The Rule of Law on the National Stage

Sally Yates, former U.S. Deputy Attorney General and former Acting U.S. Attorney General, visited SLS on February 12th to talk with law students about her time at the Department of Justice. Yates was interviewed by Professor Deborah Rhode and answered student questions about her time in the Trump Administration and the role of government lawyers.

For the first ten days of the Trump Administration, Yates served as acting Attorney General, which is a tradition for the prior Deputy Attorney General. Generally, Yates explained, the understanding is that “nothing happens during that time…” Her tenure was a notable exception. The most critical issue facing Yates was the travel ban, which she discovered through her Chief of Staff, who read about it in the online New York Times. As she wryly noted, “That’s not normally how it works. Normally there is a whole process where… all the agencies that would be affected have an opportunity to weigh in.”

Yates described spending the weekend trying to figure out what the goals of the executive order were – who was supposed to be covered and not covered – and pulling up cases on her IPad. “On Monday morning, I was told that we would have to take a position the next day… A judge had ordered the Department of Justice to state, on its record, is this constitutional or not?”

She recalled the meeting where everyone who would be involved in defending the ban gave their views. “When we got to the end of that discussion, it was becoming increasingly clear to me… that for us to defend the travel ban, I was going to have to send DOJ lawyers into court to argue that this travel ban had absolutely nothing to do with religion, absolutely nothing. And that was” (continued, page 2)
The Rule of Law
(continued from page 2)

despite all the statements the President had made both on the campaign trail and after he had been elected about his intent to effectuate a Muslim ban....And you know, I don’t think any lawyer should be advancing something that’s not grounded in truth, but I sure don’t think the Department of Justice should be doing that. I couldn’t in good conscience send our lawyers in to advance an argument that I didn’t believe was grounded in truth, and particularly when it’s about something that’s absolutely as core to the definition of our country as religious freedom.

Yates then described her dilemma about whether to resign, or direct the DOJ not to defend the ban. “I thought back to my confirmation hearing [for DAG] when then-Senator Sessions and Senator Cornyn and others were absolutely all over me... about whether I would say no to the President if he asked me to do something that was unlawful, unconstitutional, or even something that would bring dishonor to the Department of Justice. They were talking about a different president then... but it seems the principle should be the same. They were right about that...I felt like it was my job as the acting Attorney General who was responsible for the entire Department of Justice to make a decision about what the department’s position would be. So I did.”

Besides the travel ban issue, Yates expressed other concerns about the rule of law. “Since Watergate, there has been a strong norm through both Democratic and Republican Administrations alike that there is a wall between the Justice Department and the White House when it comes to criminal investigations and prosecutions... The idea [of the rule of law] is that the laws apply equally to everyone – and they’re not used as a sword to go after your enemies or a shield to protect your friends... I worry that regular folks out there who don’t go to Stanford Law School and don’t know how things actually work, will come to believe that is how the system works: that the President does order up investigations of rivals, or protect people with whom he’s close, and then the whole criminal justice system comes crumbling down, I think, if the public loses confidence in it.”

Yates concluded with some thoughts on the distinctive obligations of lawyers. “There is a special responsibility that comes with being a lawyer. We as lawyers have the ability to make this world a little more just. And there’s no one way to do that. We have an ability to be able to chart a course that regular people who aren’t lawyers don’t have. And so I think that all of us, at some point in our careers, need to be doing something to make this world a little more just.”
In a panel on April 18, three law firm leaders – Ora Fisher of Latham and Watkins, Katie Martin of Wilson Sonsini, and Mitch Zuklie of Orrick – talked about the challenges facing major law firms and the people in charge of leading them into the future.

Fisher described the biggest challenge as “keeping our talent engaged” as things evolve in the profession, both in the way that lawyers work and in the way they address clients’ needs. Martin emphasized the pressure to evolve as quickly (or more so) than others to long-time firms, and the demand for more diversity. Zuklie also stressed the challenge of keeping up with the evolution of clients’ needs, particularly when their business models change more quickly than the regulatory landscape.

“"You have to know yourself and know your ambitions and your priorities and areas of interest."”
– Ora Fisher, Latham and Watkins, discussing the importance of new lawyers owning their own careers

In the legal industry, given the “fierce” competition for both work and talent, and the pressure from clients to provide quality work at lower cost. Zuklie mentioned other changing dynamics with clients, including the demand for more “analytical rigor” from firms to complement the qualitative and judgment components of lawyers’ advice, the decrease in client loyalty differently, in part because they want their firm to be at the cutting-edge so that they are not disadvantaged in business development. Fisher similarly pointed out that firm lawyers are “hearing what clients are demanding” (i.e. innovation, particularly in doing the work more efficiently). For Zuklie, the key is celebrating different kinds of innovation such as developing new products or services for clients, or improving processes through technology.

