnews.com/education/best-graduate-schools/top-law-schools/articles/2012/03/12/methodology-law-school-rankings?page=2>.

18. See RICHARD SUSSKIND, *THE END OF LAWYERS? RETHINKING THE NATURE OF LEGAL SERVICES* xxxii-xxxiii (2010); Alison Hugelmeyer, *2009: A Year of Opportunity for Contract Attorneys*, 5 *THE COLUMN* (2009), available at <http://www.specialcounsel.com/media/the-column/candidate/v5-2-april-2009/2009-opportunity-contract-attorneys/>.

tween law school and the real world, and it provided an opportunity for new attorneys to gain a sense of duty towards the profession. But we can no longer rely upon the mentoring role of more experienced lawyers to fill that gap for an increasingly large number of our graduates who end up working on a contract basis.

New technologies also bring new challenges for law schools. I am concerned about the challenge that social media is presenting to education, in general, but particularly to the ability of law students to write clearly, communicate interpersonally, and be effective advocates. “LOL,” “LMAO,” “TY,” “YW”—this is the language students are speaking today. I do not see how the ubiquitous use of personal digital assistants (PDAs) and text language can help but adversely impact the ability of future law students to be able to communicate both face to face and in writing. Just think about how many times you are out at a restaurant and see a man and a woman sitting at a table—you do not know if they are dating or married or friends. They are both looking down and on their PDAs. They are not looking at or talking to each other. So, how are students going to develop the skills that are necessary to be a lawyer if they do not know how to talk to each other? Or to a client? Or to a judge? And how are we going to avoid this constant use of text language from seeping into their writing in place of proper grammar and spelling and sentence construction?

Another concern is that the Internet simply has no filter. What about the incoming generations who really have never had a filter, because they’ve used the Internet, almost exclusively, to communicate? For example, many students ruin their online reputation before they even have an opportunity to build a professional one.¹⁹ What college students frequently fail to realize is that the information they post online will stay with them as they pursue professional careers. And “[t]hirty four percent of hiring managers admit to having rejected an applicant based on information obtained from social networking sites, while only [twenty four percent] said they were encouraged to hire job seekers based on online profiles.”²⁰ And what

19. Mollie Brunworth, Comment, *How Women are Ruining Their Reputations Online: Privacy in the Internet Age*, 5 CHARLESTON L. REV. 581, 588-89, 597-99 (2011) (also noting that most social networking sites often are not utilized for what is traditionally thought of as networking). The majority of people are using social networking sites to

“maintain existing offline relationships or solidify offline connections, as opposed to meeting new people.” Ninety-one percent of teens in the United States use social networking websites to connect with pre-existing friends. So essentially, students are using social networking websites not to meet new people, but to memorialize their own behavior and to observe and scrutinize existing peers’ behavior.

Id. at 591-92 (citations omitted).

20. David Hector Montes, Note, *Living Our Lives Online: The Privacy Implications of Online Social Networking*, 5 I/S/ J.L. & POL’Y FOR INFO. SOC’Y 507, 522 (2010) (citing Mike Hargis, *Social Networking Sites Dos and Don’ts*, CNN.COM (Nov. 5, 2008) <http://www.cnn.com/2008/LIVING/worklife/11/05/cb.social.networking/>).

about the effect, if any, of online postings on the character and fitness process?

I would also suggest that many top law students—diplomatically speaking—tend to be somewhat socially awkward. The trick when I interview potential clerks is not to find somebody with the intellectual ability to handle the job. They are plentiful. The problem is finding somebody with whom I want to spend a year. I can only imagine that this awkwardness will become more pronounced as students who have only communicated through a computer begin to come in for interviews. Now, this increasing social awkwardness is probably not a problem for top students who leave law school and go on to jobs with large firms where they are assigned to do document review in a back room for a couple of years while they pay off their student loans. But how are they then going to adapt in small to medium firms where they actually have to have social graces? This must be addressed by law schools.

Because of these challenges facing law schools, I commend this symposium for being willing to ask the hard questions, and I suggest several practical things law professors can do to produce students that will help guard legal institutions and preserve the rule of law. First, professors must become better connected to the practicing bar. Many professors may consult, but I suspect that the majority of them who do so are working with large firms in cases that pay a lot of money. As a general rule, professors are not “out there” except, perhaps, through legal clinics. A well-connected professoriate will be in a much better position to prepare its students to enter the legal world and to affect it in a positive manner.

Also, as an adjunct professor, I think it would serve tenured faculty well to become better connected with adjuncts. This group serves as an easy and natural connection to the local legal community. Professors should consider how to involve adjuncts in what happens around their law schools and bring them in to talk with their classes.

Further, law professors must stop writing almost exclusively for other professors. It is true, as Dean Chemerinsky recently noted, that most law professors write for the noble reason that “ideas matter and that scholarly exchanges, over time, can advance understanding and perhaps sometimes even make a difference.”²¹ But what audience is best situated to make that difference? Dean Chemerinsky identifies several audiences for legal scholarship, such as the public, law students, practitioners, legislators, judges, and other academics.²² Surely, those who are most likely to convert scholarly exchange into practice are practitioners, legislators, or judges. I can best speak to the impact of scholarship on judges.

21. Erwin Chemerinsky, *Foreword: Why Write?*, 107 MICH. L. REV. 881, 893 (2009).

22. *Id.* at 887-90.

