


MARQUETTE LAWYER

A bald eagle is the central focus, shown in profile facing right. Its head is white with a yellow beak, and its body is covered in dark brown feathers. The eagle's talons are gripping a thick metal chain that is attached to several strands of barbed wire. The background is a mix of red and white, with some faint, illegible text visible, suggesting a collage or a document. The overall tone is serious and symbolic.

FALL 2018

Judge David Barron on THE CLASH OVER WAR Between Congress and the Commander in Chief

Reactions by Azari, Feingold, and Wittes

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Hessick, Horwitz, Oldfather, Stanley Fish, et al.
on Ethics in Legal Scholarship

Partisanship in Wisconsin Supreme Court Elections

Goodwin Liu, Rebecca Eisenberg, and Jack Chin

Of Reason, Experience, and Politics

Justice Antonin Scalia once referred to “logic and reason” as “the soul of the law.” The context was a 2007 case involving Article III standing, but he meant the point broadly, speaking to what “[t]he rule of law” requires. The statement seems quite correct to me.

To be sure, the late justice did not mean it as a complete statement of what does—and may properly—influence a judge in all contexts. Whether (as seems likely to me) Justice Scalia meant to allude to Justice Oliver Wendell Holmes’s famous statement that “[t]he life of the law has not been logic [but] experience,” no one doubts that important aspects of law depend, for their existence and content, on more than the syllogism. This is why the best succinct summary of the common law—the provision in Federal Rule of Evidence 501 addressing how federal courts may determine the law of privileges—refers to “reason *and* experience.”

All of this, in a sense, helps explain the content of the *Marquette Lawyer* magazine. This issue draws especially on recent programs in Eckstein Hall involving the application of reason and experience in particular contexts. We begin with Judge David Barron’s Hallows Lecture, addressing “When Congress and the Commander in Chief Clash over War” (pp. 8–23). It is a constitutional law topic, but how much guidance does the text of the Constitution offer? Only so much, Barron explains. One of the commenters—Ben Wittes, a prominent and influential journalist in Washington, D.C.—is even more explicit about the matter: “Constitutional scholars tend to debate separation of powers issues in the language of high principle,” he states (p. 22). “But the reality of these disputes is more political in character.” Wittes demonstrates the point with some examples—some *experience*.

To say that something is political is necessarily to say that we should be interested in the views and experiences of our fellow citizens—those with whom we share the same *polis*, if you will. Professor Gabriel “Jack” Chin, in his Barrock Lecture on Criminal Law (pp. 46–48), draws on the experiences of large numbers of former prisoners to suggest changes in law and policy with respect to the collateral consequences of criminal convictions. Professor Rebecca Eisenberg, in her Nies Lecture on Intellectual Property (pp. 51–53), puzzles out why pharmaceutical companies at times seem to embrace Food and Drug Administration approval of products even when it is

not required. Justice Goodwin Liu’s personal story—his road to serving on the California Supreme Court (pp. 54–55)—is fascinating, even apart from the *politics* of it in the modern sense of the word.

To hear of such experiences may well influence those who attend the Law School’s events—students, faculty, lawyers, and a wide range of engaged and curious citizens. The influence of an event may be less dramatic than that described by James Sandman, president of the Legal Services Corporation (pp. 48–51), who was so influenced in listening to a particular speech at a breakfast in Washington, D.C., that he left the managing partnership of a major law firm and started down the road of public service. Consider also Janet Protasiewicz, L’88, whose route to a judgeship on the Milwaukee County Circuit Court began, in an important sense, when she happened to be passing by a house in her neighborhood on the south side of Milwaukee one day while she was in high school (p. 65).

There is so much to learn from the experiences of others. Tennyson, in his poem “Ulysses,” imagining one of the earliest residents of any *polis*, captured it brilliantly. Odysseus (you will indulge me the Greek nomenclature) is back in Ithaca. He is restless—he wants to see more things, meet more people. It is true that he has been away for 20 years—a decade besieging Troy and a decade returning home: “Yet all experience is an arch wherethro’ / Gleams that untravell’d world, whose margin fades / For ever and for ever when I move.”

I hope that your interest is similar and that, even if you could not be with us in Eckstein Hall for a particular program, you will find yourself enriched by some of this magazine’s content, to only half of which I have been able to refer in this column. If Justice Scalia was right (as I have already suggested), shared experiences may not be the soul of the law, but they are the heart of a community. At Marquette Law School, we try to ensure that those experiences are available to—and thus that the community includes—more than those who can be with us at any given time in Eckstein Hall. Join us by reading this *Marquette Lawyer* magazine.

Joseph D. Kearney
Dean and Professor of Law



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Marquette University Law School

Eckstein Hall
P.O. Box 1881
Milwaukee, WI 53201-1881
Phone: (414) 288-7090
Fax: (414) 288-6403
law.marquette.edu

EDITOR:
Alan J. Borsuk

DESIGN:
Douglas Frohmader
Andy Haas Schneider

COPY EDITOR:
Amy Bauman

PHOTOGRAPHY:
Mike Gryniewicz
John Nienhuis

COVER ART
Taylor Gallery

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Voting Rights Issues Drive Scholarship of New Faculty Member

Two things to know about Atiba Ellis: First—in light of Wisconsin’s being one of the states where issues involving voting rights have been consequential and controversial—Ellis has studied “voter suppression basically my entire career,” he relates. And second, during the fall 2017 semester, when Ellis was the Boden Visiting Professor at Marquette Law School, he quickly became involved in the life of the school, not only in teaching a course on civil rights law but also in other ways, including taking part in an “On the Issues with Mike Gousha” program on voting issues.

If these things make Ellis sound like a good fit for joining the Law School’s faculty, he entirely agrees. “For me, this is a fantastic move and a real opportunity to work on issues that fit both my interests and the needs of the communities in Milwaukee and Wisconsin,” Ellis said.

Ellis comes to the Law School after nine years on the faculty of the West Virginia University College of Law. Ellis grew up in Havelock, N.C., and received bachelor’s, master’s, and law degrees, all from Duke University. He clerked and practiced before becoming a legal writing instructor at Howard University School of Law in 2006.

Ellis said voting rights issues have been a central

interest of his since his work in graduate school in the 1990s. His primary scholarly focus has been on “cataloguing the push-pull of expanding and contracting voter rights” in American history. He said, “I write about the people who are on the margins of democracy and why they get excluded.”

“It’s not merely about race or class,” Ellis said, or about any other factor such as gender or age. It’s about the politics that use those statuses to “harm our core identity as American citizens.” The story of who gets to vote has been a long, tense narrative across much of American history, and “that tension continues,” Ellis said. After a period when voting was easier in the United States, current controversies focus on laws requiring people to provide identification, proof of citizenship, or other proof to vote.

Ellis also is interested in trust and estates law, which he is teaching during the fall 2018 semester, and in property law.

His wife, Jessica Wolfendale, was also a professor at West Virginia University and is joining Marquette as a professor of philosophy.

Personal interests outside of work? Science fiction is the first thing Ellis mentioned. “If it’s about space and big questions, I like it,” he said.



“I WRITE ABOUT THE PEOPLE WHO ARE ON THE MARGINS OF DEMOCRACY AND WHY THEY GET EXCLUDED.”

Atiba Ellis



Mitten Recognized by Athletic Trainers Association

Matthew Mitten, executive director of the National Sports Law Institute at Marquette Law School, received the National Athletic Trainers Association's Professional Responsibility in Athletic Training Award at the organization's 69th national symposium and expo in New Orleans in June 2018. Mitten was the first nonmember to receive the award, which recognizes distinction in the advancement of legal, ethical, and regulatory issues in the field. Mitten's primary scholarly interests include legal issues in sports medicine.

Mitten has been a professor at Marquette Law School since 1999 and is a member of many national and international sports organizations, including the Court of Arbitration for Sport, based in Lausanne, Switzerland. In addition to authoring numerous books and articles in legal and medical journals, he is actively involved with practicing lawyers in the field, currently serving, for example, as the immediate past president of the Sports Lawyers Association.



Professors Susan Bay (left) and Alison Julien co-chaired the site committee for the Legal Writing Institute.

National Legal Writing Conference Is a Success in Big Ways and Small

When it comes to a successful conference, the big things—especially the program itself—are the heart of it, but the little things make a professional gathering truly special.

The big things drew nothing but praise in the aftermath of the gathering of 430 law professors at the Legal Writing Institute's 18th Biennial Conference, hosted by Marquette Law School in Milwaukee from July 11 to 14, 2018. The event offered well-chosen and well-delivered presentations on a wide range of topics related to such matters as creating a course, trends in scholarship, and new developments in using technology in teaching.

But the little things made the experience all the more of a hit. Offering Milwaukee custard, for example, and beer from local microbreweries. Or hosting the event's gala banquet on a gorgeous evening at Milwaukee's Discovery World, with great views of Lake Michigan and the city's downtown. (Yes, even the weather did its part to enhance the conference.) Or bringing in cookies from Peter Sciortino Bakery on Milwaukee's east side. The cookies were especially meaningful to Kristen Konrad Tiscione, a professor at Georgetown Law and president of the Legal Writing Institute. Her parents grew up in Milwaukee, and she fondly remembers those cookies from her childhood visits to the city.

"It couldn't have worked out any better," Tiscione said of the conference in every respect. "Honestly, I'm not making this up. It was really wonderful." She passed along emails she received from other participants from around the country, praising the program and Marquette Law School's work as the host.

People left the conference thinking more highly of the profession, of Marquette Law School, and of Milwaukee, Tiscione said.

One of the largest professional gatherings Marquette Law School has hosted, the institute's conference made mid-July one of the busiest times of the year in Eckstein Hall. Almost all of the presentations were held in the building, and the many places in Eckstein Hall conducive to informal gatherings and conversation enhanced the opportunities for networking and mingling that are important parts of such conferences. Tiscione called the work by Marquette's hosts "flawless" and the building "commodious."

Marquette's Professors Susan Bay and Alison Julien co-chaired the site committee that organized the hosting of the event. Other Marquette legal writing colleagues—Professors Rebecca Blemberg, Jacob Carpenter, Melissa Love Koenig, and Lisa Mazzie—were on the site committee, and several were presenters in conference sessions. Dean Joseph D. Kearney welcomed conference attendees in the plenary session at the Milwaukee Hilton and took part in a panel presentation in Eckstein Hall's Lubar Center.

"I was really amazed at how engaged everyone was," Bay said of the presentations themselves. The conference built on Marquette's role as a national leader in legal writing. Julien said the Law School has hosted five presentations for legal writing professors in the last 10 years, making Marquette Law School one of the most frequent legal writing conference hosts.

A sign in the facilities-and-events offices of the Law School says, "Sweat the details." The host team for this large gathering did just that, and it paid off.



Photo by Katharina Poblitzki and with permission from the New York Times

Megan Twohey

Reporter Recounts Work That Sparked a Global Movement

The real moral horror about Harvey Weinstein's record of sexual misconduct was that "he was able to get away with this for 40 years," according to Megan Twohey, an investigative reporter for the *New York Times*. Numerous women, including a list of well-known actresses, have accused Weinstein, one of the entertainment world's most powerful figures for many years, of forcing them into unwanted sexual involvement with him. And, Twohey said, a "complicity machine" involving aides, associates, and friends protected him from the consequences of his conduct.

The way that came to an end played a pivotal role in launching the #metoo movement, which has led many women to speak out about the way they have been mistreated by men. Twohey had a big part in the downfall of Weinstein, who is now facing multiple criminal charges, including first-degree rape.

At an "On the Issues with Mike Gousha" program at Eckstein Hall on May 11, 2018, Twohey described the patient and intense work that she and her *New York Times* colleague and reporting partner, Jodi Kantor, did to bring to light a story that many people said would never get published.

The recognition the two won for their work includes a Pulitzer Prize and listing by *Time* Magazine among the most influential people in America. Twohey was in Milwaukee at the invitation of the Milwaukee Press Club, which cosponsored the program at Marquette Law School.

"It was remarkable at every turn what we uncovered," she said about the extent of Weinstein's sexual harassment in many different settings. Twohey, who has a young daughter, said she hoped the revelations reported by the *Times* and other news organizations will mean that her daughter will not find herself years from now in workplaces with such problems.

"I think this has been a big teaching moment for families," Twohey said.

Law School Recognized for Diversity Efforts

The Law School Admission Council's 2018 annual meeting recognized Marquette Law School for its service in "hosting pipeline programs that promote access to justice and the legal profession."

The council, a national organization focused on quality, access, and fairness in law school admissions, said the distinguishing factor for the recognition was Marquette Law School's sponsorship, along with the Eastern District of Wisconsin Bar Association, of the Summer Youth Institute. The annual program gives middle school and high school students from the City of Milwaukee an introduction to the legal system and paths to legal careers. The 2018 Summer Youth Institute, based at Eckstein Hall, was held from July 19 through 27. Two dozen students learned about the legal system from judges and other lawyers, toured courts and law firms, and took part in a curriculum culminating in oral arguments in front of judges.

Marquette's program received one of four "regional excellence" awards for diversity efforts. The other law schools receiving such an award were the University of New Mexico, the University of Pennsylvania, and Stetson University in Florida.



Iman Snobar, a student at Milwaukee's Ronald Reagan High School, with U.S. Magistrate Judge Nancy Joseph, during the Summer Youth Institute.

Remembering Professor J. Gordon Hylton:

DEDICATED, BELOVED, DISTINCTIVE

Gordon Hylton, a professor at Marquette Law School from 1995 to 2015, died at 65 of cancer on May 2, 2018.

This is an edited excerpt from a remembrance written for the Marquette Law School Faculty Blog.

by Professor Alan R. Madry

During his 20 years at Marquette Law School, Gordon Hylton was one of the most interesting, wonderfully eccentric, and beloved members of the community. No one more thoroughly enjoyed and reveled in being part of the academic world than Gordon. He was a devoted teacher; a relentless, careful, and thorough scholar; and a cherished colleague.

I personally found Gordon to be one of the most interesting people of my acquaintance largely because he had so many interests, found so many things fascinating, and—aided by a legendary memory—pursued them with passion and rigor and a remarkable urge to explain everything. And he was generous. He enjoyed nothing so much as chatting with his students and his colleagues about baseball, country music, the odd personalities who had sat on the Supreme Court, the reasonableness of property doctrines, the early history of Christianity—and all of this, always, with great enthusiasm and courtesy, approaching knowledge and insight as both important and the most fun.

Gordon was a native of Pearisburg, a small town (pop. 2,699 in 2016) in Giles County, which is located in the southwest corner of Virginia. He was a graduate of the University of Virginia School of Law and received a Ph.D. in the history of American civilization from Harvard University. His dissertation was on the admission of African-American lawyers to the Virginia bar, a subject he pursued with an ever-broader focus throughout his scholarly career.

Gordon came to Marquette in the fall of 1995, after teaching at Chicago-Kent College of Law, where three times he was named professor of the year, and Washington University School of Law in St. Louis, where he was the only visiting professor to be named professor of the year. Gordon continued to distinguish himself as a teacher here at Marquette and received the Ghiardi Award for Teaching Excellence early in his tenure.

Gordon never regarded teaching law as merely preparing students for a job in the law. Education for Gordon was always *more*: It was about preparing students for a critically reflective life and, especially with law students, for wise leadership in their communities. He saw himself preparing tomorrow's senators, chief justices, and heads of corporations and nonprofits. He never just taught doctrines; he always asked if the law on the books was coherent and made good moral sense.

He participated in every aspect of the Law School's life; he taught in every one of its foreign programs and also in Ukraine as part of the Fulbright program. He was a constant presence in every workshop, seminar, conference, lunch or dinner, always contributing with courtesy and a marvelously encyclopedic memory, which itself seemed a true miracle of nature.

Gordon had an especially endless passion for baseball. Even for someone such as me who has no interest in baseball, we could talk for hours about the sport because those conversations were never about just baseball. They were about the place of baseball in the history of American culture and the growth of sport as an aspect of the country's response to capitalism and industrialization.

Gordon Hylton was particularly devoted to and proud of his four children, Veronica, Joseph, Elizabeth, and Caroline. We at Marquette were fortunate to have shared him.



Professor J. Gordon Hylton



HALLOWS LECTURE

WHEN CONGRESS AND THE COMMANDER IN CHIEF **CLASH OVER WAR**

David J. Barron

I'm particularly pleased to be here today because I have a bit of a connection to this great university. My brother, Jonathan, now a professor at the University of Southern Mississippi, was a post-doctorate fellow in the English Department at Marquette, and I visited him here nearly 25 years ago. It's taken me some time to get back to Milwaukee, but I am glad to have done so, and I want to thank your dean for the invitation. As he mentioned in introducing me, we had the privilege of clerking together at the Supreme Court many years ago, for different justices. I should have predicted Dean Kearney's future. If we could analogize the group of young lawyers who were then clerking on the Court to a law faculty, he was definitely our dean. There was no one more enthusiastic or welcoming and no one more interested in doing something that is increasingly rare and increasingly important: trying to bridge differences of party and outlook to remind us of the importance of there being a shared legal culture in which respectful disagreement is possible.

In that same vein, I want to carry on a conversation that my colleague on the bench, Judge Brett Kavanaugh, began with his excellent Hallows Lecture here in 2015. Judge Kavanaugh drew on his own service, as an executive-branch lawyer in the George W. Bush administration, to address five important separation-of-powers challenges, one of which concerned war powers. I want to draw on my own experience as an executive-branch lawyer, in the Barack Obama administration, to review some of the history that bears on how our constitutional system allocates war powers. I wish to do so by considering one very important but often overlooked allocation: namely, who has control over how a war is conducted once it's underway.

David J. Barron is a judge of the U.S. Court of Appeals for the First Circuit. Before joining the court in 2014, he was the S. William Green Professor at Harvard Law School, whose faculty he joined in 1999. Barron, who began his legal career as a law clerk to Judge Stephen R. Reinhardt of the U.S. Court of Appeals for the Ninth Circuit and Justice John Paul Stevens of the U.S. Supreme Court, has written extensively about presidential and congressional authority during wartime. He is the author of *Waging War: The Clash Between Presidents and Congress, 1776 to ISIS* (Simon & Schuster 2016). This is an edited and expanded version of Judge Barron's 2018 E. Harold Hallows Lecture at Marquette University Law School. Interspersed here are three writers' reactions to Barron's assessment.



I. THE NATURE OF THE PROBLEM

This issue obviously has importance now, as it has ever since the attacks of 9/11. Since that September, we have been in an authorized armed conflict, as reflected in the statute that Congress passed that month, known as the Authorization to Use Military Force—and it seems likely that we will be in that conflict for the foreseeable future. This means that a recurring issue concerns not so much what we often focus on in thinking about war powers—who gets to declare war or use force—as a distinct one: Who gets to decide *how* to fight a war once it begins—that is, with what weaponry, with what tactics, with what scope, who may be detained and how and where, with what protections, what kind of surveillance is permissible and when, what kind of interrogation, how long can it go on? All of these issues and more have been subject to constitutional contestation over the last nearly two decades, sometimes resulting in face-offs in the Supreme Court but much more often resulting in clashes between presidents and Congress. The reason is clear. Not only is this an authorized war with no clear end, but it's a very unusual one in which the enemy is not traditional (in fact, some people contest whether it's a war at all) and the home front is very much a potential battleground. The result is that the conduct of this war is quite likely to bump into areas in which Congress has not been at all shy about regulating, thereby setting the stage for potential clashes between what the commander in chief would like to do and what Congress has said he may do.

My goal in this lecture is not to resolve such dilemmas: The privilege of being a judge making public commentary is that I'm relieved of my usual paid obligation, which is to make a decision. Instead, I just want to introduce the problem to you and describe some of the history that underlies it. I think that we can find in that history some important lessons about what has enabled our system of separated powers to endure—but also some cautions about its fragility and its dependence on the wise decision-making of those who are entrusted with leading its component parts.

One last point before diving in: The particular separation-of-powers challenge that I'm going to be discussing is a fitting one to address in a lecture that remembers the great legacy of Chief Justice Harold Hallows. His service as chief here in Wisconsin

spanned 1968 to 1974. These were critical years in the history of the battle over constitutional war powers, as some of you may remember.

Although I won't be focusing on those tumultuous years, it was during that time that what had largely been a passive and compliant Congress (some would even say an absent one) began slowly but surely to challenge the chief executive in his conduct of the Vietnam War. In the course of those years, the first measures to prohibit the use of combat force were enacted, with respect first to Laos and then Cambodia and eventually all of Indochina. The War Powers Act was also passed in this period, which also saw these things: the great American historian Arthur Schlesinger declared that we were facing the specter of what he termed an imperial presidency; Richard Nixon's too-often-underappreciated successor, Gerald Ford, would find a way to bring the Vietnam War to an end while respecting congressional limits on his war powers; and Ford would also declare it his intention to convince the American people that his presidency would not be an imperial one.

My own interest in the subject traces back to a time before I was a judge and before I'd even gone into the government while already a law professor. Before all that, I was a young lawyer at the Office of Legal Counsel, which is a small office in the Department of Justice. While working there, I was exposed to issues of presidential power.

After I left that office, it popped back into the news, as I was teaching. Some of you may remember that, in the early years of the war on terrorism, a series of news reports came out about memos, issued by that office, that took a quite sweeping view of the president's power to conduct war. Those opinions suggested that the president alone had the power to decide how best to defeat the enemy and that Congress had no right to control how he exercised that power. Those ideas took the form of opinions suggesting that even the torture act was unconstitutional insofar as it got in the way of the president's power to carry out the interrogation tactics that he believed to be necessary.

I confess that as an academic I was surprised to hear that this could be the law or that history would bear out that premise. But I was also surprised to find very little scholarship addressing the questions of who *does* have the final say in how to conduct a war. And so I dived into the issue as an academic and, along with Marty Lederman, produced two very long (and I mean *very* long) articles reviewing that history and trying to question the sweeping propositions that my old office had taken.

Who gets to decide *how* to fight a war once it begins—that is, with what weaponry, with what tactics, with what scope, who may be detained and how and where, with what protections, what kind of surveillance is permissible and when, what kind of interrogation, how long can it go on?



But sometimes life catches up with you. It turned out in 2009 that I was appointed to lead that office as the acting head. This meant that the questions I had written about were no longer academic. I had to confront them myself—and, as you may guess, things can sometimes look a little more challenging when they confront you for real.

I knew that the issues were sure to arise. After all, those memos and the positions that the prior administration had taken about the president's power to conduct the war had been very much a subject of the campaign in 2008. I was now working on the transition for the new president, who in the campaign had made any number of commitments about how he would conduct the war differently.