When asked what advice they would have for law students building their careers, panelists emphasized the benefits of starting at a big law firm. Martin cited the training opportunities and improved mentoring at a firm like Wilson Sonsini. Zuklie cited his relationships with both clients and colleagues as a major benefit of his experience at a large law firm, and stressed the importance of strong sponsors in his own career. Fisher emphasized the need for young lawyers to “own your own career…. You have to know yourself and know your ambitions and your priorities and areas of interest.”
Whenever someone quotes the Chinese curse “May you live in interesting times,” it is usually to point out the upside of such eras. This column is no exception. Certain distinctive challenges facing the legal profession in the past year formed the basis for particularly strong programming by the Center on the Legal Profession. Some centered on questions presented by the Trump administration concerning the rule of law and the ethical responsibilities of Supreme Court Justices, government attorneys, and elected politicians. Sally Yates spoke to students and the Advisory Forum about her firing as acting Attorney General after she refused to enforce President Trump’s travel ban against citizens from predominantly Muslim nations. New Yorker and CNN commentator Jeffrey Toobin explored current challenges for the Supreme Court. And former Senator Russ Feingold addressed the law school on “Making a Difference Through Politics.”

Some prominent speakers addressed other hot button issues. Emily Bazelon, writer for The New York Times Magazine and author of the new book Charged, keynoted a panel on prosecutorial practices and the need for criminal justice reform. Advisory Forum member David Sanford discussed recent gender discrimination lawsuits against law firms and academic institutions. Another series of events helped students think more deeply about challenges facing the legal profession, and their own futures. Louise Pentland, CLO of PayPal, and Kristin Sverchek, GC of Lyft, explored the role of general counsel in creating cultures of compliance at major corporations. A panel of accomplished and diverse litigators discussed the challenges of “Trying Cases While Women.” Advisory Forum members Mitch Zuklie, Ora Fisher, and Katie Martin of Wilson Sonsini talked about the leadership challenges facing chairs who manage large law firms. And Matt Fawcett, the GC of NetApp, joined Mike Callahan, former GC of LinkedIn and Yahoo (now executive director of the Rock Center at Stanford), to talk with leadership students about ethical dilemmas for general counsel.

The Center has also supported various research projects. One, ongoing, involves pro bono by in-house counsel offices. Another, with the Stanford Criminal Justice Center, involves the use of criminal records in determining “moral character” for bar admissions. I have a book coming out this fall with Oxford University Press, Character: What It Means and Why It Matters, discussing such issues.

All in all, it has been a pretty good way to end the Center’s first decade. We will be celebrating our 10th anniversary next fall with a workshop on Access to Justice and we hope to find many of you in attendance. As always, we welcome your thoughts and are grateful for your support.
Trying Cases While Women

Lara Bazelon, University of San Francisco
Lynn Hermle, Orrick
Anisa Sirur, SF Deputy Public Defender

In an April 23 panel discussion for students at Stanford – co-sponsored by Women at Stanford Law – Lara Bazelon keynoted a conversation arising from her widely circulated 2018 article in the Atlantic, “What It Takes to be a Trial Lawyer If You’re Not a Man.” The piece recounted the challenges that women still face in today’s courtrooms, relying in part on a study authored by Professor Deborah Rhode when she chaired the American Bar Association’s Commission on Women in the early 2000s. In that study, Rhode discussed the double bind and double standard confronting women attorneys. The double bind involves the need to avoid being perceived as too feminine or not feminine enough, too soft or too aggressive. And the double standard is that often what is seen as assertive in a man is seen as abrasive in a woman. These challenges are particularly salient in the courtroom, when female trial counsel receive special scrutiny from judges, clients, opponents, and jurors.

Bazelon was joined by two copanelists. One was Lynne Hermle, a prominent employment partner at Orrick best known for successfully defending the venture capital firm Kleiner Perkins at trial against Ellen Pao’s gender discrimination claim. The other, Anisa Sirur, is a public defender in San Francisco who is part of a younger generation of female women trial lawyers navigating these issues.

Hermle described a context that has not changed much over the course of her career, with most judges being men, male opponents sometimes being difficult, and jurors being “overly observant” and “curious” about female litigators. But Hermle has also found that being a woman gives her certain advantages, including the ability to pose tough questions in a manner that did not alienate the jury.