In short, I agree with Justice Ginsberg in her interview with Bryan Garner who recently interviewed the Justices of the Supreme Court.²³ Ginsburg noted that “law-review writing is often in a language that ordinary judges and lawyers don’t understand.”²⁴ She said, “Judges are not going to read those articles, because they haven’t got the time to try to penetrate them.”²⁵ And I think that is pretty representative of my view of law reviews, as well. This is caused by hiring and tenure processes that over-emphasize abstract scholarship.²⁶ But if professors keep on setting the standards, and keep moving the goal posts into increasingly esoteric terrain, they are going to be writing exclusively for each other and will never reach the market they hope to access in order to influence judges and practitioners to “make a difference” or improve the rule of law.

I would encourage professors to take advantage of the resources available to them to instill in their students a sense of duty toward the rule of law. As we all know from experience, what most law students want today is a set of rules that they can memorize. They are not interested in how the law evolved or where it is going. In general, I do not get the sense that many students have any real interest in the importance of what will become their role in our system of justice. One reason for that is the pressure on them to earn good grades so they can obtain a job and pay back their student loans. So professors need to continue helping them with those practical matters. However, we also have to find ways to encourage students to value the preservation of the rule of law. One way of doing that is to promote participation in the Inns of Court. The Inns of Court are designed to improve the skills, professionalism, and ethics of the bench and bar.²⁷ I recommend that law professors encourage students to get involved in a meaningful way so they get contact with practicing lawyers and professors have the opportunity to see the practicing lawyers, as well. This is a win-win.

Law professors with the right attitude could turn students’ understanding of social media to their advantage by teaching them about the ways these technological developments are influencing the law. Social media is beginning to affect many practices in the law—everything from research to notice, discovery, and legal ethics. Social media savvy lawyers can channel that knowledge into cost savings for their clients, plugging into the open source movement and using alert tools and RSS feeds.²⁸ In some cases Fa-

23. Bryan A. Garner, *Interviews with United States Supreme Court Justices: Ruth Bader Ginsburg*, 13 SCRIBES J. LEGAL WRITING 133 (2010).

24. *Id.* at 138.

25. *Id.*

26. See Chemerinsky, *supra* note 21, at 885.

27. See *Mission & Goals*, AM. INNS OF COURT, <http://www.innsforcourt.org/Content/Default.aspx?Id=151> (last visited May 26, 2012).

28. Michael L. Rustad & Diane D’Angelo, *The Path of Internet Law: An Annotated Guide to Legal Landmarks*, 2011 DUKE L. & TECH. REV. 1, ¶ 91 (2011).

cebook has become both a means of serving process and a top source of evidence.²⁹ All of this raises fascinating questions, such as whether it is ethical to “friend” a third-party witness to investigate a case, or what reasonable expectation of privacy we have in our online posts.³⁰ By making students aware of these developments, law schools can make the abstract notion of practicing law feel real to their students—preparing them to guard the rule of law in all the new contexts they are bound to encounter.

The most important way that law schools can encourage students to respect and guard the rule of law is to provide strong mentoring and teach them to act like poised professionals. I would like to highlight a program that I believe is actually a difference: The Geoffrey Fieger Trial Practice Institute at Michigan State University College of Law.³¹ On days the students in this program are presenting, they have to wear courtroom attire to school. It is very easy to pick out these students. They know they are different because they were accepted into a highly competitive program. And, I submit, they act differently. They are starting to actually look and act like lawyers do. They are gaining the key mentoring that they need from experienced litigators that work closely with them to prepare for mock trials. But more importantly than all of that, the self-confidence and self-esteem that they are generating by standing out to their peers day after day is nothing short of remarkable. These students will perform better in a job interview and ultimately work with clients, judges, and colleagues better because they will have not only learned the technical aspects of becoming a trial lawyer, but they will also have gained social graces through the program. They are going to be able to make presentations, and they are going to be able to use the communication skills lawyers need, regardless of whether they become trial lawyers—the absence of which will lead to the breakdown of the rule of law. So that is just one local example that I think is working spectacularly.

Law schools and law students today face serious challenges, yet within them lies the future of our profession. If lawyers are to be conservators of

29. Stephanie Francis Ward, *Our Pleasure to Serve You: More Lawyers Look to Social Networking Sites to Notify Defendants*, 97 A.B.A. J. 14, 14 (2011); see also Joseph A. Nicholson, Note, *Plus Ultra: Third-Party Preservation in a Cloud Computing Paradigm*, 8 HASTINGS BUS. L.J. 191, 194 (2012) (noting that Facebook is a source of evidence in one out of every five divorce cases).

30. Shane Witnov, *Investigating Facebook: The Ethics of Using Social Networking Websites in Legal Investigations*, 28 SANTA CLARA COMPUTER & HIGH TECH. L.J. 31, 32 (2011). See generally Joshua S. Levy, *Towards a Brighter Fourth Amendment: Privacy and Technological Change*, 16 VA. J.L. & TECH. 499, 501 (2011); *United States v. Jones*, 132 S. Ct. 945, 954-55, 957 (2012) (Sotomayor, J., concurring) (discussing the possible need to reconsider whether information voluntarily disclosed to third parties is worthy of Fourth Amendment protections).

31. See generally *The Geoffrey Fieger Trial Practice Institute*, MICH. STATE UNIV. COLL. OF LAW, <http://www.law.msu.edu/tpi/> (last visited May 26, 2012).

legal institutions and the rule of law, we must train them properly. I suggest that with a renewed commitment to activities that truly benefit the students, and by getting them the mentoring they need to truly understand and develop respect for themselves, their profession, and the rule of law, legal education can do just that.