This meant that questions might arise if the president chose to pursue one approach to interrogation or detention—say, closing the detention facilities at Guantanamo Bay—and Congress decided that it had a different view of how to conduct the war. What would the new president do? Would he back down, or would he, too, contend that Congress had no right to dictate the rules of engagement?

When I returned to being a professor, I was interested in the subject anew, but this time less to figure out what the right answer was and more to research what presidents have done in our history when they have clashed with Congress over how to conduct a war. Have they fought back? Have they backed down? Have they tried to find some way of accommodating? What has been the approach? Based on this research, this evening I want to explore the topic by working through three historical examples of commanders in chief who have confronted the dilemma and tried to address it.

II. THREE CASE STUDIES FROM HISTORY

Now you will forgive me because tonight I have cherry-picked my commanders in chief. This may make the matter seem a more optimistic tale than one could otherwise choose to tell. But I think it important to review these three: George Washington during the Revolution, Abraham Lincoln during the Civil War, and Franklin Delano Roosevelt during World War II. It's not just that they were extraordinary people who really, I think, understood the separation of powers in a way that very much suggested (as one person said of FDR) that it was stitched in their breast.

It also is that each of them confronted this challenge when there were real existential threats to the country. Indeed, during the Revolution, there was a question whether there would be a nation at all. Lincoln faced a time when the nation was threatening to be split in two. And of course World War II was the most serious threat to free societies that the world has ever known. So, to understate a point, it was not as if they were dealing with this challenge—of who gets to run a war—in a circumstance where the stakes were low. Yet when we review the history, each of these individuals managed to approach the question in a way that belies the idea that the commander in chief simply has absolute power or the simplistic notion that Congress alone just dictates the answer. So, with that setup, let me walk through what may amount to three stories about these commanders in chief.

[W]hen we review the history, each of these individuals managed to approach the question in a way that belies the idea that the commander in chief simply has absolute power or the simplistic notion that Congress alone just dictates the answer.



GEORGE WASHINGTON

We will start with George Washington. This is before we have a constitution and therefore before there truly is a United States of America as we know it now. But we did have a commander in chief: That was the title that the Congress of that time had given to George Washington. It is the summer of 1776. The first serious battle he faces—after a rather successful engagement with the British in Boston—is about to take place in New York. We are coming into the fall of 1776, and the British have amassed a huge naval force off the coast of Long Island. Washington is convinced that this is going to end badly for him. So he's decided that there is no percentage in trying to fight back: The aim is to get out of New York, and the question is, "How do you leave?"

One possibility is to do a clean retreat: No one gets hurt, and the British take over in New York. The other possibility is to burn New York to the ground on the way out, so that when the British arrive, there's nothing for them to claim. Washington debates it with his advisers, and he decides the clear and correct strategic option or tactical option is to burn New York to the ground.

But rather than just do that, he sends a letter to the president of the Continental Congress, who's off in Philadelphia, to ask whether he *can*. The letter says, in essence, this: "Ought we leave New York to be winters quarters for the enemy?" Now this is a room full of lawyers, so you will recognize that as a leading question.

Washington is fully expecting—I'm convinced—that the answer will be, "No, we ought not to leave New York as winter quarters for the enemy." It's not the answer he gets. John Hancock consults with his fellow members of the Continental Congress, and the very next day, they send a letter back to Washington, telling him that he is absolutely forbidden to burn New York to the ground. Washington is furious: He thinks this to be one of the capital errors of the Continental Congress. He doesn't see any good reason for this conclusion, but, by all accounts, he feels duty-bound to obey the order. So he does not burn New York.

Now, as some of you may know, fire does break out in New York, and a piece of New York does burn as Washington's troops are leaving. The British are convinced that Washington had to be behind it because any good general would actually

have burnt New York to the ground. But despite all the efforts of historians, over the centuries now, to demonstrate that Washington was behind it, the evidence is that he was not. “Providence,” as Washington put it, “or some good honest Fellow, has done more for us than we were disposed to do for ourselves”

In this first story, Washington is in the classic mode, in which he’s the aggressor. All the energy is in the executive: The executive is the one that wants to take the war to the enemy by using a harsh tactic, and Congress is the tempering force that restrains the commander in chief. The twist on the story is that, rather than the commander in chief’s acting like an emperor, he backs down and accommodates Congress’s wishes.

The story takes a different turn because not long after the standoff in New York, the Americans’ fortunes are going badly. They have one good thing: They had done pretty well in the earlier fight in Boston, before the British took New York, and during it, they had captured a British officer. But they have had a string of losses since New York, and now something even worse has happened: General Charles Lee of the Continental Army has been captured and is in British hands.

The Continental Congress thinks that this is a chance to raise the morale of the American people by making this a cause célèbre. The Congress stirs up a sense that the British are mistreating this captured American general. To keep pressing this point, it orders Washington as the commander in chief to mistreat the British officer whom he holds just as badly as it claims that General Charles Lee is being mistreated by the British.

Washington is horrified. This goes against all his notions of decency and fair play. He also thinks that it’s really stupid: It means that any of his own troops who are captured will be mistreated. He further believes that—in the eyes of the world whose support the Americans are trying to get—this will look really bad. Nonetheless, he complies. How so? Archibald Campbell, the British officer being held, finds himself no longer getting the 20 servants he was accorded as a captured enemy officer. He no longer gets to roam freely in Reading, Massachusetts, in a six-mile radius as he previously had. He finds himself put in close custody, in what he describes as a dungeon. We know that Archibald Campbell thought it to be a dungeon because he wrote a letter to George Washington, saying in essence, “You’re a dictator;

. . . Washington is in a very unfamiliar guise. The commander in chief is not the aggressor. He’s the tempering force. It’s Congress that wants to pursue hard war

you could do something about this. This is no way to treat me.” My favorite part of the letter: Archibald Campbell says (again, in essence), “I don’t even have a single servant.”

So Washington gets this letter, and you might think that he would just throw it away. Instead, remarkably, Washington writes back to our Archibald Campbell, and the thrust of his message is, “I do not have the powers you suppose; it’s neither in my authority nor is it my inclination to disobey the orders of the Congress.” But, at the same time, Washington’s on the side, writing to members of the Continental Congress and telling them that there is no reason to be doing this. He says, more or less: “You’ve told me to retaliate against Campbell; it’s not clear the British are actually treating General Charles Lee as badly as you say; so even under your own order, it’s not clear that I have to be treating him this way.”

And Washington keeps writing to the Congress even as he’s telling Campbell something like this: “My hands are tied; I must do what my Congress tells me.” Over the course of many months, the Americans work out a negotiation. Eventually John Hancock writes back to Washington and says, approximately, “Look—we never meant for you to treat him any worse than Lee is being treated; if you tell me that Lee is not being mistreated by the British, you can treat this guy fine, too.” Then, eventually, Washington convinces the Continental Congress to allow him to do a prisoner swap. Lee is let go; British soldiers are released; and the controversy passes.

The interesting thing about this is that Washington is in a very unfamiliar guise. The commander in chief is not the aggressor. He’s the tempering force. It’s Congress that wants to pursue hard war; Congress is the aggressor pushing the war on the chief executive.

Here, then, is the first thing to see *early* in our history (in fact, all this is some of the backdrop to the later Constitution): The model is a commander in chief who was quite overtly respectful of the idea that he was supposed to follow the orders of the Congress. The Framers have an idea from their own lived experience that it’s not inevitable for the president to be the aggressor and Congress to be the check. It’s just as possible for Congress to want to be the aggressor and the president to be the check. They also know from their experience that the actual lines of authority are somewhat murky.

ABRAHAM LINCOLN

Let's fast-forward quite far, into the Civil War— the next great moment of existential threat to the United States. The country has split in two. Abraham Lincoln is the president and immediately is confronted by the attack on Fort Sumter. Congress is away. Now you might suppose he thinks, "That's lucky. They can't check me." But the flip side of that is that Congress also can't *empower* Lincoln—and when one reads the Constitution, it's fairly clear there was some contemplation that the president would have to be empowered in order to wage a full-scale war.

What is Lincoln to do during this period? Here's the first issue he confronts: When do I call Congress back? In those days, Congress took an extremely long recess. The attack is in April, so Lincoln has months and months ahead of him with no Congress. Some people tell him: Call the legislators back right away. They could get here in a couple of weeks. Do a little bit if you must in the interim, but then call them back and get them to authorize things.

As it happens, Lincoln settles on July for the legislators' return. That gives him 80 days with no Congress in place. In those 80 days, he does an extraordinary amount on his own. No president has ever exercised war powers on his own the way Lincoln did during that period. He suspends habeas corpus, roughly speaking from Washington, D.C., all the way up to Maine. He authorizes huge amounts of forces to be called up. He institutes a blockade on the southern ports—which is, by all understanding at the time, an act of war. For much of this, there is no clear authority.

Why did he wait 80 days? I'm partial to this view: Lincoln waited that length of time in part because it was absolutely critical to him that Congress ratify what he had done in Congress's absence. That means he wants a Congress that has come back ready to ratify. In this he faces a problem because many of the border states had no legislators who could be seated: the representatives' terms had expired, and these states hadn't had the new elections for the next term. He picked the 80-day mark because that was the earliest period by which, under its laws, the border state about which he cared most—Kentucky—could select a new slate of members to sit in the Congress that Lincoln hoped would ratify all he had done. And in that period of time, Lincoln is monitoring very closely the coming elections in Kentucky, to make sure that he gets a slate that's going to be on board for his program.

So when Congress comes back, he's ready for it to ratify. The very first thing proposed at this session is a bill to ratify everything Lincoln had done in those 80 days. Charles Sumner tells Lincoln that it should take a week—no problem. In fact, that session goes on for nearly five weeks, and it's not until the very last day that Lincoln gets the authorization with ratification for what he had done.

As much as Lincoln or Sumner thought it would be compliant, Congress turns out to be very difficult to get on board. Its members have all kinds of different ideas about what should be done and how to do it. One of the big debates to break out was whether they can even debate things other than the war during this session; this completely exasperates Lincoln. Again, though, Congress does get on board, and that Kentucky delegation in particular proves supportive of Lincoln.

All this is worth relating because there's a clash coming for Lincoln: It's over how to fight the war, and it concerns particularly what to do about the enslaved people and how they'll be treated once they're captured.

By 1862, the Congress now is largely in the control of the radical Republicans. They want to pursue an approach that they call "hard war," and they're especially pushing for emancipation. Lincoln was famously reluctant to go down that road. Here is the way it first comes into view for Lincoln, most dramatically: Congress starts debating a statute, known as the Second Confiscation Act, which will order him to emancipate the slaves when they're taken in the South. The theory is that this is a wartime measure, so Congress should be able to decide how what's known as contraband—that's what they were calling the enslaved people in this context—should be treated.

This is a direct threat to the powers of the commander in chief: Congress is now going to tell him directly how to treat the enemy's "property," against his apparent wishes. Just to give you enough flavor of this debate, a huge fight breaks out in the Senate, and one of Lincoln's closest friends in the Senate, Orville Browning from Illinois, takes the view that this has to be unconstitutional. No way can Congress tell the commander in chief how to treat the enemy during an ongoing war. When Browning takes that view, he's confronted by a senator from Michigan, Jacob Howard. I want to read you a little bit of their back-and-forth because I think it puts into sharp relief the nature of the constitutional debate that I'm describing.

[O]ne of Lincoln's closest friends in the Senate, Orville Browning from Illinois, takes the view that this has to be unconstitutional. No way can Congress tell the commander in chief how to treat the enemy during an ongoing war.

Jacob Howard says that he thinks it's absurd to say that Congress has no power to tell a president how to fight a war:

[S]hould the President, as Commander in chief, undertake an absurd and impracticable expedition against the enemy, one plainly destructive of the national interests and leading to irretrievable disaster, or should he basely refuse to undertake one, or, having undertaken it, insist upon retreating before the enemy, and giving over the war to the manifest prejudice of the country, or should he treacherously enter into terms of capitulation with the manifest intent to give the enemy an advantage, would the Senator rise in his seat here and insist that Congress has no power to interpose by legislation and prevent the folly and the crime?

Howard said that he could not imagine how Senator Browning could be willing to follow the logic of this position and “exclaim, ‘the country is without remedy; Congress is powerless; the Constitution furnishes no means to arrest the approaching ruin; we must not travel out of the Constitution; and we must submit our necks to the yoke. [They really spoke quite well back then, didn't they?] It is the will of the Commander in chief, and that, and that only, in such a case is the Constitution.’”

Orville Browning praised his adversary for “meet[ing] the question in the most direct and manly terms”—they didn't always speak perfectly—but said that he did not agree:

[W]hen the Army is raised, when the Army is supported, when it is armed, when we are engaged in war and, it is in the field marshaled for strife, I deny that Congress, any more than the humblest individual in the Republic, has any power to say to the President, do this or do that; march here or march there; attack that town or attack this town; advance to-day and retreat to-morrow; give up a city to be sacked and burned; shoot your prisoners.

So the debate ends. Browning loses in the Senate: The Second Confiscation Act passes, including a clause that, in effect, orders the commander in chief to issue an Emancipation Proclamation.

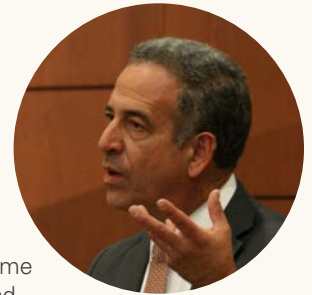
Browning makes one last-ditch effort to try and convince Lincoln not to do it. He meets with Lincoln, in the president's office, on July 13, 1862.



REACTION

CONGRESS'S MINIMUM DUTIES IN THE WAR-POWERS SPHERE

by Russ Feingold



I am pleased to respond to the excellent Hallows Lecture given by Judge David Barron at Marquette University Law School. I have had occasion to reflect on this general topic since my time as an elected official—first during a wonderful year I spent teaching at the Law School in 2011 and, more recently, while visiting at Yale Law School, where I had occasion to be on a panel with Judge Barron.

That panel—which included a number of people besides the judge and me—unanimously noted the decline in the balance between executive and congressional war powers in the past few decades. Whether this is characterized in terms of executive aggrandizement or congressional abdication or acquiescence, few believe that the current balance reflects the Founders' will or the needed checks and balances on presidential power in this sphere. This trend has been well-documented, particularly by such scholars as Louis Fisher and Michael Glennon. Judge Barron is able skillfully to cite three examples of the tension between the two branches and to explain that, in the end of each, a resolution was achieved that at least in some form reflected such checks and balances. However, in each instance, the commander in chief or president was confronted and challenged by a clear congressional position that forced him to consider the role of Congress in war making or in the conduct of a war once initiated.

Unfortunately it has become too politically attractive for members of Congress not to insist on their duty, under Article I of the Constitution, of engaging with issues such as when a military action should be commenced or terminated. It is usually easier not to have a vote on record and then to see how things go—i.e., to criticize interventions if they go awry as the death tolls of American troops mount or to appear at “welcome home” parades or ceremonies when things go well. This has been the problem with the failure of Congress under three different presidents to challenge executive interpretations of the 2001 Authorization of the Use of Military Force (AUMF) intended to take on those who attacked us on 9/11. The result is a lack of public debate about whether the expanded military interventions should be undertaken in Yemen, or Syria, or remote regions of Africa against groups such as ISIS or Boko Haram, which didn't even exist in 2001, or whether the AUMF allows expanded domestic surveillance despite the clear limitations in the Foreign Intelligence Surveillance Act. Congress has been unable to come together to protect its constitutional role in defining the scope and duration of an intervention.

There are a few recent hopeful signs, as bipartisan coalitions in both houses have at least begun to consider repealing or replacing the AUMF before the current administration uses it to broaden our role in the war in Yemen or to justify supporting the Myanmar regime's actions against its Islamic Rohingya minority. Efforts by such members as Senator Tim Kaine, Senator Bob Corker, and Representative Barbara Lee have at least been advanced at the committee level. The leadership of both houses, however, has thwarted real debate on these initiatives, giving the administration free rein. In fact, top officials of President Donald Trump's administration have asserted completely unfettered executive power in this context under the president's Article II commander in chief powers.

At a minimum, both houses of Congress should hold regularly scheduled public debate during the duration of a military intervention. Perhaps this could be required by the rules of each house. A model for this might be the kind of very focused, televised Senate debate that was held in January 1991 when President George H. W. Bush sought authorization for what has become known as the first Gulf War. Whether Bush would have intervened even if he had lost the vote is a fair consideration. Yet, at least, Congress went on record in a reasoned, deliberative way that all Americans could follow and evaluate. Sadly, nothing approaching that kind of debate preceded the grossly politically motivated and rushed decision in the fall of 2002 to authorize the second Iraq War. The subsequent exposure of the false premises of that war only underscores the need for more coherent, bipartisan congressional consideration of such matters.

This is why, for my money, the crucial comment in Judge Barron's lecture is this: “At some basic level, in a democratic system of separated powers, the people's ability to know what is being decided and why it is being decided that way is the most important check on the abuse of power that there is.”

This protection cannot be achieved without consistent, open, and coherent congressional debate on whether and how military interventions, once commenced, should be conducted and concluded. As Judge Barron so well illustrated, this is what General George Washington, President Abraham Lincoln, and President Franklin Delano Roosevelt all had to confront when each wanted to take crucial military action in the name of the American people. No president should be given any easier treatment.

Russell D. Feingold was a U.S. senator from Wisconsin from 1993 to 2011. He is the author of *While America Sleeps: A Wake-Up Call for the Post 9/11 Era* (Crown Publishers 2012) and currently serves as distinguished visiting lecturer in international studies at the University of Wisconsin–Madison.



FRANKLIN DELANO ROOSEVELT

One last example: It involves Franklin Delano Roosevelt (FDR) during World War II. The year is 1942, so we're into the actual fighting, and the war is not going particularly well. Two different events are going to come together, with the Supreme Court at the fulcrum of them. They're going to put these issues of who controls the conduct of war right into the lap of the Supreme Court, in a way that I think to be the only time in our history it's been so directly presented (maybe with the exception of the *Steel Seizure Case*). The two things are happening simultaneously.

That summer a case comes to the Supreme Court concerning eight Nazi saboteurs. These are handpicked persons, each with American ties, chosen by Hitler, and they land in U-boats on the American coast—half of them land off the coast of Long Island and half of them land in Florida. They come in their uniforms, but they bury these in the sand upon arrival. They put on their street clothes and are supposed to fade into American society and wreak havoc. They're going to blow up train stations and bridges; they are supposed to target Jewish department stores and blow them up, too.

They are, in effect, the terrorists of their day; they also turn out to be a relatively hapless crew. Because they had American ties, some also had American girlfriends, whom they immediately start looking up when they get to the United States. Lo and behold, they find themselves captured by the FBI fairly quickly.

Roosevelt has no use for their being tried in civilian courts. He views the saboteurs as an invading enemy force, and they must be tried by the military, in his judgment. So they're transferred from the FBI into military custody, to be tried in a military commission constructed out of rules that the president will establish. In fact, the trial of those Nazi saboteurs occurred in a room in the suite of offices in which I worked on the fifth floor of the Justice Department. So the history was quite resonant while I was working there.

The important thing about this case is that it tees up a question for the justices in the following way. The Supreme Court holds an emergency session to hear the petition of the saboteurs as to whether they can be tried in these military courts. In the course of those proceedings, it becomes clear the Court thinks, "Yes, they can be tried in military courts."



There's no reason they have to be held in civilian proceedings or tried in civilian proceedings."

But there is one issue about which the Court is a bit worried: What procedures can be used to try the saboteurs? The Court worries because the statutes creating the authority of the president to establish military tribunals set forth certain rules that you have to apply, and a particularly key one is that to impose the death penalty requires a unanimous jury. By contrast, the rules that the president set up for this military commission allow the imposition of the death penalty with just a two-thirds vote.

The justices start to ask some questions of the attorney general, along the lines of, "How does the president have the right to set these rules?" The attorney general makes a pass at this, to the effect of encouraging the Court not to worry about it so much. And the justices come back and say, in essence, "No, we're kind of worried about it. What do you think about this seeming conflict?" To this the attorney general says, roughly, "Well, the president is not bound by a statute in the midst of war." In reading the transcript, one can practically see Chief Justice Harlan Fiske Stone leap forward to say, more or less, "Come again—the president's not bound by a statute?" Thereupon the attorney general says, in essence, "Well, I didn't mean to say that—I mean, you know, I'm sure he's kind of bound by statute." And *thereupon* Justice Felix Frankfurter leaps out of his chair, to this effect: "What do you mean you're saying that he can be controlled by Congress?" At this point Francis Biddle, the attorney general, basically sounds like if he could just leave, he'd be happy to do so. He manages to get through the proceeding without giving a clear answer.

Within days, the Supreme Court issues its judgment. It's a brief order, denying the petition for habeas and saying, in essence, "We'll get back to you with our reasoning in October." The reason that this is so important is what happens between that judgment in July and the opinion in October. During that time, a different kind of controversy concerning the president's war powers is really coming to a head. This one has to do with FDR's power to run the economy as the commander in chief, and it arises because inflation is spiraling out of control.

Roosevelt thought that if there was any threat to the war effort that was greater than the military threat the Nazis and Japanese posed, it was inflation. He believed that we really could lose the war if we could not keep inflation in check, both because of the cost of goods to run the war and because of what inflation would do to the morale of the

American people. So he's very intent on trying to cap prices—and in particular farm prices. But he has a problem: There's a statute that seems to prevent him from capping farm prices.

Roosevelt discusses with his advisers all spring what to do about this cap. One possibility is he simply says, "You know what? I'm the commander in chief; this is absolutely vital. We're living in an era of total war. If I can't mobilize the people, we can't successfully fight the war. So I will just assert extraordinary powers as commander in chief to cap prices in order to save the country."

A lot of advisers are horrified by this idea, think it's a very dangerous notion, and there's a debate in the executive branch back and forth—what should the president do? He approaches Congress to see if it'll give him some authority. "No, we won't give you any authority," is essentially the response. So what's Roosevelt to do? Well, in classic FDR fashion, he makes an announcement, to this effect: "I'm going to give a radio address on Labor Day. You'll know then what I'm going to do."

So everybody's poised for this Labor Day address, but no one knows what he's going to do. Is he going to issue the executive order? Many newspapers seem to think so. Roosevelt knows he is not going to issue an executive order.

Instead, Roosevelt gives an address and says, essentially, "I am going to give you one month to give me the power I've requested. If you don't, I will have to do what I can do under the statutes and the Constitution." No one knows quite what to do about it. But what happens—and this was Roosevelt's bet—is that members of Congress start jumping on the floor, saying (approximately), "We have to give him the authority, or we will have a dictator." Quite clever on the president's part.