Sirur noted that her generation was challenging the status quo more than she expected, and described an incident where a judge talked to her in a patently condescending tone and asked for her bar number. Sirur filed a complaint against the judge, which she and her colleagues thought was necessary to put the judge “on notice” that lawyers were watching his behavior. Sirur, who is African-American, felt that she was being treated in a way that assumed she didn’t know what she was talking about.

All three lawyers flagged the need to pick your battles and push back against a judge in an appropriate way.

The panelists also noted the need to pay attention to their appearance in front of juries. Hermle recalled being “shocked” during the Pao trial by the focus on her appearance, and indicated she has developed a “trial uniform” where she looks like a mom so as not to worry each day. Juries are “obsessed with the way women look, absolutely obsessed,” Bazelon agreed. “They notice your jewelry, they notice if you’re wearing makeup, they notice everything.”

To end the panel, Bazelon talked about the “mythical work-life balance” that women are told to achieve, and acknowledged that sometimes she has “chosen my clients” to fully focus on when she is at trial. She later wrote a New York Times op-ed touching on these themes called “I’ve Picked My Job Over My Kids.”
he Legal Design Lab continues to use design thinking and technology to tackle some of the most difficult problems in the legal system. This past year, Margaret Hagan ramped up the Lab’s work as a research and development hub that advances access to justice by developing new tools, with the help of a full-time software developer. For example, the San Mateo County courts are currently experimenting with our Wise Messenger texting tool, and pro se litigants facing eviction in Arizona (and soon Ohio) can use an interactive tool – Eviction Help – built by one of our student fellows that helps identify tenants’ defenses and generates documents to prepare for court. Working with colleagues at Suffolk University, the Lab has also been able to use crowdsourced “issue spotting” to train an algorithm to identify legal issues in Reddit postings – one of the Lab’s initial forays into the use of AI to improve the legal system.

This year, the Lab also started applying design-thinking principles to the task of regulatory reform for legal services. In October, the Lab convened a group of policy innovators from around the world to discuss how to experiment with regulatory changes, and the Utah Supreme Court decided to use the “regulatory sandbox” model discussed there – and most commonly used in fintech – to experiment with new approaches to regulating legal services. The Supreme Court Justice leading that effort – Deno Himonas – will be at Stanford in the fall to discuss Utah’s initiative, which Margaret and Lucy Ricca have helped develop.

In the winter and spring quarters, Margaret co-taught a course called “Justice + Poverty Innovation,” with sociologist David Grusky, head of the Stanford Center on Poverty and Inequality, Medical School faculty Kajal Khanna, and Lab fellow Jorge Gabriel Jimenez. The goal of the course was to work with local partners to develop new tech and design prototypes to address poverty-related problems including debt, housing, and medical care. Students came up with a number of promising prototypes such as a text-messaging translation app that allows Spanish-speaking parents to communicate with English-speaking teachers and administrators. The students are working with Law Foundation of Silicon Valley to adapt this for the Law Foundation’s clients and other legal contexts.

The Lab also hosted its first workshop to introduce lawyers to the fundamentals of design thinking and visual advocacy. Designed and taught in partnership with David Gross and Kate Razavi of Faegre, the workshop aimed to expose participants to the “toolkit” of design-thinking techniques that they could then go back and use in their everyday work as lawyers.

Software Developed by the Legal Design Lab

**Wise Messenger:** Text-messaging app for courts to use with self-represented litigants

**Eviction Help:** Tool to help identify tenants’ defenses and generate court documents

**Learned Hands:** Legal issue-spotting game to train an algorithm by analyzing inquiries on Reddit (with Suffolk University)
How Compliance and Culture Help Business Succeed

In February 2019, the Center also sponsored a panel discussion with leading general counsel to discuss leadership in complex organizations. Louise Pentland, CLO of PayPal, and Kristin Sverchek, GC of Lyft, talked about their efforts to make strong compliance programs part of the corporate culture.

Sverchek explained how for a consumer-facing company like Lyft, strong compliance – doing background checks on their drivers, for example – is integral to building consumer trust. Pentland also talked about PayPal’s evolution from being a start-up within eBay to a stand-alone public company, and how as the company has grown, it has embraced strong compliance as part of its identity as a “force for good.”

Both counsel also talked about what they consider smart “regulatory risk.” Pentland pointed out as a global business using new technologies, PayPal will inevitably need the trust of regulators, and their willingness to give the company the benefit of the doubt as issues arise. In jurisdictions where the company is “good on the basics,” it can ask regulators to allow innovation in “a controlled environment.”