And, interestingly, given what his lawyers have advised him, Roosevelt knows at the same time—just as did Washington, way back when he read those orders from the Continental Congress and saw that there was some give in it—more than he lets on. Just as Lincoln saw Congress's Second Confiscation Act as potentially empowering him, Roosevelt's lawyers say, in essence, "You know what? Congress passed a statute recently that allows you to ration goods, and that statute allows you to put conditions on the rations. You could put price conditions on the rations, and in effect through your rationing program you'd be able to get a cap on farm prices."

Roosevelt knows this—indeed, there is a whole elaborate legal opinion he's going to rely on if

In reading the transcript, one can practically see Chief Justice Harlan Fiske Stone leap forward to say, more or less, "Come again—the president's not bound by a statute?"

necessary—but he doesn't want to disclose it. He wants to scare members of Congress that they might have a dictator on their hands in hopes that instead they'll actually authorize him to proceed.

So that scene is played out on Labor Day, but now we're back to the Supreme Court because—you will remember—the Court promised to return with its opinion in October in the case of the saboteurs. The justices haven't written it yet. But they have just witnessed this extraordinary showdown between Roosevelt, potentially claiming powers to control the entire economy, and the Congress.

Here's the end of the story. Chief Justice Stone is working on the opinion, and he sends around a draft to his colleagues. In modern parlance, he says, "Houston, we have a problem." The problem is that he's having trouble writing the opinion, and the reason for this is that the statutes requiring certain procedures seem to conflict with the procedures that the president has said he's going to use in the commissions.

Stone tells his colleagues, in essence, "Well, maybe we could just overlook it, but if we do that and then the saboteurs who are not executed come and challenge the process, it's going to be evident we overlooked a legal problem. We blessed the process, and now six people have died." The other possibility, he says, is not so good either. To paraphrase the chief justice: "I can't quite figure out how to reconcile this statute and these rules."

Robert Jackson, who is a justice on the Court at the time, sends a memo around. He says, more or less, "I have the perfect solution. Just say that it would be unconstitutional for Congress to dictate to the president as to the rules he has to apply to an invading enemy force and trying them for a war crime. And because that would likely be unconstitutional, we can't read the statute to prohibit the president from choosing his own rules."

Well, other justices are horrified. In particular, Hugo Black's law clerk writes him a memo, saying, approximately, "You cannot sign onto this, boss, because, if you do, it's a green light for Roosevelt to do what he was just threatening to do in taking over the economy. If we say the president's not bound by statute—that he has control even when Congress has told him not to fight a war a certain way—we're opening up the floodgates in an era of total war. You can't go that route." So Black informs the Court of his displeasure with Jackson's solution.

I want to close this story with the way this standoff gets resolved in the Court. The resolution

Here's the end of the story. Chief Justice Stone is working on the opinion, and he sends around a draft to his colleagues. In modern parlance, he says, "Houston, we have a problem."

to this problem takes the form of a very unusual memo that Felix Frankfurter prepares. You know it's unusual because it's titled "FF's Soliloquy." I clerked at the Court only for a year, but I never saw a memo that was titled a soliloquy. Frankfurter says, in essence, "I know the men who are fighting in the fields right now. They were my students when I taught them in law school." Here's part of what Frankfurter writes (in the actual words):

It requires no poet's imagination to think of their reflections if the unanimous result reached by us in these cases should be expressed in opinions which would black out the agreement in result and reveal internecine conflict about the manner of stating that result. I know some of these men very, very intimately. I think I know what they would deem to be the governing canons of constitutional adjudication in a case like this. And I almost hear their voices were they to read more than a single opinion in this case. They would say something like this but in language hardly becoming a judge's tongue: "What in hell do you fellows think you are doing? Haven't we got enough of a job trying to lick the Japs and the Nazis without having you fellows on the Supreme Court dissipate the thoughts and feelings and energies of the folks at home by stirring up a nice row as to who has what power when all of you are agreed that the President had the power to establish this Commission and that the procedure under the Articles of War for courts martial and military commissions doesn't apply to this case. Haven't you got any more sense than to get people by the ear on one of the favorite American pastimes—abstract constitutional discussions. Do we have to have another Lincoln-Taney row when everybody is agreed and in this particular case the constitutional questions aren't reached. Just relax and don't be too engrossed in your own interest in verbalistic conflicts because the inroads on energy and national unity that such conflict inevitably produce, is a pastime we had better postpone until peacetime."

One might misread Frankfurter's point—that is, one might mistake him to be saying that in times of war the laws fall silent. But if one reads this closely, the precondition for his saying "Let's not have a big fight if we ultimately agree" is his having said this (I've returned to paraphrasing): "All of us

REACTION

HOW POLITICS INFLUENCE PRESIDENTIAL WAR POWER—AND THE OTHER WAY AROUND

by Julia R. Azari



David Barron’s Hallows Lecture on war-powers clashes between Congress and the president highlights a number of important issues. As the judge rightly notes in his conclusion, legal debates about wartime authority reflect not just textual analysis but also real political, military, and human stakes. This response elaborates on the political implications of these considerations. Friction between branches over the conduct of an ongoing war is shaped by public opinion, partisan conflict, and prevailing ideas of the time. As wars continue, the political dynamics around them often shift, with implications for the roles of the president and Congress. The contours of these struggles often extend beyond the immediate circumstances.

Although political actors throughout history have perceived their wartime situations as new and unique (as Barron illustrates), there does seem to be something distinct about the current state of undeclared, indefinitely authorized (it would appear) wars against non-traditional adversaries. Race, national security, and presidential power have intersected before—consider Franklin Roosevelt’s executive order 9066, ordering the removal and internment of persons of Japanese ancestry. Affirmed by the Supreme Court as a constitutional national security measure, the policy also stood on the shoulders of decades of anti-Asian sentiment, some of it codified in immigration law. Here in 2018, the *Korematsu* decision is fresh on observers’ minds because of the Court’s decision to uphold the “travel ban” of President Donald Trump’s administration against six majority-Muslim nations. The crux of the Court’s decision rests on presidential national security authority. Yet the politics of the policy—Trump’s campaign rhetoric about Muslims and the role of anti-Muslim sentiment in his nomination and election—are very much rooted in a “war on terror” that has lasted for almost two decades. The backdrop of an ongoing war against an ill-defined adversary may not have changed the extent of presidential power in the realm of national security. But it has changed the electoral opportunities that determine who controls those executive powers and on what terms.

The second consideration is that conflicts tend to become less popular over time. We don’t have modern polling to assess what President Abraham Lincoln was facing, but we do know that George McClellan, running against Lincoln on an anti-war platform in 1864, won nearly 45 percent of the vote. In the face of flagging support, the war needed purpose. One of Lincoln’s most significant uses of war powers—the Emancipation Proclamation, which Barron discusses—also aligned with a shift to imbue the war with moral significance and to change its purpose from saving the union to ending slavery. Recent presidents have faced even more-challenging political conditions. By the end of 2004, a Gallup poll reported half of Americans as thinking that the Iraq War was a mistake. Similar attitudes about the Vietnam War reached that benchmark during the election year of 1968. Unpopular conflicts alter the political incentives for both presidents and Congress, encouraging them to repudiate the conflict if possible. The structure of each branch makes for different ways of addressing these dynamics. Presidents obviously have more options to undertake covert action, out of the public eye, to manage a war that has become unpopular. Congress faces collective-action problems in moving forward during an ongoing war (or really at any other time) but can sometimes pursue solutions aimed at altering the war powers framework.

This leads us to the third point about ongoing conflict and the political environment: After a lengthy and controversial war, members of Congress are sometimes inclined to blame presidential overreach and take action to correct it. Two examples of this are the Bricker amendment to the Constitution, which was unsuccessful in Congress, and the War Powers Resolution, which was passed over President Richard Nixon’s veto in 1973 and became law. The Bricker amendment, which would have altered presidential treaty-making power in the wake of the Korean War, addressed the end of conflicts, while the War Powers Resolution is primarily aimed at controlling how armed conflict begins. But both emerged in the context of a presidentially driven war that had become politically fraught. Both efforts arose from existing political situations as well—tensions within the post-World War II Republican Party over isolationism and international involvement, and clashes between Nixon and Congress in the 1970s. The mixture of political context and lengthy, unpopular wars can sometimes spark change that alters the war powers dynamic for years to come.

Julia R. Azari is associate professor of political science at Marquette University. She is the author of *Delivering the People’s Message: The Changing Politics of the Presidential Mandate (2014)* and a frequent contributor to *FiveThirtyEight* and to *Mischief of Faction*, a political science blog on *Vox.com*.

REACTION

THE WAR-POWERS DYNAMIC TODAY, AS SEEN IN GUANTANAMO

by Benjamin Wittes



I am broadly sympathetic to Judge David Barron's contention that history does not support either "the idea that the commander in chief simply has absolute power [over the conduct of war] or the simplistic notion that Congress alone dictates the answer." The relationship is clearly more iterative and textured than that. I also am broadly sympathetic to his point that it is wrong to think of the presidency always as the aggressor in disputes over war powers and Congress as always the restraining branch.

It is not just history that refutes these arguments. To illustrate Judge Barron's points, we need not go back to World War II, much less to Abraham Lincoln or to George Washington. We may look simply at the interactions between Congress and President Barack Obama over the detention facility at Guantanamo Bay.

President Obama came into office wanting deeply to "close Guantanamo." That is, he wanted to strike a less "aggressive" posture on overseas counterterrorism than had the Bush administration. On this ambition, Congress—as Judge Barron reports of the Continental Congress with respect to detainees during the Revolutionary War—put its foot down. Congress disallowed transfers of Guantanamo detainees to the United States altogether, including for law enforcement purposes. It also put restrictions on the commander in chief's ability to transfer people from Guantanamo to other countries. In other words, whereas President Franklin Roosevelt insisted on the use of a military commission to try the Nazi saboteurs, Congress effectively forced the use of military commissions on President Obama with respect to September 11. And it refused to consider alternative detention sites for the dwindling number of detainees the military held.

While the president tried throughout his tenure to reduce the detainee population of Guantanamo and maintained a public commitment to shuttering it, he respected Congress's will—despite the evident embarrassment it caused him on a major policy priority of his entry into office. Sometimes, as Judge Barron argues, Congress is the aggressor and the president is the restraint.

Guantanamo is also a good example of Judge Barron's other large point: that the power to define the rules is, in fact, a shared one. And it's not just shared between the president and Congress. It's shared with the judiciary, too. Look today at the rules for detention at Guantanamo, and you'll see a remarkable tapestry of law and regulation. The basic substantive law of detention was written by the U.S. Court of Appeals for the D.C. Circuit in a string of cases following the Supreme Court's 2008 decision in *Boumediene v. Bush*. Congress also wrote some of those rules into law and tinkered with a few of them in doing so. For example, the basic authority to detain those who are "part of or substantially supporting" Al Qaeda, the Taliban, or their "associated forces" was written into the 2012 National Defense Authorization Act. And Congress also clarified, following a D.C. Circuit decision suggesting otherwise, that the law of armed conflict does, in fact, inflect detention authority. All of these rules were produced in dialogue with the executive branch, which was both litigant in the post-*Boumediene* cases and active participant in the legislative processes at issue. And other rules governing detentions, specifically those related to the discretionary review of individual detentions, are a creature of the military's implementation of a presidential executive order.

Even before *Boumediene*, near the height of the Bush administration's executive-power enthusiasm, the power to write the rules at Guantanamo was still shared. *Boumediene* itself rejected the adequacy of an earlier iteration of judicial review over Guantanamo, one which Congress had crafted and which sought to give the D.C. Circuit power to review detention judgments from military review panels at the base. The executive branch did not resist the idea of the legislature's writing rules of the conduct of war or of the judiciary's making military detention decisions. Indeed, President George W. Bush signed it into law, and the solicitor general argued for its integrity before the Supreme Court. You actually have to go back to 2004, to the aftermath of September 11, before the power to write the rules over Guantanamo—whatever the rhetoric may have been—was not acknowledged by both Congress and the executive to be a shared one.

Constitutional scholars tend to debate separation of powers issues in the language of high principle. But the reality of these disputes is more political in character. If a working majority in Congress really cares about an issue, it will find a way to affect the rules—and the executive branch will find a way to accommodate Congress's intervention. For it will have no choice. Conversely, in other circumstances, Congress will often not assert itself or will assert itself ineffectively—and the executive, acting with unity and dispatch, will then run roughshod over the legislature or accept its delegation. These situations both mask the degree to which power is, in fact, shared—a reality that lives in the details, both historically and in contemporary war making.

Benjamin Wittes is a founder and the editor in chief of *Lawfare*, which focuses on issues of national security and law. He also serves as senior fellow in governance studies at the Brookings Institution and is the author of a number of books.

agree on the lawfulness of this procedure. We have different ways of understanding how to get there—some think it's constitutional powers, some think it's statutory authority—and it's critical to bypass a resolution of that high-stakes question of who has ultimate authority and leave it for another day.”

In that sense, what Frankfurter's doing there is much like what Washington was trying to do in his time and Lincoln in his day: to find some way of resolving this short of an ultimate bald claim by the president that these questions are for the president alone.

III. LESSONS AND CHALLENGES

So we have reviewed these three case studies of the commander in chief's clashing with Congress over how to wage war. What lessons might we draw?

The first is that it is a mistake to think of the battle between the political branches as one in which the president is always the aggressor in war and Congress is always the tempering force. Sometimes that is the case. Other times it is not. And the system of separated powers must be understood as a system that allocates power for both types of cases.

The second is that, if there is anything old about this debate, it is that when these clashes occur, defenders of presidential prerogative usually assert that the situation the president is confronting in the current conflict is totally new and, thus, that old notions of the proper allocation of power are necessarily quaint. That was said during the Cold War, in light of the advent of atomic weaponry. It has been said during the war on terror, due to the non-state nature of the enemy and the unusual threat to the homeland that is presented. But it was, of course, possible to say it also during Lincoln's presidency, when the country faced a civil war. Or during World War II, when the era of total war arrived. This reality—the availability of the argument that a certain type of warfare is totally new and thus that the rules allocating power among the branches must change—is itself a very old one, as it is important to keep in mind. It suggests to me that history has much to offer in thinking about whether a dramatic shift in the rules is really as necessary as many may contend in the moment at hand.

Third, are there really any rules at all? This is perhaps the hardest question. The text of the Constitution is notable for how little it says about who gets to decide how to conduct a war. And our

history—as suggested by even the examples I have given—is hardly clear in describing the rules of the road. Justice Jackson—in ruling against President Harry Truman in the *Steel Seizure Case*—famously remarked on just how inscrutable the history can be on these points for one willing to delve deeply into it. But still I am struck by this sense, in each of the dilemmas I have described for you: how much the participants in them believed that there were rules to be respected, and that there was a framework of ordered relations between the branches counseling a measure of caution and prudence. They felt some need to find an accommodation that would permit the dilemma to be resolved in a way that might avoid a true clash. However murky the rules may be, I find it hard to read the history as indicating that either the president or Congress is free to proceed without accounting for the views of the other.

Fourth, there is one other lurking—and especially challenging—point. The history I have described is known to us. It is visible. And thus it permits us to assess how decisions were made, why they were made, and that they were made. At some basic level, in a democratic system of separated powers, the people's ability to know what is being decided and why it is being decided that way is the most important check on the abuse of power that there is. But what if war making takes a turn that makes knowledge of it much less visible, much less knowable? What if technology develops in ways that make this basic check one that is much less of a check than it has been? That is a potentially great threat to our system of checks and balances and a challenge that—as old as this story is—is not one that the country has faced in the way that over time it might.

Finally, to end on a more optimistic note, I am struck by the fact that, for all the change in the system of separated powers, and for all the undeniable shift toward the power of the presidency in war that has occurred over that time, there is still a recognizable system of checks and balances in place. It is evidence of the great achievement of the Framers and their successors across the generations that we can still recognize such a system to be our own so long after the Constitution was drawn up in Philadelphia. But it is—of necessity—a fragile achievement. Knowing what those entrusted with trying to honor it have done in clashes over the conduct of war is vital to ensuring that the achievement does not itself become mere history. ■

At some basic level, in a democratic system of separated powers, the people's ability to know what is being decided and why it is being decided that way is the most important check on the abuse of power that there is.

The Increasing Correlation of WISCONSIN SUPREME COURT ELECTIONS WITH PARTISANSHIP —A Statistical Analysis

BY CHARLES FRANKLIN

Whatever the technically nonpartisan nature of the elections, has the *structure* of voting for the Wisconsin Supreme Court become more partisan over recent decades? The short answer is “Yes.” The longer answer—and the evidence—is of interest as well.

The question certainly is timely. Just behind Wisconsin voters is a supreme court election that was widely interpreted as partisan (now-Justice Rebecca Dallet’s victory over Judge Michael Srenock in April 2018). And just ahead is an April 2019 court election (for the seat held by Justice Shirley S. Abrahamson for more than 42 years) that already is being seen as shaped strongly by partisanship. That context makes worthwhile an analysis of electoral competition for seats on the court going back to the mid-1970s.

There is a larger context as well. Beyond judicial elections, Wisconsin elections overall have been shaped increasingly by partisan polarization. Over the past 43 years, 1976–2018 inclusive, the years Abrahamson has been on the court, there has been less split-ticket voting and more geographic homogeneity in partisan elections for governor, the U.S. Senate, both houses of the state legislature, and sometimes for local offices.

To be sure, when it comes to elections for seats on the Wisconsin Supreme Court, candidates of various philosophical leanings have won large majorities from time to time. But the degree to which partisanship structures votes for court candidates has increased steadily and substantially.

None of this is to doubt that an argument can be made for the merits of a partisan court. Partisanship is the strongest political orientation of most voters, and it sends strong signals to voters as to the likely positions and philosophies of candidates for office. Given the complexity of the issues facing justices, and the likelihood that voters are not experts in these issues, partisanship provides a useful guide to help voters translate their preferences into a vote choice.

The increasing association by the public of Wisconsin Supreme Court justices with partisan leanings is also in line with the increasingly partisan nature of presidential nominations to the United States Supreme Court and the confirmation processes for those nominations before the United States Senate.

But there is also much negative to be said—against, that is, the increasingly partisan nature of processes for selecting judges at national and state levels. At a minimum, the phenomenon enhances the perception that decisions depend on partisanship rather than an impartial evaluation of the law and facts of individual cases.

In all events, insofar as Wisconsin is concerned, the state constitution has cast its primary lot in the context of judicial selection with nonpartisan elections. The data presented in this article demonstrate that the reality in any given election deviates increasingly from that nonpartisan theory.

The overall picture of Supreme Court elections

Let us first look at the broad picture of elections to the Wisconsin Supreme Court. This analysis focuses on court elections going back 43 years to 1976, when Justice Shirley Abrahamson took her seat by appointment. She subsequently was elected four times to the court. Abrahamson's announcement in May 2018 that she would not seek reelection in April 2019 signals the end of a particularly significant tenure on the state's high court. Supreme court elections include the 32 elections from April 1976 through April 2018. In counting justices who have served, the 25 justices sitting on the bench since Abrahamson joined the court on August 6, 1976, are included.

Justices and judges in Wisconsin are chosen in elections in April. That avoids, at least, the situation in even-numbered years of having nonpartisan court elections on the same day as the major partisan elections in November.

With 10-year terms for justices, Wisconsin provides considerable independence from electoral forces, compared to more-frequent elections. However, most justices of the last 43 years have sought reelection at least once, so the shadow of voter opinion must remain at least somewhat in view.

Twenty-five justices have served on the Wisconsin Supreme Court from 1976 to 2018. Just over half—13, to be specific—arrived to the court by appointment. Democratic governors appointed 4 of them, whereas Republican governors appointed 9—approximately the same as the proportion of years each party has held the governorship (15 years for Democrats, 28 years for Republicans). Such appointees must subsequently stand for election to remain on the court.

During this period, only one sitting incumbent has been defeated: In 2008, Judge Michael Gableman defeated Justice Louis Butler, who had been appointed to the court. Justice Patrick Crooks is the only justice since Chief Justice Horace W. Wilkie, whom Abrahamson replaced in 1976, to die while on the court. All other departures have been by retirement or resignation.

The incumbency advantage in court races is primarily though the luxury of being reelected without an opponent. Of the 23 elections featuring a sitting justice since 1976, 9 were uncontested. Most justices who served more than one term enjoyed an

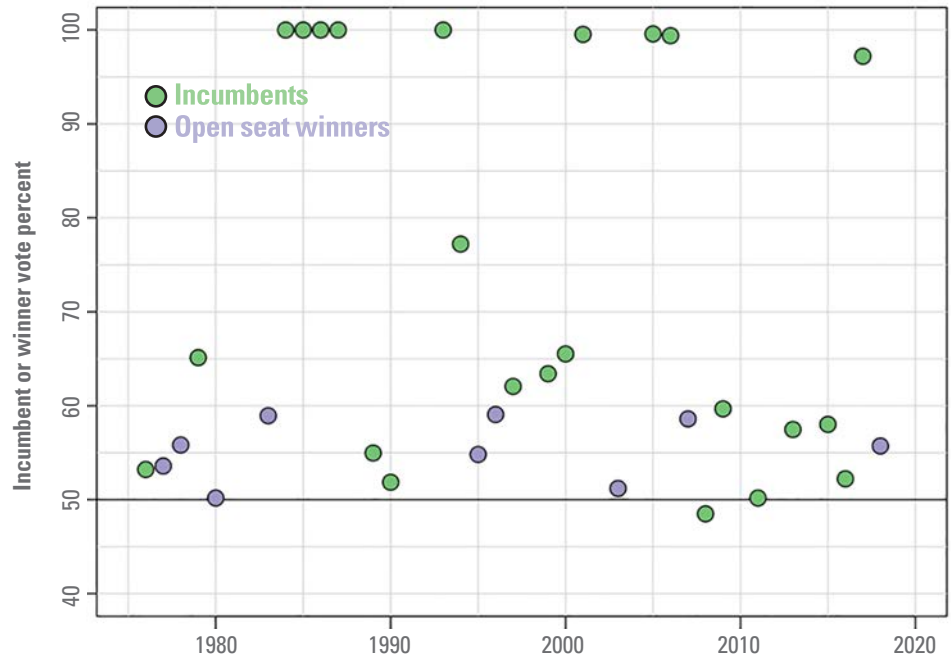


FIGURE 1: Wisconsin Supreme Court Election Results, 1976–2018

election without an opponent. Of those appearing on the ballot more than once, only Abrahamson, Donald Steinmetz, and Patience Roggensack have been challenged in each election.