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Pentland and Sverchek pointed out that although the business ethics and compliance functions were different and generally handled by different people, they were both core parts of a strong corporate culture. And they pointed out that a general counsel who is well-integrated into the company’s leadership team can help create a positive culture, and make it consistent with the company’s mission and values.
Are Prosecutors the Key to Criminal Justice Reform?

Much of the Center’s work focuses on access to civil justice, but the Center continues to shine a light on the challenges facing the criminal justice system as well. On May 6, Professor David Sklansky moderated a discussion with Emily Bazelon, writer for The New York Times Magazine and author of the new book Charged: The New Movement to Transform American Prosecution and End Mass Incarceration, and Matt Gonzalez ’90, Chief Attorney in the SF Public Defender’s Office. Bazelon’s book had just been featured on the front page of the New York Times Book Review, and NPR’s Fresh Air with Terry Gross. Bazelon highlighted the wave of “progressive prosecutors” profiled in her work. These lawyers are elected on platforms to prosecute fewer drug and other lower-level offenses, and to reduce mass incarceration. She discussed the incentives facing prosecutors, and emphasized the importance of judging prosecutors on metrics other than conviction rates and success in high-profile cases.

Though both Bazelon and Gonzalez thought that progressive prosecutors had potential to achieve significant reform, they each pointed to other institutional actors who could play important roles. Congress could provide federal funding to support indigent defense and condition subsidies on states’ compliance with criteria for providing effective representation. State legislatures could regulate the plea bargaining process, for example, by placing a limit on the “trial penalty” that prosecutors can request at sentencing if defendants turn down plea offers and elect to litigate.

In addition to this criminal justice programming, the Center also released a report in July with Stanford’s Criminal Justice Center on the use of criminal records in determining “moral character and fitness” for bar and law school admissions. The report concluded that the use of such records was a problematic barrier unlikely to further the goal of public protection, and the California state bar has already signaled that they will be using it to revisit the way moral-character determinations are done. This report relied significantly on Deborah Rhode’s research on the topic, which is discussed in her forthcoming book Character: What It Means and Why It Matters. The report was written largely by students in a policy lab on the topic co-taught by Lucy Ricca.
On October 3, Jeffrey Toobin, CNN analyst and New Yorker journalist, discussed the Supreme Court just days after the confirmation hearings of then-Judge Brett Kavanaugh, and days before the vote on his nomination. Before a standing-room only audience, Toobin reflected on the Supreme Court “as an institution and as a reflection of the current political moment.”

Toobin explained how for much of the 20th century, moderate Republicans held the balance of power on the Court. But in his view, that part of the Court has disappeared, as has that segment of the Republican Party in the rest of the country. That evolution reflects how the Court is set up. As Toobin explained. “We get the Supreme Court that we vote for on Election Day.” Toobin said observers should be “very clear-eyed” about what the conservative shift on the Court means for the law. “It means that Roe v. Wade is going to be overturned…. There are many states which have said openly…that when the composition of the Court changes…. they will simply ban [abortion] and challenge the courts to overturn those bans. And the Supreme Court will uphold those bans….Affirmative action gone, out the door….They’re going to expand the constitutional prohibitions on gun control to include more guns, bigger guns, concealed carry. All of that is coming.”

Toobin gave some historical perspective on the confirmation process, observing that it has become “so much more contentious” than it used to be.

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ACLU lawyer Ruth Bader Ginsburg was confirmed with more than 90 votes, Toobin pointed out, and Byron White’s hearing lasted “eight minutes.” Though there has been ebb and flow over the years in the contentiousness of the process, Toobin observed that there was one constant: “The only chance for defeating a nominee, historically at least, is when the opposition party controls the Senate.”

When asked if the politicized nature of the Kavanaugh hearing damaged the Court as an institution, or Judge Kavanaugh’s relationships with his colleagues if confirmed, Toobin was skeptical. “These predictions that the Court will be diminished in importance, will be discredited, I don’t really buy it.” Recalling Justice Jackson’s observation about the Court, he quoted: “We are not final because we are infallible. We are infallible because we are final.”

Toobin was also confident that a Justice Kavanaugh would not have a problem forming relationships with his new colleagues: “They’re nice to each other. They recognize that they are stuck with each other for decades. And there is an institutional comity, civility there.”

Toobin also observed that the Justices know Kavanaugh already as a D.C. Circuit judge, and they “travel in the same circles.” “He’ll be fine,” Toobin concluded.

Toobin also predicted that the conservative tilt on the Court – reflected in the replacement of Kennedy with Kavanaugh – would produce legal change incrementally.