When an incumbent does face a challenger, incumbents garner only slightly larger percentages of the vote than do winners in open-seat elections. The average vote for an incumbent in a contested race is 58.5 percent, while the average for an open-seat winner is 55.3 percent. In other words, in this time period there has been (on average) only a modest 3.2 percentage point incumbency advantage. Surprisingly, incumbents defending a seat they received by gubernatorial appointment average 60.6 percent of the vote, while incumbents defending a seat from their own previous election average 56.5 percent.

Open-seat contests are seldom landslides. In open-seat elections, four of nine winners prevailed with less than 55 percent of the vote, while five of nine won with 55 to 59 percent. No open-seat race saw a candidate reach 60 percent.

Six of 23 incumbents received less than 55 percent of the vote, including one loss (with 48.5 percent), while 3 of 23 won 55 to 59 percent and 5 of 23 won with 60 to 80 percent. Nine of 23 won in uncontested races.

While incumbents since 1976 have won 22 of 23 elections and faced no opposition in 9 of these races, their electoral strength does not come in running up

Figure 1 reflects vote percentage for the incumbent or winner in supreme court elections since 1976. Races involving an incumbent are in green, while open-seat elections are in purple. The only incumbent defeat is in 2008.

the score against challengers so much as it comes from either warding off any challenges or winning by moderate but consistent margins.

There have been three “second acts” for candidates who lost races for the court. Louis Ceci lost in 1980 but was appointed in 1982 and was elected in 1984. Patrick Crooks lost in 1995 but won the next year and was reelected in 2006. Louis Butler lost in 2000, was appointed in 2004, but was defeated in his 2008 election bid. Ceci and Crooks both served with justices who defeated them in their first attempts (Donald Steinmetz and Ann Walsh Bradley, respectively). Butler was appointed to replace the person who had first defeated him, Diane Sykes, when she was appointed to the U.S. Court of Appeals for the Seventh Circuit.

The geography of the vote

Judicial elections are often cast as conflicts between liberal and conservative judicial philosophies, with the balance of the court shifting over time. While these divisions are significant, the electorate has been willing to deliver large majorities to different sides of the philosophical divide in different races, while others have been more closely decided. Annette Ziegler in 2007, Abrahamson in 2009, Roggensack in 2013, and Ann Walsh Bradley in 2015 each won with 57 percent or more of the

vote, and swept a large majority of counties. While incumbency is a factor in these races, Ziegler ran in an open-seat race.

When supreme court races have been decided by narrow margins, a more geographically divided map emerges, one that resembles recent partisan elections. In the close races of 2008, 2011, and 2016, a common pattern is evident, with Milwaukee County, Dane County, and much of the southwestern counties favoring the more liberal candidate, while the eastern half of the state shades conservative, with some pastels typical in the northwestern counties. Only the most recent election of 2018 finds blue counties in the Fox River Valley area while generally following partisan contours.

This pattern shows that the state may be politically divided geographically but some candidates and elections produce widespread majorities, while the most competitive races revert to familiar geographic divisions. As polarized as partisan voting patterns may be, strong judicial candidates can achieve widespread victories even in areas that are not their philosophical homes.

Increasingly partisan elections

While supreme court candidates of both more-liberal and more-conservative philosophical leanings—the terms are crude but useful—have won large majorities from

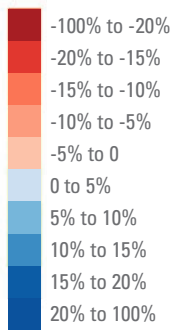
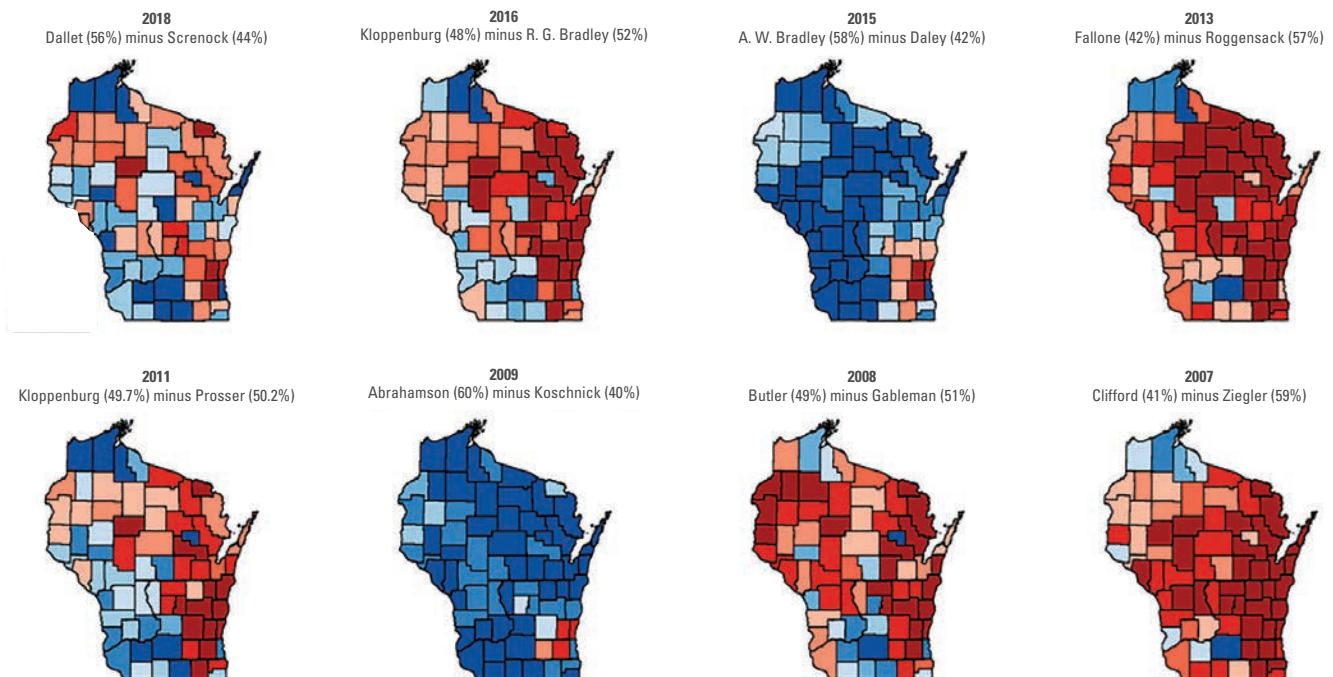


FIGURE 2: Wisconsin Supreme Court Vote Margins, 2007–2018



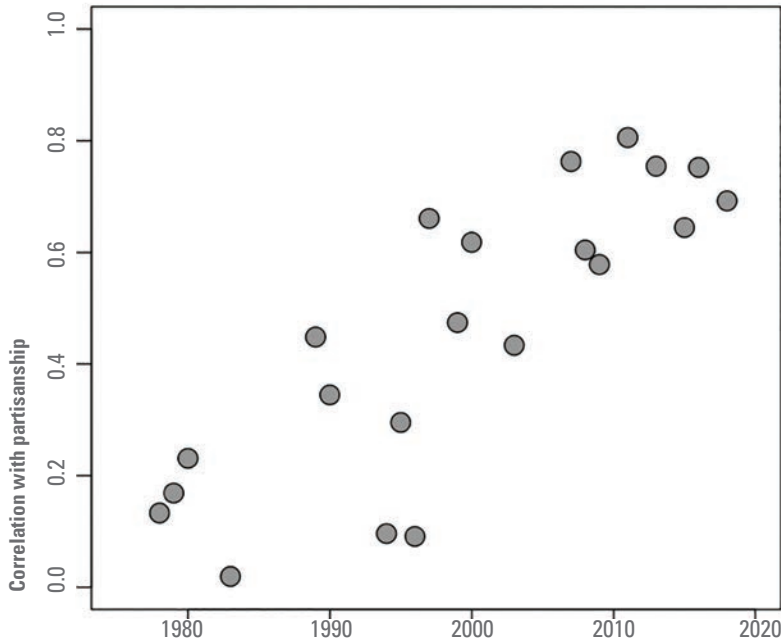


FIGURE 3: Partisan Structure of Supreme Court Vote, 1978–2018

time to time, the degree to which partisanship actually structures votes for candidates has increased steadily and substantially since 1976.

To measure how partisanship structures votes for supreme court candidates, we first calculate the average Republican share of the two-party vote for governor for each county from 1974 through 2014. While there has been variation in county votes across elections, this measures the long-term partisan leanings of each county.

The partisan component of supreme court elections is measured by the correlation, abbreviated as “r” in the figures below, of the winning candidate’s vote in each county with the long-term partisanship of that county. Correlations can range from zero,

indicating no relationship, to 1.0, indicating a perfect relationship. A judicial candidate whose vote rises as the county’s average Republican vote rises will have a positive correlation, the size depending on how strong the partisan component of the vote is. A candidate aligned with Democratic partisans will have a negative correlation with the Republican partisanship measure but an equal positive correlation with the Democratic share. In this analysis, we correlate Republican-aligned candidates with the Republican

share of the county vote and Democratic-aligned candidates with the Democratic share. This means all correlations will be positive, indicating the strength of partisan structuring of the vote for all court candidates.

Figure 3 shows how partisanship has increasingly structured the vote for the supreme court over the past 43 years. In the 1970s and 1980s, there was a minimal correlation with partisanship, below .20 in three of the four elections. In the 1990s, the correlations generally increased, though with a wide range of values across elections. Here is a striking

fact: Since 2000, no election has seen a partisan correlation below .40—and, since 2010, the correlation has been above .60 in every election.

Consider the partisan structure of the vote for two elections at the beginning and at the end of this period. In 1978, John L. Coffey won an open seat on the court with 56 percent of the vote. The structure of his vote is shown in Figure 4. Coffey’s vote had a small correlation with county partisanship, just .13, a common pattern for the 1970s and 1980s. While Coffey performed well in the most Republican counties, he also did well in Democratic counties. Likewise, he trailed in some Republican and in some Democratic counties.

As suggested in Figure 4 (and subsequent figures), the correlation (r) between county partisan voting and the vote for nonpartisan supreme court candidates increased substantially from the 1970s to the 2010s.

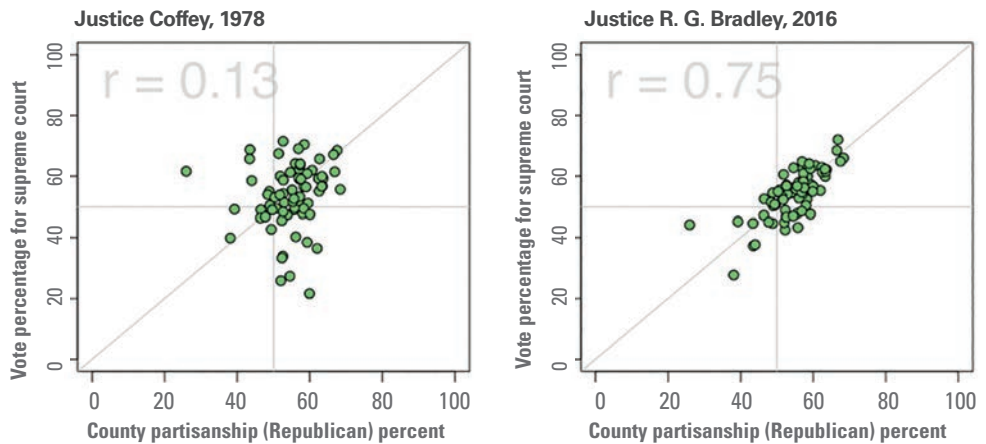


FIGURE 4: The Partisan Structure of the Vote in Two Elections

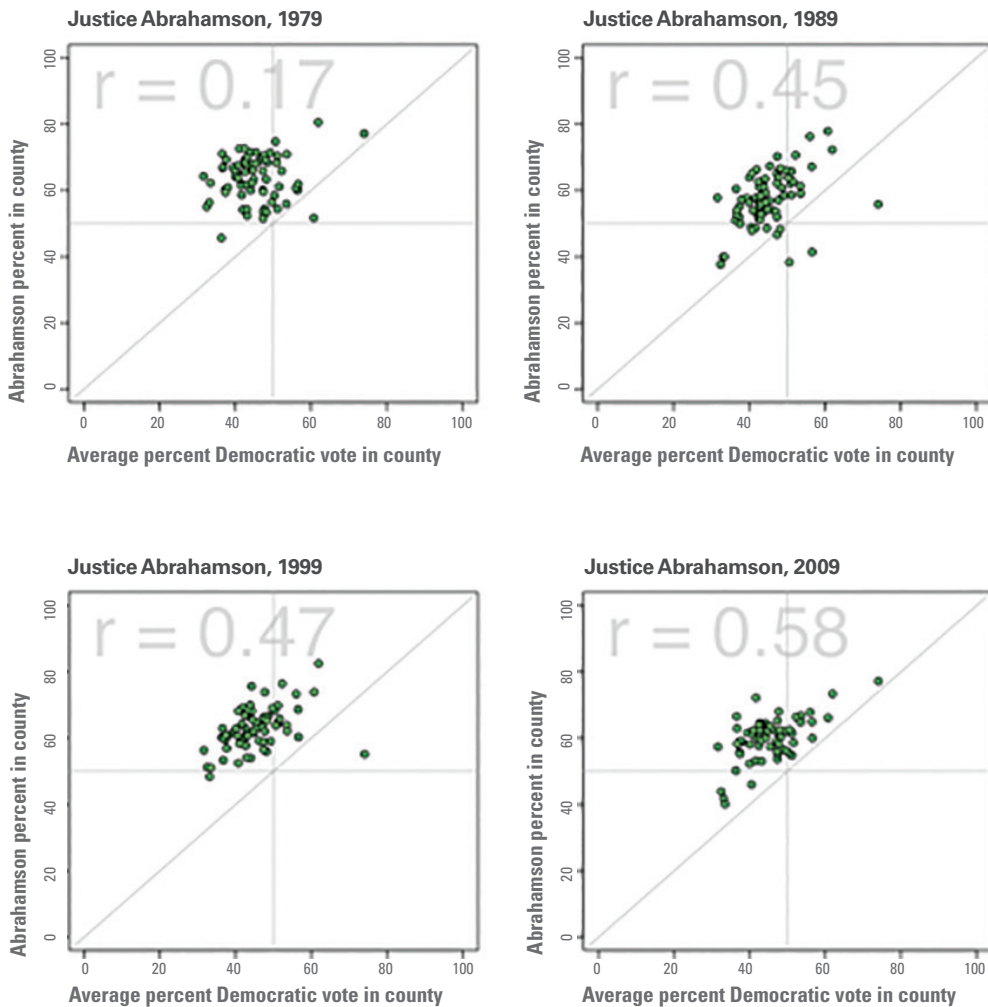


FIGURE 5: Partisan Correlation over Time for Abrahamson

Contrast the structure of the vote for Justice Rebecca G. Bradley in 2016, as shown in Figure 4. The partisan correlation is a large .75, with Bradley doing better in Republican-leaning counties and worse in Democratic ones. This pattern has been typical of supreme court elections since 2010, with correlations ranging from .60 to .80 in the five most recent elections.

The increase in partisan voting is not simply because justices are now partisan when in the past justices were nonpartisan. We can see this by looking at the partisan voting structure for those justices who have run in more than one election.

Surprisingly, of the 25 justices who have held a seat on the court, only four have faced more than one contested election campaign since 1976: Abrahamson

four times and Steinmetz, A. W. Bradley, and Roggensack twice each. The correlation of partisan votes with judicial votes increased for each of these justices from earlier to later elections.

Justice Abrahamson has the longest series of contested reelection campaigns, having been challenged each time. The partisan structure of the vote in her four elections is shown in Figure 5.

In her first election after being appointed to the court in 1976, Abrahamson was elected with a vote that had little partisan component, a correlation of just .17 in 1979. A decade later, in 1989, this correlation nearly tripled, to .45. It was a nearly identical .47 in 1999. In her last election, in 2009, the correlation rose again, to .58.

Steinmetz is the only justice of the four repeat players to change the partisan makeup of his support. As seen in Figure 6, in 1980, he did better in more Democratic counties and worse in more-Republican ones, with a correlation of -.23. His 1990 vote reversed this relationship, with a positive correlation of +.34, doing better in Republican counties than in Democratic ones. These are modest correlations by current standards, but are an interesting change in partisan structure, one not seen for any other justice.

Justice A. W. Bradley has had two contested elections separated by an uncontested one. In the 20 years between her first and second contested election, the correlation of her vote with the partisan vote doubled from .30 in 1995 to .64 in 2015, as shown in Figure 7.

Now-Chief Justice Patience Roggensack faced contested elections in 2003, well into the partisan evolution of court elections, and again in 2013. Her vote correlated with the partisan vote at .43 in 2003. The correlation was nearly double that just 10 years later, in 2013, at .75. Figure 8 reflects these correlations.

As partisan as recent elections have been, it is worth noting that they are still less partisan than are overtly partisan gubernatorial elections: There the partisan correlation has ranged from .72 to .94, with an average of .85. The court has not quite reached

this level of partisanship, although with correlations in the last five court elections of between .64 and .81 (and an average of .73), the gap is narrowing. For comparison, in the first five elections covered here in our time period (beginning in 1976), the average partisan correlation was .20.

The fact that the partisan correlation has gone up in races involving the same winning candidate over time supports the statement that partisanship has become a bigger factor in state supreme court races and suggests that the increased impact of partisanship is here to stay for the foreseeable future.

But this does not mean that the outcome of supreme court elections is easy to predict or that partisans of one side or other are sure to win. Large statewide majorities for both more-liberal and more-conservative justices have emerged in recent elections, and close elections have demonstrated the competitive potential as well. The specific candidates and the specific dynamics of each election still matter. ■



Charles Franklin is professor of law and public policy at Marquette University Law School and director of the Marquette Law School Poll.

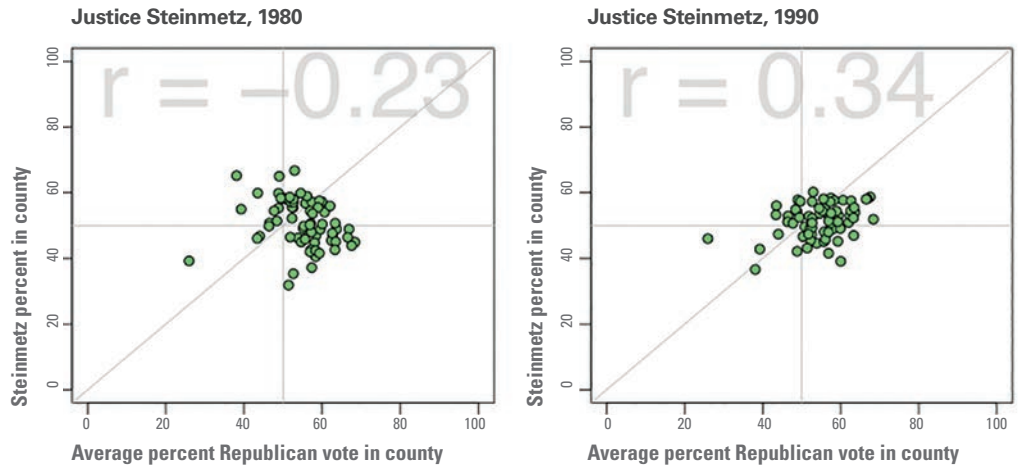


FIGURE 6: Partisan Correlation over Time for Steinmetz

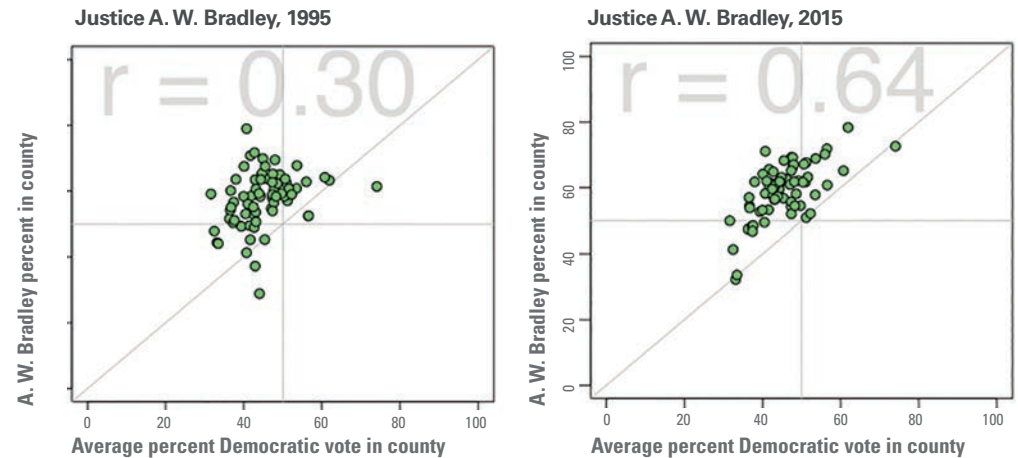


FIGURE 7: Partisan Correlation over Time for A. W. Bradley

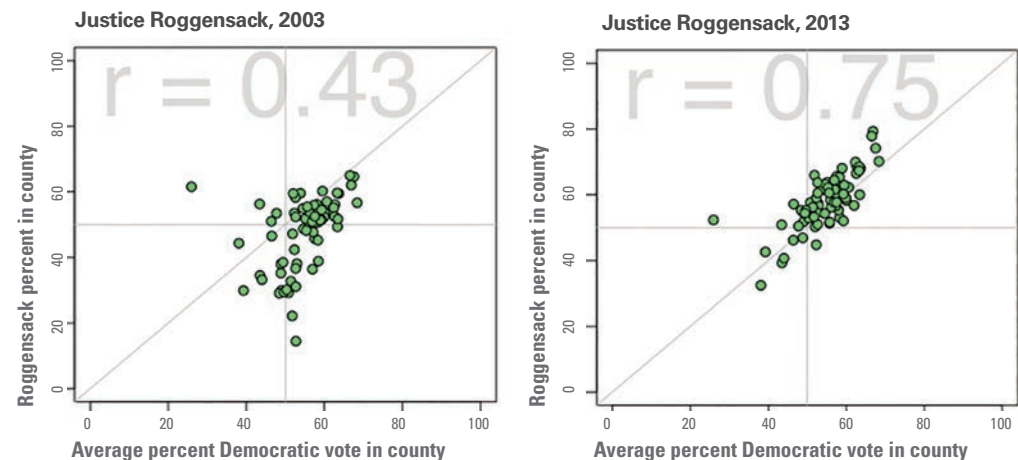


FIGURE 8: Partisan Correlation over Time for Roggensack



Setting Markers on the Path to ETHICALLY SOUND LEGAL SCHOLARSHIP

When writing a piece of legal scholarship, do you start with a question and work in good faith toward an answer? Or do you start with an answer and select things that support your point?

In defining ethical scholarship, the answers must be “Yes” to the first question and “No” to the second, in the view of Professor Chad Oldfather, associate dean for academic affairs at Marquette University Law School. That is to leave aside, he noted, whether the second sort of writing is even scholarship at all.

Questions such as this motivated Oldfather and colleagues from across the nation to convene an unusual and provocative roundtable conference at Eckstein Hall last fall. In a day and a half of focused conversation and in nine papers submitted by participants, a range of issues involving the ethics of legal scholarship was probed and prodded.

Participants included law professors and academic figures in other fields. They shared an interest in exploring the ethical norms relating to legal scholarship and shared concerns about some things being done in the name of legal scholarship.

The outgrowth of conversations on the internet among several of the participants (some of whom had never met each other in person before convening in Milwaukee), the session had a goal of coming up with a concise and constructive set of principles for what constitutes ethical legal scholarship. The resulting draft statement accompanies this article.

The organizers—Marquette’s Oldfather, Professor Carissa Byrne Hessick of the University of North Carolina School of Law, and Professor Paul Horwitz of the University of Alabama School of Law—said that many conferences don’t end with a common resolution or consensus about an issue.

“In this case, the symposium planners had a different goal in mind: to actually arrive at some common, generally agreed upon answers and principles,” they wrote in the introduction to the summer 2018 issue of the *Marquette Law Review*. “With the wonderfully collegial collaboration—but not, to be sure, complete agreement on every issue—of the symposium participants, and the kind assistance of the editors of the *Marquette Law Review* and their willingness to do the unusual, we have done just that here.”

The organizers’ introduction continued:

It helps that the subject of this symposium—the ethics of legal scholarship—is one as to which there is widespread agreement that all is not well. Not all of this consensus necessarily reaches the “outside” world. The legal academy, like any other branch of the academy, can be defensive. When academics generally are, or are perceived to be, under assault from outside (and sometimes internal) forces, it is unsurprising that the pages of the *Chronicle of Higher Education* and of an equally endless number of books are filled with defenses of what we do, and serve as the launching point for a barrage of arrows pointed anywhere else but at ourselves. When law schools are surrounded (and inhabited) by critics, it is unsurprising that they too will have their ardent defenders. Similarly, although law professors have worried about the state of legal scholarship for as long as legal scholarship has



Chad Oldfather



Carissa Byrne Hessick



Paul Horwitz



“The seeming privacy of other platforms, such as Facebook, may encourage other forms of writing, perhaps more naked in their motivations and expressions.”

existed, when those criticisms come from the outside, our colleagues can be relied upon to rally 'round the flag.

The same is true for the *ethics* of legal scholarship. Even if—as we think—there is a fairly broad consensus among legal scholars themselves that we either behave imperfectly as ethical actors when engaging in legal scholarship or lack clear guidance for what it *means* to act ethically, or both, legal academics may be unwilling to say so outside faculty lounges, private chats in offices, and other safe spaces.

While some aspects of controversies over ethical scholarship are longstanding, other aspects are shaped by the enormous changes that have occurred in the communication of ideas, Oldfather, Hessick, and Horwitz wrote:

The long timeline and (somewhat) careful vetting of scholars' writing in some platforms encourages one type of writing. The seeming privacy of other platforms, such as Facebook, may encourage other forms of writing, perhaps more naked in their motivations and

expressions. The immediacy of platforms like Twitter, which both contain and incentivize hot takes, hot responses from readers, and hot replies from the author, may result in still another form of writing. Taken together, they raise important questions about the nature of legal scholarship and the duties and constraints of legal scholars writing as such.

The conference was organized into six sessions, but the proceedings were informal and conversational. The participants focused much of their discussion on the definitions, importance, and practical implications of basic aspects of ethical practice, such as thoroughness, good faith, acknowledgment of all sides of an issue, and candor about matters such as sources and an author's involvements with an issue.

Presented here, in addition to the proposed principles themselves, are snapshots of the roundtable discussion and an edited excerpt from a conference paper that brought a lot of reaction when it was circulated beyond the participants. It concerns whether and how standards of legal scholarship apply to Twitter posts by law professors.

EXCERPTS FROM THE SYMPOSIUM

Here are edited excerpts from the discussion, followed by the text of the draft statement that emerged from the conference. We also offer an excerpted and edited version of one of the papers submitted by the participants, chosen because of its intriguing focus: Do the standards of legal scholarship apply to postings on Twitter from law professors? All of the proceedings are available in the *Marquette Law Review*, in print and online.

Joseph D. Kearney, *Marquette Law School Dean* [in opening remarks]: I also admit or claim a certain particular affinity for your topic. I have my own views about professional ethics within the law professoriate. No doubt they are less well-developed than (and thus easily displaceable in favor of) whatever principles you collectively arrive at here. Yet I will indulge myself by making one specific point—an observation of a phenomenon that I find distasteful at best. This is the phenomenon in which law professors participate in amicus curiae briefs—or sometimes even represent parties—in litigation outside of officially recognized law school contexts (such as clinics) and yet nonetheless associate themselves with their law schools in the matter. While it happens all the time, I think this inappropriate, even apart from the immodest self-denomination by some of these professors as “scholars” when they file these briefs. This is not to suggest that I myself act against this phenomenon any more than other deans seem to do, at least on the amicus front (you may be sure that I would take action if a colleague purported, in a capacity associated with the law school, to represent parties in litigation). None of this is to disdain the legal practice. In fact, considering myself professionally, most fundamentally, to be a lawyer, I keep a hand in litigation, and I myself on one occasion even filed a brief for myself as an officious intermeddler—that’s a loose translation of amicus curiae, I know from my study of Latin. But I do none of that cloaked in Marquette Law School garb. There we have a principle that I would commend for your consideration in your work this weekend.

Robin West, *Georgetown Law*: What prompts my interest in this topic is that it became clear to me, as I was writing a book about law teaching and scholarship, that the legal academy is in a very severe sort of “identity crisis” with respect to what legal scholarship is and what the point of it is.

To just give a flavor of the split, when I was writing one of the chapters on the nature of legal scholarship, I started asking people unscientifically, randomly, “What do you think of normative legal scholarship?” That’s the phrase often used to describe legal scholarship that more or less takes the form “the law is X, and it ought to be Y.”

And I noticed right away, one afternoon in the same 10-minute period, colleagues telling me, on the one hand, “Normative legal scholarship is just not legal scholarship” and “It’s not legal scholarship because it’s not scholarship. If it’s normative, it’s not scholarship. So, it’s not legal scholarship if you’re saying the law ought to be this. That’s something else. It’s advocacy or it’s adversarialism or it’s op-ed writing in the guise of the law review”

At the same time and on the other hand, there were others telling me, including some extremely distinguished law faculty, that “legal scholarship that is *not* normative is not legal scholarship because it’s not legal. If it’s not normative, it’s not legal. Legal scholarship has to be normative.” This comes out in tenure debates. You will have colleagues saying, “We can’t credit this as scholarship. This is normative.” And then you’ll have others saying, “We can’t credit that as scholarship because it’s not normative.”

So how deeply that difference cuts, I think, makes it very difficult to think about the ethics of legal scholarship as a defined, understood entity.

PARTICIPANTS Marquette Law School Conference on the Ethics of Legal Scholarship

Nicola Boothe-Perry
Professor of Law, Florida
A&M University College
of Law

Stanley Fish
Davidson-Kahn Distinguished
University Professor of
Humanities and Law, Florida
International University
College of Law

Leslie Francis
Distinguished Alfred C.
Emery Professor of Law and
Distinguished Professor
of Philosophy, University
of Utah

Neil Hamilton
Thomas and Patricia
Holloran Professor of Law,
University of St. Thomas
School of Law (Minnesota)

Carissa Byrne Hessick
Anne Shea Ransdell and
William Garland “Buck”
Ransdell, Jr. Distinguished
Professor of Law, University
of North Carolina School
of Law

Paul Horwitz
Gordon Rosen Professor of
Law, University of Alabama
School of Law

Chad Oldfather
Professor of Law and
Associate Dean for Academic
Affairs, Marquette University
Law School

Ryan Scoville
Associate Professor of Law,
Marquette University Law
School

Amanda Seligman
Visiting Fellow in Law and
Public Policy, Marquette
University Law School, and
Professor of History and
Urban Studies, University of
Wisconsin–Milwaukee

Eli Wald
Charles W. Delaney Jr.
Professor of Law, University of
Denver Sturm College of Law

Robin West
Frederick J. Haas Professor
of Law and Philosophy,
Georgetown University Law
Center

Leslie Francis, *University of Utah*: I come pretty close to holding the position that we're in such a world of hurt about how law reviews operate that it may be very difficult without tackling that to think carefully about how scholars ought to operate. And maybe just a quick observation related to that, something that was kind of a theme around here was that a lot of people think about lawyers' ethics. I just want to put out on the table that I'm not sure lawyers' ethics are at all relevant to law professor ethics or that at least we ought to have it be an open question whether anything that is a principle of lawyers' ethics has any particular relevance here. I've been thinking about confidentiality. Also, you don't have a duty as a lawyer to cite to the court authority from another jurisdiction that's antithetical to the position you are maintaining. You don't have an obligation to give the court your methodology.

Stanley Fish, *Florida International University College of Law*: Long ago I became enamored with a statement, and of course, have forgotten its author. It went this way: "Our thoughts are ours; their ends none of our own." [Ed. note: It's from *Hamlet*.] And I take that to mean, as I'm sure you immediately understand, that as we work things out, we are responsible for the product of that activity. What then happens, when and if the fruits of our labors are put out into the world, they are not something that we can control, although there are, of course, many ways in which you try desperately to control them.

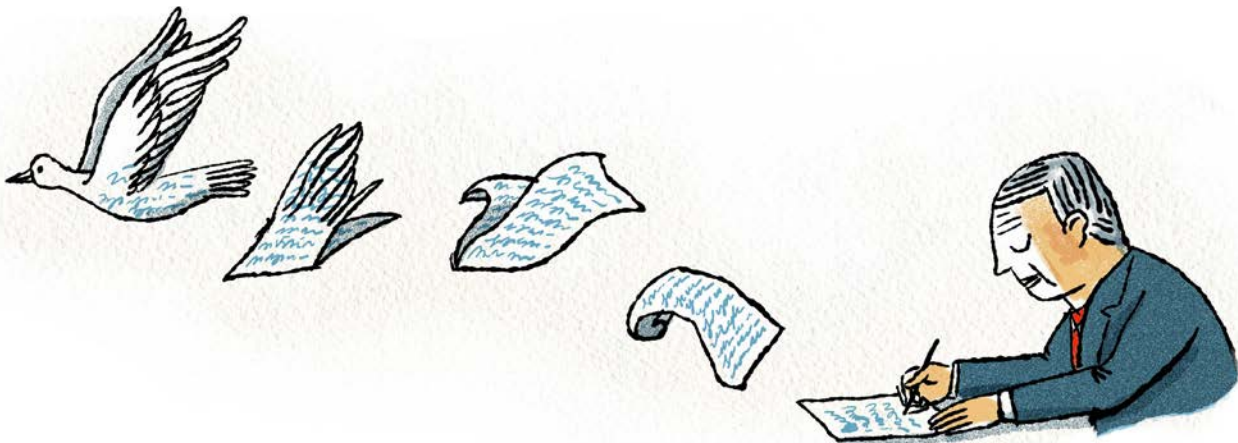
So, the question of impact is something that is so contingent. It doesn't mean that there aren't ways that we could increase the likelihood that contingency will swing in your favor, but nevertheless something can always happen in either direction that will completely surprise you—that is, something that you wrote and you didn't think that anyone would listen

to it, and it is suddenly picked up in ways that you couldn't predict. More frequently, it is something that you wrote that you were convinced the world needed to hear immediately and was heeded by no one.

One other remark. This goes back to a general question of, "What is scholarship and what are scholarly activities?" In general, when I'm doing scholarship, and I think most of you would say the same, I'm trying to get it right. I don't know what "it" is, and "it" varies and the complexities of "it" certainly vary, but I'm trying to get "it" right. And I'm trying to get it right because a puzzle or a problem has attracted my attention and I just can't quite figure out how something works or what's wrong with this answer or what's missing. So there's a satisfaction, almost a satisfaction of engaging in athletic performance, when you can at least think that you've figured it out and then you can tell other people about it, and sometimes you're figuring it out in the company of other people.

But when I'm at a conference like this one, I have absolutely no doubt what legal scholarship is. It's what we're doing here—that is, the feel of a conversation like this one.

Eli Wald, *University of Denver*: Some scholarship, like highly specialized work, will tend not to generate mass referencing, and that's, of course, okay. But in general, I would really be quite concerned—or at least mindful of—if there was a work of scholarship that over time had no citations or references to it by scholars in the field. Unfortunately, it is not at all uncommon to have scholarly works that never get cited or engaged with, but at least one should be curious about why it is that a scholarly work is not gaining some recognition and engagement from some people in the field.



Amanda Seligman, *University of Wisconsin–Milwaukee (professor of history) and Marquette Law School (visiting fellow in law and public policy)*:

I think about the long conversation in which a work of scholarship might exist even if it has no particular currency at the moment. . . . But to plant a seed that will be picked up later on. And I think it's particularly important to think about the academy and the way the academy cultivates creativity in society in comparison to business, in which the ends are so much more particular—to make a profit, to create a different kind of product. Our social function has to do with starting conversations even if we can't see where they're going.

Wald: Not to exaggerate the scope of Stanley and Robin's agreement, I'm sympathetic to trying to define scholarship and its boundaries in the direction that they are advancing. What's legal scholarship? Seeking the truth and pursuing specific commitments unique to the discipline of law—for example, justice's imperative. What's not scholarship? Partisan advocacy. What are we not sure about? Forms of normative scholarship, because some (like Stanley and Robin) disagree as to whether certain forms of normative scholarship constitute the pursuit of justice or are mere advocacy.

So far, so good. Unfortunately, resolving disagreements about normative scholarship cannot be done by reference to legal expertise. I wish it was that simple to say that legal scholarship is about the deployment of expertise to explore the law. The problem with this definition is that it's not entirely clear what the expertise of law professors is. Some think of law professors' expertise from a historical-jurisprudential perspective. During the era of Formalism, the expertise used to be narrow and self-contained; it was about the "law." Then came Legal Process. Next came the "law and . . ." interdisciplinary schools of thought, like Law and Economics, Critical Legal Studies, and Law and Sociology, and legal expertise expanded to include economics, political science, cultural studies, sociology, literature, etc. That is one concrete way to talk about the evolving expertise of law professors.

Neil Hamilton, *University of St. Thomas School of Law*: I thought *sincerity* was an ambiguous term, but could the author tell me up front what's the motive? It goes back to, I think, what Chad Oldfather was talking about here, "What is the motive behind this piece?" And then I can decide whether they are what I would

call traditional scholarly ethics or whether they are advocacy ethics. I have up front "what am I looking at here?" in terms of the piece.

Ryan Scoville, *Marquette Law School*: Two points. One, it seems like everything we've talked about so far is actually [dealing with the question of an author's] candor. Second, I'm not sure sincerity should require consistency. I think "sincerity" was in a couple of the draft codes that we read. To me, it seems fine for someone to argue X in one piece and then not X in another, just to test out ideas. I don't see why you should have to have some sort of logically consistent end-game that ties all of your scholarship together.

Carissa Byrne Hessick, *University of North Carolina School of Law*: I just wanted to say something briefly about the decorum point and about whether there's too much politeness—as Amanda put it, I think, "a culture of politeness." And I want to say that I'm pro-politeness, because I actually think that at least at some schools—some faculties are known—you give a talk there and it's going to be all about ripping you down and blah, blah, blah, and they pride themselves on it. I actually think that the problem with the politeness norm is that sometimes it leads people not to engage because people fear that engagement is inherently impolite, and I actually think that what the politeness norm ought to be is all about figuring out how to engage politely. That is—and maybe *politely* is the wrong way to think about it—how to engage on the substance in a way that is productive, that isn't mistaken for an attack on the author, and that isn't seen as anything other than engaging with the author's idea in good faith in order to further sort of the joint enterprise. . . . I think that we should engage with people's ideas, we should reframe their ideas in a way that presents them in their strongest light, and then say the extent to which we think that those ideas are valuable in what they add, and then talk about the extent to which they fall short.

Nicola Boothe-Perry, *Florida A&M University College of Law*: When we were having the discussion, I was just jotting down recurring themes or recurring words. So what I have is when we were defining what is legal scholarship. It's a good-faith, collaborative, engaging process that contributes usefully to the law or the legal landscape. And then underneath that would come, well, what types of that collaborative process would qualify, where we would go into those. I'm again just thinking of writing the restatement.

Chad Oldfather, *Marquette Law School*: Do we want to expand on the idea of “collaborative”?

Boothe-Perry: By collaborative, we were talking about, everybody kept saying, “You’re engaging with other scholars,” or “You’re engaging in some conversation.”

Oldfather: Does the audience for scholarship consist primarily or exclusively of other scholars? Does it necessarily extend to the bench and bar? Does it possibly extend beyond that into the general public?

Boothe-Perry: Every type of writing will have a specific type of audience. But you’re still engaging in some collaborative process for that audience, whether it’s to influence judges in their opinions or whether it’s to influence the public in an op-ed or whatever else. We were thinking of scholarship, but it’s still collaborative, right? Just collaborative in a different scheme depending on what the scholarship is.

Wald: Let’s talk a little bit about what may, or should be, distinctive about law and legal scholarship—justice. In an excellent book, Robin talks about justice and its neglect in law schools and legal education. Assuming and hoping that justice will one day play a more significant role in law, what role should it play in legal scholarship? I don’t think that every piece of scholarship necessarily has to directly engage in some way with conceptions and the application of justice to count as legal scholarship. Of course not. But, should legal scholars generally be committed to, think about, research and write about, aspects of justice, to correct for the suppression and irrelevance of justice in law schools, legal education, and legal scholarship?

Paul Horwitz, *University of Alabama*: Given that I’m at least a self-identified or a card-carrying pluralist, I obviously agree with a lot of what’s been said. The goal is not to read people out of the legal

academic profession in the first instance, and so I’d rather be broad as well. And this, I think, goes to the first part of your statement. There are three things we can say, again, whether they’re said in the document or elsewhere, and one is there is a large amount of perhaps unacknowledged or un-explicit consensus . . . that people have concerns, and that this is not limited to people on a particular methodological or ideological or prescriptive path, it’s a widespread concern among law professors. And second, that maybe more than one would acknowledge, there are a lot of things that everybody can agree on. Not everything, but there are probably a number of things where the reaction would be similar across, again, internal and external and so on, and that is important. And the third, I think, is that the value of a document and a symposium on this subject is to have a document and a discussion, physical or, I guess, electronic corpus, that says law professors are worried about this, need to be explicit about it, need to bring that discussion out into the open and try to figure out where the agreements are and where their intentional differences lie. And in other words, the usual large statement, that this is not a perfect document, but we need to have a discussion.

Oldfather: I think there’s another point to consider, and this is one that Dan Farber makes, encouraging a greater willingness to engage critically with one another, right? So, I think there are problems in two respects there, and we spoke about the first, but not necessarily the second, which is that there may not be enough critical interaction with other people’s work, and that that sort of interaction is actually a significant part of advancing the scholarly enterprise.

Scoville: I mean, that’s sort of a product of an overemphasis on novelty, isn’t it? At least in part. You’re not viewed as doing sufficiently novel work if you’re simply responding to the work of others.



A Short List of BASIC NORMS

Draft Statement Sets Forth Principles on Ethical Legal Scholarship

In describing the draft statement on the ethics of legal scholarship that emerged from the Marquette Law School conference (see article beginning on p. 31), Professors Chad Oldfather of Marquette University, Carissa Byrne Hessick of the University of North Carolina, and Paul Horwitz of the University of Alabama wrote:

Like most such ethical guides, whether for academics, professionals, or others, these basic principles are necessarily general in form. They comprise a short list of basic norms—exhaustiveness, sincerity and good faith, candor, open-mindedness, and disclosure—that can guide legal scholars

. . . [A] duty to “acknowledge” and “engage” with “pertinent past work” on the topic on which one is writing enables readers to evaluate that piece of writing against the backdrop of other work, from a variety of perspectives and methods, addressing the same subject. (Not incidentally, it also forces the writer him- or herself to confront that work.) In each case, these principles, applied carefully and in good faith, do not tell scholars *not* to be politically engaged or *only* to be politically engaged; they do not tell them to adopt liberal or conservative (or other) political principles in their work or urge them to strive for “objectivity” or “neutrality”; they do not, in short, tell the reader what kind of legal scholar to be. Instead, they tell that scholar to be whatever sort of legal scholar he or she is in an open, and open-minded, fashion, one that acknowledges and is upfront about one’s animating premises, influences, agreements and disagreements, goals, sources, and internal or external constraints. They give readers—whether other law professors, scholars in other fields, or a more general readership—the ability to judge that work more knowledgeably for themselves. . . .

. . . Our attempt, unusual for academic symposia such as this, to put something specific on the table, agree on it, and share it with our colleagues was never meant to be a final and definitive answer to the questions that confront us concerning the ethics of legal scholarship. It was not meant to end the discussion. But we have attempted to provide a useful place from which to *begin* and continue such a discussion.

Here is the text of the draft statement of principles, omitting footnotes:

Defining Legal Scholarship

For purposes of this document, legal scholarship is defined as all published works that (a) are written by law faculty or other legal academics, (b) contain independent, critical, and careful analysis, (c) are the product of significant effort and professional expertise on the part of the author, and (d) provide information, insight, or other value to the reader. Legal scholarship includes works that employ traditional legal methods, as well as works that use methodologies from other disciplines. Legal scholarship is ordinarily published by academic presses, scholarly journals (such as law reviews), and their online counterparts.

Legal scholarship does not include work which is prepared during the course of litigation or in other situations in which the author represents a client. Therefore, it necessarily excludes briefs, opinion letters, and expert testimony at trial.

In defining scholarship for the purposes of this document, we do not seek to weigh in on whether various activities ought to “count” as scholarship for promotion and tenure decisions within law schools. Different schools have chosen to adopt more expansive definitions for those purposes, while others have adopted more restrictive definitions. Our definition of scholarship is not intended to endorse either a more expansive or a more restrictive view. Instead it is meant only to identify the forms of scholarship to which we believe that the articulated principles of scholarly ethics ought to apply.

Specific Norms

Exhaustiveness: *An author should treat the identified topic of a work in an exhaustive manner, including through the acknowledgement of and engagement with pertinent past work bearing on that topic.*

An author should competently and in good faith undertake sufficient research to identify pertinent past work addressing her topic, and should then acknowledge and engage with that work as appropriate. An author should scrupulously avoid inaccurate claims of originality.