“The only chance to defeat a nominee is when the opposition controls the Senate.”
“I think John Roberts in particular is a very astute politician, and I don’t say that as criticism. ... The title in the Constitution is not Chief Justice of the Supreme Court, the title is Chief Justice of the United States. I think Roberts takes that seriously, that he is the embodiment of the judicial branch of government. I think he sees himself as the curator of the reputation of the Court, to the extent he can... He does not relish the Court being in the center of the political fray. And there is a history of the Court denying cert sometimes in cases that are particularly hot-button, waiting for other cases to come along.”

When asked about judicial temperament by Professor Rhode, Toobin said he was “so flabbergasted” by Kavanaugh’s performance at his confirmation hearing. “You have to put in its political context and recognize where we are. He gave that Fox News interview, which Trump let it be known it was bad and weak.”

Given how important Trump’s support was, “I don’t think there’s any doubt in the world that Kavanaugh set out last Thursday to prove to the President that I’m a kick-ass guy like you are.”

Toobin also pointed to the “gender politics” of Kavanaugh’s performance. “Can you picture a woman who would have behaved like that? And if she had, they would have thrown a net over her and pulled her right out of the room... This is where our politics are... I know the current Justices well enough to know that that in particular would have really appalled them. That is not how they want to see the Court portrayed.”

“The title in the Constitution is not Chief Justice of the Supreme Court, the title is Chief Justice of the United States. I think Roberts takes that seriously, that he is the embodiment of the judicial branch of government.”
Deborah L. Rhode,  
Director (E.W. McFarland  
Professor of Law)  

Deborah L. Rhode is a graduate of Yale College and Yale Law School, and served as a law clerk to Justice Thurgood Marshall. She is a former president of the International Association of Legal Ethics and the Association of American Law Schools, a former chair of the American Bar Association's Commission on Women in the Profession, and the former founding director of Stanford's Center on Ethics. She also served as senior counsel to the Minority members of the Judiciary Committee, the United States House of Representatives, on presidential impeachment issues during the Clinton administration. She is the most frequently cited scholar on legal ethics. She has received the American Bar Association's Michael Franck award for contributions to the field of professional responsibility, the American Bar Foundation's W. M. Keck Foundation Award for distinguished scholarship on legal ethics, the American Bar Association's Pro Bono Publico Award for her work on expanding public service opportunities in law schools, and has been recognized by the White House as a Champion of Change for a lifetime's work on increasing access to justice.

Jason Solomon,  
Executive Director, Center on the Legal Profession  

Jason Solomon is the Executive Director of the Stanford Center on the Legal Profession and a Lecturer in Law. From 2013-2016, he served as Associate Dean for Academic Affairs and chief of staff to the dean at Stanford Law School, where he worked on a range of strategic initiatives. He also taught Statutory Interpretation and Constitutional Litigation.

Most recently, he worked as the Chief Legal Officer for Summit Learning, a nonprofit partnership between Summit Public Schools, Facebook, and the Chan Zuckerberg Initiative that provides a project-based curriculum and learning platform to public middle and high schools across the country. In this capacity, he served as product counsel for the engineering team on issues of data use, security and privacy, and also advised Summit's school leaders on a range of legal issues.

Before joining Stanford, he was a tenured professor at William and Mary Law School. His research focused on the theory and practice of civil justice, and he taught Torts, Employment Law and Administrative Law. He began his academic career at the University of Georgia, and before entering the legal academy, he served as Counselor and Chief of Staff to the President of Harvard University.

Earlier in his career, he worked as a law clerk for two federal judges, and as an aide at the White House and U.S. Treasury Department. He is a graduate of Harvard College and Columbia Law School, where he was Notes Editor on the Law Review.

Margaret Hagan,  
Director, Legal Design Lab  

Margaret Hagan is the Director of the Legal Design Lab, a project of the Center on the Legal Profession. Hagan is also a lecturer at the law school and the Stanford Institute of Design (the d.school). She was a fellow at the d.school from 2013-2014, where she launched the Program for Legal Tech & Design, experimenting in how design can make legal services more accessible and effective. She taught a series of project-based classes, with interdisciplinary student groups tackling legal challenges through user-focused research and design of new legal products and services. She also leads workshops to train legal professionals in the design process in order to produce client-focused innovation.

Margaret graduated from Stanford Law School in June 2013. She served as a student fellow at the Center for Internet & Society and president of the Stanford Law and Technology Association. While a student, she built the game app Law Dojo to make studying for law school classes more interactive and engaging. She also started the blog Open Law Lab to document legal innovation and design work. Margaret holds an AB from the University of Chicago, an MA from Central European University in Budapest, and a PhD from Queen's University Belfast in International Politics.
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