An author should fully explore available legal resources and evidence, including that which is contrary to the author's normative positions or goals, whether in general or with respect to the specific topic under investigation. If non-legal sources are relevant to the project, then the author should also fully explore such sources. This norm is similar to what Richard Fallon called the obligation of "confrontation." "The confrontation norm requires scholars to be candid in acknowledging difficulties with their arguments by confronting the most significant possible non-obvious objections to their analyses."

More generally, in addition to her ongoing general responsibility to engage in research and work to improve her scholarly competence, an author has a duty to acquire sufficient expertise to support the production of a work and the claims and analyses within it. She must, in addition, remain mindful of the limits of her expertise, and shape and present the claims and analysis made in a manner that does not exceed the bounds of that expertise.

Sincerity/Good Faith: *An author should make all of her claims, arguments, and characterizations of past work in good faith, and should state them in such a way as not to mislead her readers.*

This principle is similar to what Richard Fallon called the "norm of trustworthiness, which demands that [an author] sincerely believe all of her claims or arguments and that she state them in ways not intended to mislead her readers about their relations to other arguments or evidence." An author should, among other things, refrain from making false or unsubstantiated claims of novelty or originality.

It further incorporates a norm of engagement. A scholar should not merely engage with the past work on a topic, but should do so in an appropriately charitable and respectful manner. In circumstances

where it is possible to do so, an author should provide the authors of past work with which she engages in a substantial way the opportunity to review and respond to her characterization of that work.

Candor: *An author should be explicit about her methodology and the substantive assumptions underlying a scholarly work, and should clearly articulate the scope and limits of her claims, analysis, and any normative recommendations.*

Few works of scholarship directly address first principles, such that authors' analyses necessarily proceed from certain premises and assumptions. Those analyses are likewise a product of and are undertaken pursuant to methodological choices. Authors should clearly outline both.

As a corollary to this principle, authors should cite to sources supporting any factual claims they make. Claims about the state of the law or particular doctrines are factual claims that should be supported by a systemic review, and the methodology for that review should be disclosed.

In the case of any data they produce or generate themselves, authors should make the data publicly available to the extent possible, and they should describe the processes used to generate the data.

Open-mindedness: *An author should approach the researching and production of a work with an open mind, rather than with a predetermined goal. Put differently, an author should cultivate a mindset pursuant to which she regards herself as striving in a work of scholarship honestly to answer a question rather than simply to justify a pre-identified conclusion or advance a particular interest.*

Authors should strive to be mindful of their own biases and predilections and of the effects they may have on their analyses, should be open to the possibility that their initial hypotheses may be wrong, and should seek to adhere to their selected methodology and follow its analysis wherever it may lead.

The norm of open mindedness is not a condemnation of, or even inconsistent with, the production of normative scholarship. Nor does it require that authors disclaim a point of view. Such a stance is impossible to achieve, and the nature of law and legal analysis is such that normative considerations are necessary ingredients.



Disclosure: *An author should disclose all information not otherwise apparent from the work itself that is material to the evaluation of a work of scholarship. This disclosure should be included in the work itself.*

The animating principle here is that a reader of legal scholarship should be able to identify and account for any information about the author or the circumstances under which a work was produced that might lead a reader to question the author's ability to comply with these principles. This obligation extends to any funding which might lead a reader to question whether the author has complied with the author's ethical obligations as a scholar. It further extends to any affiliations or activities, professional or otherwise, with the potential to influence the positions taken or arguments made, including not only partisan affiliations but also, for example, the fact that a person has filed an amicus brief on an issue under analysis.

An author should disclose the contributions of any co-authors, as well as of research assistants to the extent that they are responsible for any portions of the intellectual content or drafting of a work of scholarship.

Disclosure does not in any way diminish an author's obligation to comply with the author's other ethical obligations as a scholar. At times a conflict of interest will be so substantial that such compliance will not be possible and the work should not be produced. One example of such a conflict is if a research funder places restrictions on the conclusions that an author may reach. Another example is if an author's professional obligations as counsel for a party or amicus in litigation limit the ability of the author to acknowledge and explore counterarguments.

Authors who have no disclosure obligations under this principle are encouraged to explicitly say so.



WHAT U GAIN & LOSE by Law Prof's Tweets

This is an edited excerpt from Carissa Byrne Hessick's article, "Towards a Series of Academic Norms for #Lawprof Twitter," which was part of the Conference on the Ethics of Legal Scholarship at Marquette Law School on September 15 and 16, 2017, and published in the summer 2018 issue of the Marquette Law Review. Hessick is Anne Shea Ransdell and William Garland "Buck" Ransdell, Jr. Distinguished Professor of Law at the University of North Carolina School of Law.

When we talk of legal scholarship, we ordinarily mean law review articles, university press books, and similar publications. But those are far from the only outlets for a scholar's research and opinions. Many legal scholars write briefs, comments on agency action, popular press books, opinion pieces, and other works that are aimed at a wider audience. Legal scholars also maintain blogs, post on Twitter, testify before legislatures and other policy bodies, and give statements to the press. From time to time, law professors have questioned what professional norms ought to apply when scholars engage in these non-scholarly activities.

In this short symposium contribution, I offer some tentative thoughts on what professional norms ought to apply to law professors who engage in a now-popular form of public discourse: Twitter. Specifically, I suggest that law professors should assume that, each

time they tweet about a legal issue, they are making an implicit claim to expertise about that issue. I also suggest that when law professors participate on Twitter, they should do so in a fashion that models the sort of reasoned debate that we teach law students.

One might legitimately question the value of discussing Twitter in a symposium devoted to legal scholarship. With its rigid character limits and focus on "hot takes," Twitter is arguably the antithesis of scholarship. And yet there is little doubt that Twitter has an increasingly important role in public discourse and legal discourse in particular. There have been a number of exchanges criticizing how some law professors use the Twitter platform. Nevertheless, I think that there is value in law professors participating on Twitter, and thus it is worth discussing whether, as a profession, legal academics ought to endorse or criticize certain behavior on Twitter. . . .

Twitter and the Dissemination of Ideas

There are a number of reasons that a law professor might want to post on Twitter. As compared to the other platforms available to law professors, Twitter has distinct advantages as a method of communication with other law professors and with the public more generally. Twitter allows law professors to broaden the reach of their ideas, increase their professional profiles, and communicate more easily and more quickly than other media.

A law professor who wants to communicate an idea to other law professors has several options. She can publish that idea in a law review article or an academic press book. This process takes a long time, not only because writing those manuscripts involves a lot of time and effort, but also because it takes a significant amount of time, after a manuscript is complete, for it to appear in print. Consequently, a law professor who has an idea about a timely topic may find that her idea is obsolete (or no longer of public interest) by the time it is published. It is also uncertain how many people will read a professor's law review article or academic book. . . .

The professor can attempt to communicate her idea to other law professors by speaking at academic conferences or faculty workshops. But many conferences and workshops are by invitation only. Whether one receives an invitation to such a conference may depend on the strength of one's personal connections to the organizer or whether one is already considered a "big name" in the field—issues over which most law professors have limited control. . . .

Technology has made the communication of ideas within the academy somewhat easier. Law professors are able to post their manuscripts on the Social Science Research Network (SSRN) or other repositories. This allows professors to disseminate their manuscripts almost as soon as they are finished writing, thus eliminating the time lag associated with publication. The title and abstract of those manuscripts are emailed to other professors through digests or e-journals every few weeks. Thus, more people may learn that a professor has written on a particular topic.

Law professors can also communicate their ideas by blogging. A blog post is usually short, and therefore takes less time to write than an article or a book. Law professors also have the ability to make a blog post immediately available. This short time lag between when the law professor has the idea and when she makes it publicly available makes blog posts a good medium for law professors to disseminate their time-sensitive ideas.

Although blogging allows for quick communication, blogging is not necessarily a good medium for ensuring that an idea is widely disseminated. There is no guarantee that other professors will see, let alone read, a blog post. . . .

Unsurprisingly, it is easier for a law professor to disseminate her ideas within the legal academy if she enjoys a strong professional reputation. A professor with a strong professional reputation is likely to get more citations to her scholarship and receive more conference invitations. She is more likely to be invited to join an established blog; and if she chooses to start her own blog, the site is likely to receive a significant amount of traffic. But a professor who is looking to develop her professional reputation must do so largely by trying to disseminate her ideas. This creates a Catch-22, especially for junior faculty or faculty outside of the most elite law schools: They want to disseminate their ideas widely in order to develop a good professional reputation, but not already having such a reputation hampers their ability to disseminate their ideas widely.

A law professor who wants to communicate her ideas outside of the academy is even more limited by her existing professional reputation, and she has even fewer options both to communicate her ideas and to increase her reputation. She can try to publish op-eds or popular press books. But it is much more difficult to publish in those venues than it is to publish in law reviews or with academic presses: manuscripts are not blind-reviewed, and thus authors who already have strong reputations are more likely to be published. The professor can speak with reporters and try to get quoted in an article or to make an appearance on radio or television. But media calls are usually initiated by the journalist, rather than by the expert. . . .

Twitter makes the communication of ideas both inside and outside of the academy much easier. Twitter allows professors to offer their opinions quickly and in an easily digested format. Because tweets have character limits, they allow professors to express an opinion on a topic without expending the time required to write something longer, like an academic article or a blog post. . . .

Twitter also allows professors to offer their opinions on their own initiative. A professor who wants to comment on a newsworthy topic need not wait for a reporter to call her. Twitter allows law professors to reach a national audience at the click of a mouse. What is more, an idea or an opinion offered on Twitter can come to the attention of a journalist writing on the topic. While journalists are unlikely to



Carissa Byrne Hessick

read law review articles or even law professor blogs, they often search Twitter. And so a tweet may lead to media opportunities, such as quotes in newspaper articles or appearances on television shows, which will increase an academic's professional profile.

Twitter also makes it easier for law professors to communicate with other law professors. Many law professors are on Twitter, and it is easy to interact with other professors by commenting on their posts or jumping into "conversations" that other professors are already having. Indeed, it appears that this behavior is expected, even between professors who have never met each other before. Twitter thus enables professors to increase their professional network without having to travel to conferences.

The Twitter platform not only allows professors to more easily disseminate their ideas, it also gives professors more information about how many people have seen their idea, as well as who agrees or disagrees with the idea. Ordinarily, law professors have to wait for years in order to assess whether their ideas have had an impact. . . .

Twitter's Virtues as Vices

. . . But the very features of Twitter that make it a good vehicle for expressing ideas are also its most problematic features for academics.

Take, for example, the ability of a professor to express an opinion easily on Twitter. One of the defining features of academic scholarship is that it is the product of considerable time and effort. Tweeting, as compared to traditional scholarship, takes almost no time or effort. This makes Twitter an attractive venue for expressing ideas. . . . But eliminating the time and effort associated with legal scholarship has other, quite negative consequences.

Twitter is not designed to highlight or encourage effort. Unlike longer formats, such as law review articles and blog posts, an idea expressed in a tweet is unlikely to contain much in the way of reasoning. Tweets are conclusory. . . .

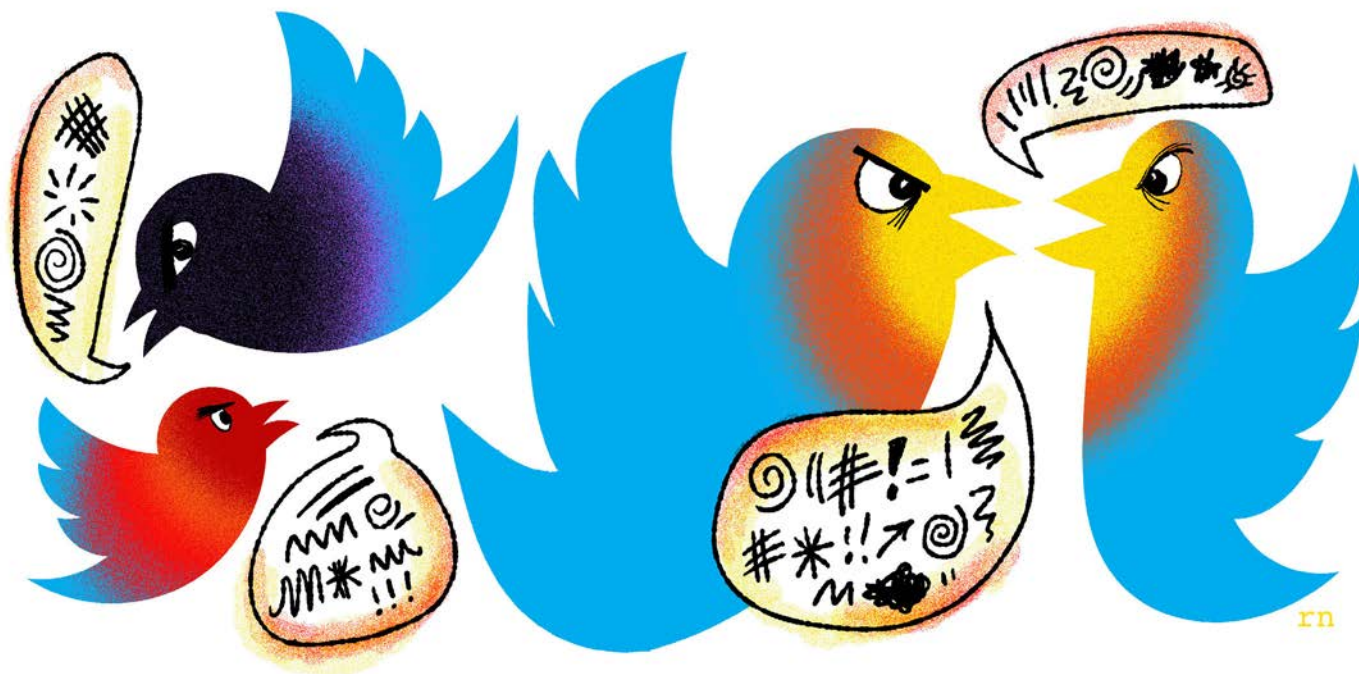
What is worse, the shortened format may also distort ideas. Because of the shortened format, professors must make choices about what information to highlight, what information to omit, and what information to treat superficially. Space constraints may create incentives for professors to treat an idea superficially—particularly ideas with which they disagree. . . . This tendency to oversimplify may transform substantive disagreements between academics into little more than virtual shouting matches.

Twitter's shortened format also encourages professors to share ideas that are not fully formed or vetted. Because it is so easy to communicate ideas on Twitter, professors will often present ideas on Twitter for the first time. Precisely because the barriers to communicating an idea are so low, those who use Twitter will often use the platform to make statements that they would never make in other contexts—statements well outside of their areas of expertise, or statements that they have spent no more time thinking about than the time it took to type them. It is the process of reasoning that forms the core of most legal analysis. And it is reasoning (rather than just our conclusions) that separates academics from non-academics. Thus, if a professor tweets casually—without reflection or depth of knowledge—then she is using the platform in a way that does not help her communicate her ideas *as an academic*.

The ability to tweet casually is especially attractive when it comes to newsworthy topics. Twitter allows those who have expertise on a topic to disseminate their ideas when that topic is timely. . . . But Twitter does not distinguish between those law professors with expertise on a topic and those without. . . . And, unfortunately, one rarely gains large numbers of followers or garners large numbers of retweets by offering sober, nuanced analysis. Pithy generalizations and partisan fodder are more likely to generate interest and followers. . . .

. . . Because the process of writing and publishing scholarship takes so long, a professor will publish an idea only after considerable reflection. In contrast, a law professor's tweets on noteworthy events do not require generally applicable principles. Professors can offer an opinion on a particular event—such as an opinion on whether a particular government action is constitutional—without having to articulate or defend a generally applicable principle. Because a professor is expressing an opinion only about this particular instance, the opinion may have been influenced by her intuitions or preferences about the outcome of that particular case. That is to say, it might reflect a political or personal preference rather than a considered legal opinion.

Perhaps most importantly, if a professor is using Twitter in order to express an idea on a noteworthy topic, then she is using the platform in order to avoid the time lag that would ordinarily provide an opportunity for reflection. Like most law professors, I have often changed my mind about legal opinions after reflection. . . . Twitter encourages and rewards



those professors who offer opinions quickly, rather than those who leave themselves time for reflection.

The increased control that Twitter gives over one's opportunities to increase professional reputation can also be problematic. Although the traditional scholarship model does not give professors much control over their professional reputations, the little control a law professor does have is over the quality of her scholarship. For most people, high-quality scholarship requires significant reflection and great depth of knowledge. Twitter rewards the opposite. . . . A professor who published law review articles on current events and without reflection would be mocked; but a professor who tweets in such a manner will likely be rewarded by a large Twitter following. . . .

Even Twitter's ability to facilitate communications between law professors has its downsides. Twitter's quick communication sometimes allows professors to refine their ideas more efficiently. But the ability to communicate quickly sometimes leads professors to communicate rudely. Time for reflection doesn't just help professors refine their ideas; it also gives them time to cool off and couch their disagreement with peers in polite (or at least professional) terms. I am sorry to say that I have witnessed more than one professor whom I otherwise admire behave very rudely on Twitter. And because Twitter is a constantly available platform, it allows people to tweet when they are tired, angry, or otherwise not their best selves. This probably makes unprofessional behavior far more likely.

I should note that I am personally guilty of many of the Twitter vices that I have identified. I have tweeted outside of my area of expertise; I have allowed newsworthiness to eclipse rigorous analysis and reflection; and I have sometimes tweeted in an intemperate tone. The fact that the Twitter platform facilitates, and at times incentivizes, such behavior is not an excuse for what I've done. But I do tend to think that, to the extent more law professors exhibit this behavior on Twitter, the behavior is likely to increase. Indeed, the legal literature on norms suggests that our behavior is, in many respects, influenced by the behavior we see in our environments rather than by legal prohibitions. Thus, if more law professors were to eschew the vices of Twitter—if, as a profession, we were to develop informal social norms to counteract the incentives of the platform—then we could see a real positive change in how law professors behave on Twitter.

Suggested Norms for Law Professors on Twitter

. . . [A] law professor's participation on Twitter isn't necessarily limited to shaping a law professor's individual public image; the law professor's participation can also shape public perception of law professors as a group.

To be clear, not everything that a professor does necessarily reflects on the academy as a whole. If a law professor tweets about a sporting event, complains about the state of public transit in her city,

or tweets about some other relatively mundane issue that has nothing to do with the law, then the tweets are unlikely to have an effect on the reputation of the legal academy as a whole. But when professors tweet about legal issues, or when they tweet false and incendiary information from Twitter accounts that identify them as law professors, then their behavior on the platform may reflect not only on them as individuals, but also on the legal academy as a whole.

Because law professors' tweets may affect public perception of law professors as a group, we, as a group, should work to develop norms associated with law professor participation on Twitter. Indeed, we should work to develop norms associated with all types of non-scholarship public discourse, including op-eds, legislative testimony, and amicus briefs. But this short essay is focused on Twitter.

I have two suggested norms for law professors who tweet: First, law professors should assume that, each time they tweet about a legal issue, they are making an implicit claim to expertise about that issue. Second, professors who participate on Twitter should keep in mind that they are part of a profession that is committed to promoting reasoned debate. These norms will not correct all of the Twitter vices identified in this essay—they are far too modest to do that. But my hope is that, in proposing relatively modest norms, they are more likely to be accepted by other professors.

Importantly, these suggested norms are directed only at those who publicly identify themselves as law professors on Twitter. A law professor whose Twitter profile and tweets do not identify her as a law professor is “tweeting in her personal capacity” and should feel free to tweet only with her own reputation and interests in mind. And a law professor's posts on other non-publicly available social media, such as Facebook, are also more appropriately considered personal.

Perhaps more importantly, I am offering these norms as a starting point for discussion. . . .

1. Assume you are claiming expertise when you tweet about issues related to law

Law professors who identify themselves as law professors on their Twitter profiles are making a representation to the public. They are identifying themselves as an expert on legal issues. Thus, a person who identifies herself as a law professor on Twitter should assume that others will interpret that identification as a claim to expertise. That claim to

expertise lurks in the background of all tweets on legal topics.

An implicit claim to expertise does not necessarily mean that a law professor should only tweet in areas where she is an expert. Because Twitter is populated by many people who know very little about the law, a law professor will often be able to clarify or dispute a legal issue that is being mischaracterized by others, even if that issue is outside of her core area of expertise. . . . [W]hen tweeting on legal issues outside of their area of expertise, law professors should take care to dispel the implicit claim to expertise created by their self-identification as a law professor. . . .

One might question whether law professors' tweets about political issues also carry an implicit claim to expertise. After all, it is often difficult to disentangle law from politics (and vice versa). Take, for example, a law professor who tweeted that a particular presidential action should or should not lead to impeachment. Whether impeachment is warranted is both a legal and a political question, and so it may be unclear whether the professor is making a legal statement—in which case the implicit claim is present—or a political statement—in which case it likely is not. Reasonable minds could differ on this issue, but I believe that, to the extent that a law professor's tweet on a political issue could be viewed as a tweet on a legal issue, then she should err on the side of caution and assume that there's an implicit claim of expertise.

To be sure, assuming an implicit claim to expertise can be burdensome, and it may lead law professors to tweet less outside of their areas of expertise. After all, a tweet that is framed as a question or that includes a disclaimer of expertise is hardly going to be thought pithy and retweeted widely. And so some professors may find it is simply not worth tweeting on newsworthy topics outside their area of expertise. I'm not sure that is a bad thing.

2. Help promote (or at least do not undermine) reasoned debate

Whenever law professors express ideas, at least some people will disagree with them. Disagreement is nothing new to law professors. We often disagree with judges or other professors in our scholarship. And when we publish our own scholarship or speak at conferences and workshops, people often disagree with us. Engaging with those who disagree with us is part of our job as law professors.

Using Twitter to engage with opposing views is not easy. The character limits lead many Twitter users to

be abrupt. Those same limits also pose a challenge for offering explanations, rather than simply conclusions. Some people appear to use Twitter primarily as a platform to inflame the passions of others, while others proudly proclaim that their tweets are meant to be “snarky.” Dealing with abrasive and downright rude people does not lead a person to be calm, cool, or collected.

Even though the Twitter platform makes civil disagreement more difficult, law professors should strive to uphold the same norms of reasoned debate that we have in our disagreements about scholarship. When disagreeing about ideas in scholarship, law professors are often able to do so in a professional manner. They identify the precise grounds of debate, concede when appropriate, and keep the discussion focused on the substance of the arguments. Twitter disagreements should follow the same form. A law professor should ask herself, before tweeting, whether the tone and the content of her disagreement are appropriate given that she publicly identified herself as a law professor.

One might wonder why a law professor ought to have a special obligation to promote reasoned debate. What is it about law professors—as opposed to dentists, accountants, or elementary school teachers—that should require them to maintain a civil tone on Twitter? The difference is that one of the major skills

we aim to teach our students in law school is to be able to argue dispassionately about controversial topics. Our ability to disagree civilly with one another about our scholarship is not simple professionalism; it is part of what helps set legal thinkers apart from those without legal training.

Twitter can be a useful platform for law professors. But it also poses a number of challenges. Many law professors whom I admire avoid the platform altogether; several others tweet, but express great ambivalence about doing so. The avoidance and ambivalence are attributable, at least in part, to the problems with the platform I’ve addressed here.

But if the more circumspect and intellectually scrupulous law professors stay off Twitter, that is not necessarily good for the legal academy as a whole. Twitter may be a passing fad. But right now it is a major platform by which the general public is exposed to law professors. The law professors who are the most active on Twitter are, in a very real sense, the public face of the legal academy for a large segment of the country. That is why the rest of the legal academy should take an interest in setting norms for the platform. ■



INSIGHT & PERSPECTIVE

An important goal of Marquette University Law School is to be a crossroads where leading thinkers in many legal fields offer thoughtful, in-depth perspectives. The first four pieces below—variously involving criminal law, innovation without patents, public service in the law, and a personal narrative from a major figure in the legal world—are snapshots reflecting the intellectual diversity in the Law School’s programs. What they have in common is that they offer insight and perspective and are strong examples of the Law School’s success in offering students, lawyers, and the general public chances to learn from scholars and public figures. The final piece provides some context about a public figure who is part of the Law School and behind much of the school’s public programming.

Gabriel “Jack” Chin

The Additional Costs of Conviction

This is an edited excerpt from the text of last fall’s George and Margaret Barrock Lecture on Criminal Law, delivered on November 8, 2017, by Gabriel “Jack” Chin, who holds the Edward L. Barrett Chair of Law and is the Martin Luther King Jr. Professor of Law at the University of California, Davis. The full text of the lecture, “Criminal Justice’s Collateral Consequences: Future Policy and Constitutional Directions,” will appear in this fall’s *Marquette Law Review*.

After decades of obscurity, collateral consequences seem to be moving into the spotlight of the United States legal system. Everyone knows that a conviction may result in imprisonment, fine, probation, or parole. Until relatively recently, even among lawyers, few understood that

people with criminal convictions face a network of additional legal effects, known as collateral consequences. This was unfortunate, because collateral consequences affect many areas of life, often more significantly than traditional forms of punishment. Some criminal

convictions can lead to loss of civil status; a citizen may lose the right to vote, serve on a jury, or hold office; a non-citizen may be deported or become ineligible to naturalize. A



conviction may make a person ineligible for public benefits, such as the ability to live in public housing or hold a driver’s license. Criminal convictions affect employment; laws prohibit hiring of people with convictions as peace officers or as employees for the health-care industry. A criminal conviction can also make a person ineligible for a license or a permit necessary to be employed or to do business; it can cause the forfeiture of a pension. Criminal convictions can also affect family relations, such as the ability to have custody of or visitation with one’s child. While criminal convictions have serious nonlegal effects, such as stigma or shame, the focus of this article is on legal mandates.

In the last half of the twentieth century, courts invalidated few, if any, collateral consequences, ruling that they were civil regulatory measures which were tested against deferential standards of review associated with other economic regulations and were not subject to the restraints imposed by the Bill of Rights on criminal punishment. However, starting in the new millennium, courts and important actors began to notice collateral consequences and think about how they can be integrated into the legal system. In 2004, the American Bar Association promulgated ABA Standards for Criminal Justice: Collateral Sanctions and Discretionary Disqualification of Convicted Persons. The Uniform Law Commission promulgated the Uniform Collateral Consequences of Conviction Act in 2009, and the American Law Institute amended the Model Penal Code sentencing provisions to address collateral consequences in 2017. As a result, jurisdictions imposing collateral

consequences have a wealth of carefully considered policy recommendations and statutory models to improve their laws.

The courts have also been active. In 2010, the Supreme Court issued its landmark decision in *Padilla v. Kentucky*, overruling scores of lower court cases to hold that counsel had an obligation to advise noncitizen clients about the possibility of deportation following a conviction. More recently (in 2017), the Court, per Justice Anthony Kennedy, offered a broader suggestion of doubt about the network of collateral consequences. In the course of an opinion invalidating a prohibition on sex offenders accessing the internet, the Court stated: “Of importance, the troubling fact that the law imposes severe restrictions on persons who already have served their sentence and are no longer subject to the supervision of the criminal justice system is also not an issue before the Court.” Similarly, state courts and lower federal courts have found that particular collateral consequences violate state and federal constitutional guarantees. State legislatures have also responded, with many of them increasing access to relief methods or otherwise relieving collateral consequences. . . .

There is some evidence that collateral consequences are moving toward becoming a more formal sentencing factor. The ABA Standards for Criminal Justice provide: “The legislature should authorize the sentencing court to take into account, and the court should consider, applicable collateral sanctions in determining an offender’s overall sentence.” The commentary explains that “the sentencing court should ensure that the totality of the penalty is not unduly severe and that it does not give rise to undue disparity.” The Model Penal Code also brings collateral consequences into the sentencing process.

In a highly publicized 2016 decision, *United States v. Nesbeth*, Senior U.S. District Judge Frederic Block (in the Eastern District of New York) considered collateral consequences in imposing a sentence:

I have imposed a one-year term of probation. In fixing this term, I have also considered the collateral consequences Ms. Nesbeth would have faced with a longer term of probation, such as the curtailment of her right to vote and the inability to visit her father and grandmother in Jamaica because of the loss of her passport during her probationary term.

Because courts consider other personal circumstances when imposing a sentence, it is hard to see why they should categorically ignore collateral consequences provided by law.

Relief from Collateral Consequences

The ABA, the Model Penal Code, and the Uniform Collateral Consequences of Conviction Act all contemplate means of relieving individual collateral consequences to facilitate rehabilitation, reentry, and self-support. For example, if all people convicted of felonies may be excluded from public housing, some mechanism should be available for a nonviolent offender to live in public housing so long as there is a realistic basis to believe that it will facilitate self-support and presents no unreasonable risk to public safety. In addition, all of the groups contemplate broader relief if rehabilitation is indicated by the passage

of time, completion of the sentence, and the individual’s record.

The law of most jurisdictions has always provided for executive, legislative, or judicial relief. There is evidence that relief improves employment outcomes. The federal system has no established relief measure other than a presidential pardon, a matter that has proved frustrating for some federal courts.

Eliminating Unnecessary Collateral Consequences

Collateral consequences have developed piecemeal, not systematically. Because of the limited judicial review, legislatures have not had to articulate the reasons for their enactment or evaluate their effectiveness or costs. It seems that collateral consequences are sometimes imposed casually, without full consideration of how they fit into a system of punishment, reentry, employment, and protection of the public.

Bar organizations agree that jurisdictions should refine collateral consequences and eliminate ones that are unnecessary. The Model Penal Code proposes that disenfranchisement be prohibited, or limited to the period of imprisonment, and that jury disqualification be limited to periods of correctional control. The ABA proposes that convicted persons not be disenfranchised, except during



Illustrations by Robert Neubecker

confinement, and should not be ineligible “to participate in government programs providing necessities of life” or for “governmental benefits relevant to successful reentry into society, such as educational and job training programs.”

Jurisdictions, equipped with comprehensive collections of collateral consequences, should ensure that they are structured to promote public safety, both by protecting the public from harmful individuals and by leaving room for people with convictions to lead law-abiding lives. The connection between the consequence and the reduction of the risk has often been based not on evidence, but, rather, on intuition or assumptions based on perceived logic. Increasingly, however, risk can be measured and evaluated. A number of studies show that the risk of reoffending diminishes with time since criminal involvement. There is also evidence that a provisionally hired employee who clears a state-mandated criminal background check has a reduced likelihood of future arrest; that is, not imposing the collateral consequence has a positive public-safety effect. In addition, a recent study suggests that the disqualifications imposed by statutes do not match up to the decisions that would be reached based on use of empirical data about criminal records and reoffending. It may well be that individuals can get a fairer shake, and public safety can be better protected, if decision makers consider empirically reliable factors such as the time since criminal involvement and evidence of law-abiding behavior, rather than using categorical bars based on conviction of particular crimes. . . .

The Legislative Response

Subjection of new collateral consequences to ex post facto limitations, and even holding that a state or federal constitutional provision requires notice of collateral consequences, by no means completely resolves the problem. As important as those changes may be in individual cases, they are incremental with respect to the system as a whole

and to the tens of millions of people validly subject to existing collateral consequences. Even constitutional limitations do not prevent imposition of collateral consequences once the limits have been satisfied. Courts have no authority to rewrite or invalidate otherwise constitutional laws in the name of good policy. Courts work at the margins, at best trimming collateral consequences to the extent that they are unconstitutional, or interpreting laws to avoid constitutional doubts.

Nevertheless, the court decisions represent an important signal in at least two dimensions. First, if some collateral consequences are brought into the criminal justice system—say, by requiring notice of deportation or of sex offender incarceration—it requires little additional time or effort to mention other important consequences. Many lawyers are likely to include warning and counseling as part of their practice even in the absence of a legal requirement, whether as a matter of good practice, for fear that the legal requirement may be coming, or both.

In addition, court decisions have the potential to signal that legislation is needed (just as legislation may signal to courts that problems worthy of attention to doctrine may exist). Legislatures seem to share the same concerns about collateral consequences as courts. Legislation mitigating collateral consequences is increasing in the states. The Collateral Consequences Resource Center has issued two major reports on state laws dealing with restoration of rights. The center’s 2016 report, covering 2013–2016, concluded that “[s]ince 2013, almost every state has taken at least some steps to chip away at the negative effects of a criminal record on an individual’s ability to earn a living, access housing, education and public benefits, and otherwise fully participate in civil society.” The center’s 2017 report noted that “[t]he national trend toward expanding opportunities for restoration of rights and status after conviction . . . has accelerated in 2017.” ■

James Sandman

“In Pursuit of a Cause I Really Care About”

An end-of-the-year Eckstein Hall event combines the Law School’s Pro Bono Society Induction Ceremony and its Gene and Ruth Posner Pro Bono Exchange. Last spring’s Posner Exchange featured James Sandman, president of the Legal Services Corp., interviewed by Mike Gousha, the Law School’s distinguished fellow in law and public policy. The audience in the Lubar Center included the 94 students about to be inducted into the Pro Bono Society in recognition of the time—at least 50 hours and in some cases more than 120—each had put into pro bono work. Here are excerpts from Sandman’s remarks.

On becoming a law clerk after graduating law school:

When I graduated from law school, I clerked for a judge on the U.S. Court of Appeals for the Third Circuit, Max Rosenn. Judge Rosenn was my most important mentor and role model as a lawyer. He was a terrific judge, but he was also a model of the lawyer as public citizen. He was deeply involved in his community. He was just always giving back. There was nothing in the community that his fingerprints weren’t all over, and it was great at the outset of my career to have a role model like that.

On joining the major law firm of Arnold & Porter after his work as a clerk:

[One of the reasons] that I went to Arnold & Porter, in addition to the fact that

they didn't have departments, was they had and have a world-class pro bono program. The firm had been founded after World War II by three people who had come out of government, and, in the late '40s and the early '50s, they saw the effects of Senator Joe McCarthy of Wisconsin, who was accusing people in government and in academia of being Communists or Communist sympathizers. This was a time when it was the kiss of death to be thought that you had anything to do with communism.

And in the early years of the firm, the lawyers spent more than half their time doing pro bono work representing government employees whose livelihoods were being threatened by accusations that they were Communist sympathizers. . . . That culture of pro bono was just so deeply embedded that it made it easy for me to do pro bono from the day I joined the firm.

On leaving Arnold & Porter in 2007, after 30 years, 10 of them as managing partner:

I loved my firm, and I loved being managing partner of the firm. Being managing partner was a very interesting job. It's like being dean of a law school. No two days are ever alike. I not only continued to practice, but I got to deal with everything from information technology, to accounting and finance, to strategic planning, to every personnel issue imaginable. Our firm employed 1,600 people. That's a small village. And I loved that. It broadened my experience and got me exposed to things that I never would have been able to do had I simply been practicing law. But I was functioning in the world of "big law," as they call it. And if you're a managing partner of a big law firm, you have to be able to pay your lawyers the going rate. The going rate today for an associate at a big firm in a big city is a starting salary of \$180,000 a year. And you've got to be able to pay your partners an average of seven figures.

I reached a point where I felt as if I were devoting my life to making rich people richer. Not the clients of the firm,



but my colleagues. That's not why I went to law school. I mean, I know how to do that. I knew what the levers were to manage revenue and expense—but I just came to feel a disconnect between what I was doing for a living and my values as a person.

And one of the lessons that I learned is that one of your goals in your career should always be to find harmony between what you do for a living and who you are as a person. That can be hard to find, particularly right at the very beginning of your career. Very few people find that straight out of law school. But if you pursue it over time, if you're persistent and deliberate about it, it will come. You have to be willing to take some risks and make some changes, and that's what I did.

In the fall of 2007, when I'd been considering making a career change for some time, I went to the annual pro bono breakfast of the Washington Lawyers' Committee for Civil Rights. The speaker was Michelle Rhee, who

had recently become chancellor of the District of Columbia Public Schools. She subsequently became the face of urban public education reform in the United States, but she didn't have a national profile at that point. She gave an electrifying speech. Everybody who was there remembers it. And she left you with the sense that if any person could turn around what was then the worst-performing public school system in the United States, she could.

At the end of her speech to this group of lawyers, she said, "So what can you all do to be helpful to me?" And she ticked off three or four things that lawyers could do, none of which I remember except the last. She said, "If any of you know where I could find a good general counsel, I really need one. I'm surrounded by lawyers who only know how to say 'No.'"

Well, it may sound impetuous, but I decided right there on the spot, "I'm going to work for her. I'm going to go for that



James Sandman

job.” So I followed up, and seven weeks later I was working at the District of Columbia Public Schools. If you’re looking to make a change in your career, try moving from a big law firm to the District of Columbia Public Schools. It was wild.

The first thing I learned on my first day of my first new job in 30 years was there is no free coffee in the government. I didn’t know that. It only makes sense. You can’t use taxpayer money to buy coffee. Who’s buying the taxpayers their coffee for them? But I had brought my mug from home. I came out of my office, and I said to my new colleagues, “Where’s the coffee station?” And I could tell from the looks on their faces right away that I had committed a horrible faux pas. They—their looks—said, “This new guy is not going to last very long.”

And I had to learn a whole new area of law—education law. I had no background as an education lawyer. I had to learn local law.

Why he left his position with the school system:

The chancellor of the D.C. Public Schools reports to and is appointed

by the mayor, and, in 2010, the mayor was defeated in his bid for reelection. I knew, as a result of that, that Michelle Rhee was likely to be moving on, and I didn’t know who her successor would be. And at that point, Legal Services Corporation was looking for a president. I was contacted by a friend who told me about the opening. And I thought, “Wow, what another great opportunity to use my management experience”—to be, in effect, CEO of what was then a \$400-million-nonprofit corporation—in pursuit of a cause that I really care about: access to justice for people who can’t afford a lawyer.

The Legal Services Corporation:

The Legal Services Corporation is the country’s largest funder of civil legal aid programs in the United States. Despite our name, we don’t provide any legal services to anybody. We fund other organizations to do it. So, for example, here in Milwaukee our local grantee is Legal Action of Wisconsin.

His description of equal access to justice as “a cruel illusion”:

I say this because in huge numbers of high-stakes cases today, the vast majority of litigants can’t afford a lawyer. It is common in the United States today for more than 90 percent of tenants in eviction cases to have no lawyer, even though more than 90 percent of landlords do have a lawyer. It is common for the majority of parents in child support and child custody cases not to have a lawyer. The majority of victims of domestic violence seeking protection orders have to go it alone without a lawyer. Imagine that.

The person who goes into our system alone, unrepresented, untrained in the law, confronts a system created by lawyers for lawyers, built on the assumption that everybody has got a lawyer. Everything about the system, from the language of the law to the forms that are used to the rules of civil procedure to the rules of evidence, was created with lawyers in mind. It’s a system that works pretty well if you have a lawyer and not well at all if you don’t.

It’s a great invisible issue in our society. It’s largely unknown. Most Americans don’t realize that you have no right to a lawyer in a civil case. They don’t realize that you can lose your home or have your children taken away from you or be a victim of domestic violence in need of a protection order, and you have no right to a lawyer.

So the people who are trying to navigate the system without the benefit of a J.D., membership in the bar, or maybe a college education or even high school diploma are at sea. And that’s why I say for them our promise of justice for all is a cruel illusion. It’s not true.

The need for changing the system:

There are important cases—cases involving a roof over your head, your personal safety, or the stability of your family—for which we need to redesign the system with the understanding that the majority of the litigants are not going to have a lawyer. And if you were to start over again, you would never design the system that we have today. If you put yourself in the position of the user of the system who is not a lawyer, but a person uneducated in the law, you would create a system that was much simpler, that didn’t have the complexities that we have.

“Everything about the system . . . was created with lawyers in mind. It’s a system that works pretty well if you have a lawyer and not well at all if you don’t.”

James Sandman

Allowing non-lawyers to provide some assistance that now generally requires lawyers:

I think it's a no-brainer that that is necessary, subject to proper training and regulation. There is resistance in the profession to any effort to permit people who are not licensed lawyers to do anything that looks like the practice of law. Come on, folks. Some competent help is better than no help at all. The people who insist on maintaining the current standards for the unauthorized practice of law, what they're saying is, "It's okay to leave these people—low-income people who cannot afford a lawyer—with no help at all. Nothing is better than inflicting, oh, say, a paralegal on them." That is not true.

His message to the law students receiving recognition for pro bono involvement:

First of all, congratulations and thank you to all of you who have been honored today for the pro bono work that you've done here. You're off to a great start. You're doing it the way you should. Keep it up. I'd encourage you to look for opportunities, whatever you do in your careers, to continue to give back in pro bono. And there are lots of opportunities out there. There are organizations that can match you up with opportunities that will permit you to make a difference.

What I've learned in my own career and life is that a career is long. You have lots of opportunities to do different things at different points in your career. When you're in law school, you're focused, understandably, on your first job—that job you get right out of law school—and sometimes people have unrealistic expectations of what that job is going to be and mean to them. Well, your first job is only that, your first job. I'm now in my eleventh year of a second career in public service, and I've never been happier. ■



Rebecca S. Eisenberg

Innovation Without Patents: FDA Regulation and Insurance Coverage of Diagnostic Genetic Testing

This is an edited excerpt from Marquette Law School's 2018 Helen Wilson Nies Lecture in Intellectual Property, "Opting for Regulation When Patentability Is in Doubt," delivered on March 6, 2018, by Rebecca S. Eisenberg, the Robert and Barbara Luciano Professor of Law at University of Michigan Law School. The complete article will appear in this fall's issue of the *Marquette Intellectual Property Law Review*.

... For now at least, most laboratories that perform genetic testing services do not need approval or clearance for their tests from the Food and Drug Administration (FDA). In this environment, when an applicant has sought FDA approval for a genetic test, it has generally been for a specific companion diagnostic product developed in tandem with a targeted drug and used to identify which patients are likely to respond to that drug.

Meanwhile, more-comprehensive genetic tests that use next-generation sequencing technology—NGS—to

examine hundreds of genes to detect mutations driving a patient's cancer have become available without FDA approval. These tests have proliferated in both academic medical centers and commercial laboratories. Perhaps the successful development of this new technology, in the face of considerable uncertainty about the availability of patents, suggests a need to refine the conventional wisdom about the role of patents in providing incentives for biomedical innovation.

Before we discard the conventional wisdom, we should consider two

explanations for why this particular technology might flourish in the absence of patents. Both of these explanations are consistent with the familiar story from the pharmaceutical industry that it needs patents to cover high costs of product development. First, perhaps innovators are willing to invest in laboratory-developed tests only because of the FDA's exercise of administrative discretion, at least so far, to refrain from regulating these products. This explanation leaves open the possibility that patents may be necessary to motivate investment in more heavily regulated therapeutic products such as drugs. Second, perhaps pharmaceutical firms are willing to invest in genetic testing because having validated companion diagnostic products helps them develop and get regulatory approval for lucrative new patent-protected drugs targeted against specific mutations. Indeed, as explained earlier, development and validation of companion diagnostics may accelerate FDA approval of these targeted drugs.

In both of these stories, innovators seek to avoid the costs of FDA regulation and are more inclined to invest in the face of lower regulatory costs and risks. In this sense, these stories are also consistent with broader narratives about costly regulation as a drag on innovation.

Neither of these stories explains why laboratories that offer genetic testing of tumor DNA have begun to seek FDA approval of their products, even when it is not legally necessary because the products qualify as laboratory-developed tests (LDTs). Laboratories are free to offer these tests without the FDA's blessing, and in fact they are already lawfully offering them before they voluntarily submit applications to the FDA. Last year, the FDA approved two very similar "next-generation sequencing" tests for LDTs that detect mutations in hundreds of genes in tumor DNA samples. One application was from Memorial Sloan-Kettering Cancer Center (MSKCC) for FDA clearance of its IMPACT test as a Class II device. The other was an application from a private firm,

"Insurers have a tradition of not paying for research, at least as a formal matter. But, in fact, insurers have always paid for innovative treatment choices that have not yet been validated through clinical trials."

Rebecca S. Eisenberg

Foundation Medicine, for premarket approval of its Foundation One test as a Class III device. The choices of different regulatory pathways have had interesting consequences that I will consider soon.

But first, why would these laboratories take upon themselves the costs and risks of submitting their products to FDA regulation when the FDA does not require it? The short answer is that health insurers were refusing to pay for testing. This itself is a bit of a puzzle, since the cost of testing is trivial compared to the overall costs of cancer care. It is not obvious why insurers that readily pay in excess of \$100,000 a year for expensive, new targeted drugs would decline to pay a few thousand bucks up-front for testing that might reveal in a single test whether the patient is a candidate for any of more than a dozen previously approved targeted cancer therapies. Some insurers are willing to cover less-comprehensive genetic tests that focus only on clinically validated mutations that have been shown to predict treatment response but not the more-informative tests that sequence more DNA and are likely to reveal mutations of unknown significance in hundreds of genes. This position follows model coverage guidelines for NGS in oncology, as proposed in 2015 by the Green Park Collaborative-USA, a multi-stakeholder program hosted by the nonprofit Center for Medical Technology Policy.

Although the difference in cost between limited testing to detect particular validated mutations and more-comprehensive testing that will reveal many more mutations is small, some insurers see an important principle at stake: their role is to pay

for clinically validated care but not for experimental care, and certainly not for research. There is some truth to the charge that coverage for broader genetic testing would have the effect of using insurance to pay for research. Although there is immediate clinical value in genetic testing to identify candidates for targeted therapies, there is also considerable research value in detecting additional mutations in genes that are known to play a role in cancer. The biological significance of these mutations may not yet be clear, but they are suspects that may prove to be culprits in driving cancers. Tracking these mutations in registries of cancer patients, along with their health records, would provide valuable data for researchers seeking a better understanding of cancer, perhaps enabling future improvements in cancer treatment. NGS testing uncovers both clinically validated mutations that are targeted by FDA-approved drugs and other mutations of unknown significance. In other words, genetic testing has significant value as data collection for research, in addition to its immediate value in matching patients with currently available treatments.

Insurers have a tradition of not paying for research, at least as a formal matter. But, in fact, insurers have always paid for innovative treatment choices that have not yet been validated through clinical trials. Even when the FDA requires premarket testing for drugs and medical devices, substantial questions about clinical validity and utility may remain at the point of initial approval—questions that can be answered only in the course of subsequent clinical care. Many health-care innovations do not require FDA approval at all. The



Rebecca S. Eisenberg

FDA does not regulate the practice of medicine, and caregivers are free to adopt new innovations in the course of clinical care without first having to await studies that would satisfy the FDA's standards for proof of safety and efficacy. Insurers might balk at paying for an expensive new procedure, such as autologous bone marrow transplantation for cancer patients, on the grounds that it is experimental, but much experimental medical care flies beneath the radar of insurance gatekeepers and gets covered based on the choices made by caregivers. Insurance coverage is especially important to facilitate innovation in areas that are not regulated by the FDA, because without the FDA demanding data from clinical trials, it is less likely that innovators will collect data prior to clinical use in the course of health care. Moreover, clinical use is unlikely to proceed in the absence of insurance coverage, making insurance coverage important to spur innovation.

Therein lies the Catch-22 for unregulated NGS genetic testing: Insurers won't pay for testing unless the results have validated clinical significance. Drug companies will pay for premarket validation of the relatively small number of mutations that allow them to get targeted therapies approved by the FDA. But beyond these "druggable" mutations, drug companies have less interest in understanding the clinical significance of the much larger universe of variants in genes that play a role in cancer. Because many of these variants are relatively rare, it is not economically feasible to study them in premarket clinical trials on the scale that drug companies typically undertake in pursuit of FDA approval. Studies in

much larger populations of patients are necessary to correlate these variants with health outcomes in order to validate their clinical significance, a job better done in observational studies in the course of clinical care. But clinical care won't happen without insurance coverage. In short: Validation requires use in clinical care, use in clinical care requires insurance coverage, and insurance coverage requires validation.

This dilemma highlights an important function of FDA regulation that goes far toward explaining why innovators might seek FDA approval for new technologies that they are free to market without that approval: The FDA performs a technology assessment function that public and private insurers rely on in deciding what they will pay for. For public insurance such as Medicare, federal law authorizes payment for "reasonable and necessary" care. Centers for Medicaid and Medicare Services (CMS) regulations interpret this language to exclude "experimental" care. Private insurance policies often include similar language, and private insurers often follow the lead of Medicare in deciding what they will cover, although they need not do so as a matter of law.

"Reasonable and necessary" care under the laws governing Medicare coverage is not necessarily the same thing as "safe" and "effective" care under the laws

administered by the FDA. Nonetheless, for the most part, health insurers provide coverage of FDA-approved technologies, although they may require prior authorization when cheaper alternatives are available. Sometimes federal or state law coverage mandates require them to cover these products, and sometimes they are simply avoiding the burden of conducting their own technology assessment by relying on the FDA's determinations.

This is a significant benefit of FDA approval that may explain why innovators such as Foundation Medicine and MSKCC decided voluntarily to submit their products to FDA regulation even though they were not required to do so. Perhaps they hoped that FDA approval would serve as a good enough proxy for clinical utility to persuade insurers to pay for testing. . . .

FDA approval or clearance of a new technology makes doctors and patients more willing to use it and insurers more willing to pay for it, even when the FDA would otherwise do nothing to stop the technology from reaching the market. Although public and private insurers could and sometimes do perform their own technology assessment, it is often cheaper and easier to free ride on the work done by the FDA. ■





Goodwin Liu

An “Unplanned” Career Reaches Legal Heights

These are edited, shortened excerpts from the conversation with Goodwin Liu, associate justice of the California Supreme Court, in an “On the Issues with Mike Gousha” program at Eckstein Hall on April 19, 2018. Liu also judged the Jenkins Honors Moot Court Finals during his visit to Marquette Law School, and the final entry below is from his comments following the arguments.

On his personal background:

I’m the son of immigrants who came from Taiwan in the late 1960s. This was a time in which the United States was recruiting foreign doctors to work in underserved areas, so I was born in Augusta, Georgia. From there, we moved to a very small town in Florida, called Clewiston, which is near the southern end of Lake Okeechobee, in the area where Zora Neale Hurston’s book, *Their Eyes Were Watching God*, is set. In 1977, when I was not quite seven years old, we moved to Sacramento, California, and that’s where I spent most of my childhood. At the time, Jerry Brown was the governor, and he is again the governor today.

I think my parents’ story is so typical of the general immigrant story. They came to this country without much money, from a

place that at the time was not democratic. And immigrants, I think, feel this, not just in the political sphere, but they feel economically as well, that they and their kids are not going to get a fair shake in a society that is not governed by the rule of law. My parents, like many immigrants, came to America because they really believed that this country is dedicated to the rule of law and that people here will be treated fairly and have equal opportunity. They started here with very little, but they had good educations and they worked hard to give their children good opportunities.

On how he became a lawyer:

I always think of my career path as a series of unplanned events. Those of you who are students here should take heart—

there’s no plan, believe me. It wasn’t until after college that I decided to go into law. I had finished college and had applied to medical school and gotten in, and I was given a deferred admission at a very good medical school in California. My parents were so excited that this happened, and then I eventually disappointed them by deciding not to go. But they recovered.

[Liu graduated from Yale Law School in 1998.]

On Justice Ruth Bader Ginsburg, for whom he clerked:

It’s so interesting to see her public profile enlarged and elevated in the way it has been. When I clerked for her, it was the 2000 term, the *Bush v. Gore* term. She’s a very physically diminutive person, a Jewish grandmother, and she has a very soft voice. You almost have to lean in really close to her to hear her talk. . . . She’s not a screamer; she doesn’t write in a vituperative kind of way. And she has always put a very high premium on collegiality even with her colleagues with whom she disagrees, and I think that was an important lesson. Over time, she has become a major force in the public sphere, and I think it’s in part because she carries herself so modestly, but she has such a sharp intellect, she has a flair for identifying the core issue in a case and zeroing in, especially in her dissents, on what is wrong with whatever it is she is criticizing. That is a very special skill.

On being nominated for a federal appellate judgeship:

This is also part of the story of unplanned events. It was unplanned that I went to law school. And then, when I was in law school, I thought I would probably return to the public policy sphere—work in government or be a policy wonk of some kind. I never thought I was going to be a law professor. And when I became a law professor, I never thought I was going to become a judge. I did not seek it, nor did I plan for it. The proof of that is that nobody who ever planned to be a federal

judge would have written as much as I had. That is the occupational hazard of being a law professor—that you’re going to end up writing on a whole bunch of things, which I did. And being in the constitutional law field and in the education policy field, many topics are going to be controversial.

On his experience of being nominated by President Barack Obama to a seat on the U.S. Court of Appeals for the Ninth Circuit and having the nomination held up for a year by Republicans in the U.S. Senate:

Every nominee will tell you: It is a challenging experience. There’s nothing that really prepares you for it. There’s a lot of lead-up to being nominated—vetting by the FBI, the American Bar Association, the Department of Justice. And you’re being examined top to bottom—every aspect of your background and life. Eventually, someone calls from the White House and says, “We’re ready to nominate you.” And then your name goes out there. And I came to realize: The confirmation process is a political vortex that has a history and that has other parts you don’t know anything about. But I learned that you have to have a thick skin in the political world, and you cannot take criticism personally.

On whether there are two systems of justice, one for those who can afford attorneys and another for those who cannot:

It is one of the biggest challenges that faces not only the legal profession but also society more broadly. During my Supreme Court clerkship, we had lunch with Justice David Souter. He was the attorney general of New Hampshire and became a First Circuit judge and then was elevated. Before that, he was a lawyer in New Hampshire, and he said that when he was coming up in his profession, it was inconceivable in his community that a person who needed a lawyer—for a custody issue, benefits, a divorce, or probate—could not get a lawyer. If people could pay a fee, they

would pay; but if they couldn’t pay a fee, well, that’s fine, too; you just serve them anyway. That made an impression on me. So, as a concluding thought, I’ll offer an exhortation to the lawyers and the law students here that doing important work for people who cannot afford legal services is so important. No matter what you do in your career, that has to be one of the things that you do.

On how a student might prepare for a moot court argument:

A good oral argument sounds like a conversation. And invariably here is what happens in moot court: Students, because you are students and we are judges, adopt what I consider an overly formal or rigid demeanor. Of course, it’s easy for us to tell you, “Just relax.” You’re not going to relax—you feel a lot

of pressure, and you’re trying to show us appropriate deference.

But if you actually go into a courtroom and watch how experienced lawyers argue cases, they treat judges as peers in the legal profession—the idea being that we’re all sitting here together, trying to work together to solve a problem.

And so a better exercise in practicing your style is to be with *your* peers and argue in front of them. Think about how you would explain this problem and your point of view to your classmates. You might have to modulate that a bit for what you present in court, but that should be kind of your baseline—how you, in a conversational way, just explain it to someone who doesn’t know that much about it and whom you’re just trying to tell, “Here are the issues, and here’s how they should be resolved.” ■

Mike Gousha

“Knowledge Is Great, but You Need to Listen”

Mike Gousha is a widely respected broadcast journalist and a full-time member of the Law School community. His remarks at the Marquette University College of Education’s graduation ceremony this past May, at the invitation of Dean Bill Henk, tell some of Gousha’s story—and some other truths.

Thank you, and congratulations to the graduates, their parents and families, and the College of Education faculty, staff, and leadership. It’s truly an honor to be with you.

As Dean Henk noted, I am not an educator. I’m a journalist, who works on our public policy initiative at Marquette University Law School. Before that, I had a long career in television, reporting and anchoring nightly newscasts. In fact, when I told my friends that I was being appointed as “distinguished fellow in law and public policy,” they seemed a bit perplexed. Or as one of them put it: “Seems like a pretty fancy title for a guy who wore makeup and read out loud for much of his adult life.”

But let me assure you: I come from good stock. I was born into a family of teachers. My dad was a teacher who went on to become state school superintendent in Delaware, the Milwaukee Public Schools superintendent, and the dean of the School of Education at Indiana University.

My mom was a speech pathologist, who worked in public school districts in Ohio, Delaware, Wisconsin, and Indiana.

And I have three nieces who are schoolteachers, in Minnesota, Indiana, and California.

More on them in a bit. But my point is that I’ve been surrounded by educators from the time I was born, and as a result,

I think I can safely say I have some sense of how hard you work, how much you care, and how much you're valued.

Yes, I know it may not always seem like we value educators. For example, in recent weeks, we've seen teachers in states around the country walk off the job to get better pay and better funding for their schools. Our nation's priorities seem a bit confused. We worship celebrities who often possess little discernible talent—other than taking *selfies*—while thousands of unsung, *selfless* educators are in our schools and universities every day, helping prepare the next generation to be successful, productive members of society.

And yes, at times, it appears that educators, and even knowledge, are under assault. A few months ago, as part of my work at the Law School, I interviewed a Naval War College professor, Tom Nichols, who had written a book called *The Death of Expertise*. In his book, Nichols worries that we've become proud of "not knowing things." He writes, "Americans have reached a point where ignorance, especially of anything related to public policy, is an actual virtue. To reject the advice of experts is to assert autonomy, a way for Americans to insulate their increasingly fragile egos from ever being told they're wrong about anything. It is a new Declaration of Independence: no longer do we hold *these* truths to be self-evident, we hold *all* truths to be self-evident, even the ones that aren't true. All things are knowable and every opinion on any subject is as good as any other." I'm tempted to wish that Professor Nichols would tell us what he really thinks.

I'm not quite as pessimistic as the good professor, who is quite good-humored outside the pages of his book. For example, at Marquette Law School, we've done polling on how state residents feel about their teachers, and teachers get very high marks. Let's



just say you're way more popular than journalists or Congress.

Still, let's be candid. This is an interesting time for educators.

And so, I wrestled long and hard with what to say today. What advice to pass along. Keep in mind, that, as a journalist, I've spent a lifetime reporting the stories of others, but little time offering opinions of my own.

After some soul-searching, I decided there were really three things that have guided me in my career. The first is something that my 94-year-old father and I talked about just the other day in a phone call. I asked him what he, the former teacher and school superintendent, would say to our graduates. He thought about the question for a while, and said, "Knowledge is great, but you need to listen. You need to find a way to communicate."

I couldn't agree more. In your work and mine, we need to talk less and listen more. If we do, we'll open our minds to new ideas, to potential solutions for the challenges we face today. Listening also signals respect, an essential ingredient for effective communication. But I would add to my dad's comments, and say that, in addition to being better listeners, we need to make sure to invite others into the discussion. To be more inclusive, to make sure there are more voices in our conversations.

Speaking of voices and conversations, my second piece of advice would be to have internal conversations about your career, regularly. What am I talking about? We'll call it your annual integrity checkup. Ask yourself some hard questions. "Why am I doing this?" "Do I believe in what I'm doing?" "Does it bring me joy?" And if it

doesn't, "Why am I still doing it?" Twelve years ago, I had to take a long, hard look at my own career. From the outside, I'm sure many folks thought I was in a great situation. But I wasn't happy, didn't agree with the direction of our newsroom, and decided I had to leave and find a new job that more closely aligned with my principles and values. I've never regretted that decision for a moment, and you won't either. It's okay to compromise on our preferences. But it's not okay to compromise on our principles. And when our passion and joy are gone, we owe it to ourselves to make a change.

And third, we need to celebrate our successes, to acknowledge the good work of our peers and coworkers. Positive feedback, encouragement, even the celebration of small victories—all this is absolutely crucial to a healthy, productive workplace. And yet it's often in short supply. We spend far too much of our time focused on what I call deficit-driven conversations. The negative, what's wrong. We spend much less time on what we're doing right, on the progress we're making, on the opportunities before us.

Perhaps in education, at least, that's because success isn't always flashy or easy to see or even to measure. It can take time. It's a process. When the Marquette men's basketball team beats Villanova, fans storm the floor. When the Packers win a Super Bowl, we have a parade through the streets of Green Bay. But what does success in education look like? Often, it's defined by metrics, such as better test scores. But there is a lot of work that educators do where success is less clearly defined and, as a result, less appreciated.

I mentioned my family earlier in my remarks, and over the last few years, I've

"From Delaware, my father became the superintendent of schools in Milwaukee. When he arrived in 1967, there were no African-American principals in a district of 120,000 students."

Mike Gousha



had some interesting conversations with my nieces about why they went into teaching. Amber, who's now in her upper thirties, works in a school district just outside Indianapolis. For years, she taught middle school kids. I said, the best I could remember, middle school kids were pretty squirrely, so why would she want to teach that age group? She didn't hesitate. "Precisely because they are so squirrely," she told me. "They're going through a challenging part of their lives. A lot is changing, and they need someone to help guide them, support them, and teach them during what can be a pretty difficult time."

Incidentally, Amber is married to a teacher. Chris, her husband, is the only male teacher in his elementary school. He's become a father figure of sorts to young boys in his school, a number of whom are growing up in single-parent households. Chris gets letters from parents thanking him for being a role model for their sons. We don't hold a parade for teachers such as Amber and Chris, but we should celebrate their good work and their daily successes. In their own way, they are game changers—life changers for their students.

My niece, Sarah, has a different set of challenges. She teaches English at a high school in an affluent school district in Silicon Valley in California. Sarah runs the drama program. But while high-achieving, it's a district with its own set of challenges: intense academic competition, tremendous peer pressure and cultural expectations, a higher rate of suicide. More than a few of the kids in Sarah's

drama program might be considered outsiders and loners. And it's working with those kids that Sarah often finds most rewarding. She helps them find a creative outlet and teaches them how to work together. Often these kids find a new enthusiasm for school, their sense of dread replaced by a sense of belonging. How do we measure that? And yet it's success, just the same. We should take a moment, to acknowledge and celebrate these achievements. Sarah, too, is a game changer, a life changer for her students.

Many of you in this beautiful theater will also change lives. You may not even know it at the time, but the knowledge you share, the encouragement you offer, the guidance you provide will be transformational. But with any career, there will be moments when you will wonder, "Am I really making a difference?"

Even today, my father, who spent a lifetime in education, wonders what it all meant. Did he make a difference? This is a man, who as state superintendent of Delaware, integrated the state's schools, ending a terrible legacy of separate and unequal education.

From Delaware, my father became the superintendent of schools in Milwaukee. When he arrived in 1967, there were no African-American principals in a district of 120,000 students. My father began to change that immediately. But he still regrets not having done more, faster, to address segregation in Milwaukee. My father arrived after a desegregation lawsuit had been filed against the school district.

He was here seven years but nonetheless left before it was settled.

My point is that in any career—yours, his, or mine—there will be times when we are tested, when we are worn out, frustrated, and when we question what we have really accomplished. Could we have done more?

Only you will know if you still have the passion and commitment, if you still feel the joy of being an educator.

But I'm betting that more than a few of you will. I've seen it up close, in my own family. As I mentioned earlier, my mother was a speech pathologist for five decades. In the final years of her career, she worked in a poor, rural school district outside Bloomington, Indiana. In her sixties, my mom was suffering from crippling rheumatoid arthritis. Getting to and from work wasn't easy for her. But she still loved what she did. She loved knowing that she could make a difference in a child's life. I remember her telling me the story of a teenage girl, who came to my mom with a severe stuttering problem. A year and a lot of hard work later, the stutter was gone. That student's lack of self-esteem had been replaced by a new, quiet confidence. As a thank you, this girl, who lived in grinding poverty, painted a beautiful picture and gave it to my mother.

Today that picture hangs in the hallway of our home. A reminder—a celebration—of the role educators play in our lives. You are game changers. Life changers. What an honor to be with all of you today. Thank you and good luck! ■

AN EYE ON THE HORIZON

Conference Takes Up Water Issues Along the Great Lakes

Dan Egan, a senior water policy fellow at the University of Wisconsin–Milwaukee and author of the 2017 book, *The Death and Life of the Great Lakes* (W. W. Norton & Co.), is an expert on the problems facing the Great Lakes. Few can speak as knowledgeably about those problems.

But Egan also offers a more positive perspective: Drive past a place such as Bradford Beach on Milwaukee’s Lake Michigan shore on a nice summer afternoon and look at how crowded it is. You didn’t see such scenes 40 or 50 years ago, when alewives and other problems often made the water and the shore smelly and unhealthy messes.

The good news and the bad, the potential and the concerns, were offered by Egan and other authorities at a half-day conference at Eckstein Hall in April 2018. The conference, titled “Lake Michigan and the Chicago Megacity in the 21st Century” and cosponsored with the *Milwaukee Journal Sentinel*, brought together two of the major policy interests of Marquette Law School: one focusing on water and the other focusing on the future of the “Chicago megacity.”

There is a strong case for pairing water issues and the future of this “megacity,” the region of 11 million residents extending across 21 counties in southeastern Wisconsin, northeastern Illinois, and northwestern Indiana. For one thing, the abundance of water that Lake Michigan offers is a key to the economic future of the region. For another, some of the most important controversies about Great Lakes water involve the Chicago megacity.

Peter Annin, the keynote speaker, told the 200 officials, researchers, advocates, and engaged citizens at the conference in the Law School’s Lubar Center that the Chicago megacity is “the front line in the Great Lakes water wars.” Annin said, “I think we’re just going to continue to see more” of clashing interests in the area.

The Chicago megacity—the metropolitan region from southeastern Wisconsin through Illinois to northwestern Indiana—is “the front line in the Great Lakes water wars. I think we’re just going to continue to see more” of clashing interests in the area.

Peter Annin

He described turf battles that go back more than a century and continue today about diversions of water from the Great Lakes. Some disputes ended up before the United States Supreme Court. Today, those disputes arise under the framework of the Great Lakes Compact, which prohibits diversions of Great Lakes water to locales outside the Great Lakes basin, with limited exceptions. Annin is director of the Burke Center for Freshwater Innovation at Northland College in Ashland, Wis., and the author of *The Great Lakes Water Wars* (Island Press), the second edition of which was published just this fall (2018).

In his conference keynote, Annin recounted and analyzed the controversy over using Lake Michigan water to supply Waukesha, Wis., which is outside the Lake Michigan basin. He described as well the current debate over whether a diversion of millions of gallons a day of Lake Michigan water should be allowed for the Foxconn factory, which is planned for a Racine County location. Though much closer to the lake than Waukesha, the Foxconn complex nonetheless is located in a community situated partly west of the Lake Michigan watershed. The Great Lakes Compact does not permit a diversion application by a private entity acting on its own behalf, but here local governmental entities would be the conduits.

Shortly after the conference, a group of environmental advocacy organizations filed a formal legal challenge to the approval issued for the Foxconn diversion by the Wisconsin Department of Natural Resources. The challenge is currently pending before an administrative law judge and may wind up in the Wisconsin courts.





Illustration by Jean-Francois Podevin

Continuing the Law School's focus on the Chicago megacity—and on water

The conference was a fresh chapter in Marquette Law School's engagement in exploring the state and future of the Chicago megacity. In 2012, the Law School and the *Journal Sentinel* hosted a conference focused on Milwaukee's future in that megacity, with a special emphasis on the question of how closely Milwaukee should tie its economic future to Chicago. Three years later, in 2015, another conference examined public attitudes in the region, using a special Marquette Law School Poll to advance understanding of how megacity residents view opportunities and challenges, from transportation to tourism.

During the same general period, the Law School launched its Water Law and Policy Initiative, led by Professor David Strifling, to support the Milwaukee region's efforts to become a worldwide leader in water research and policy. Today, the expanded initiative seeks to help establish the Law School, its Lubar Center for Public Policy Research and Civic Education, and, more broadly, Marquette University as a center for study, exploration, discussion, and education concerning water issues.

The conference was the latest in a series of public education efforts by the Water Law and Policy Initiative, including large-scale conferences, public presentations, media appearances, and academic publications. These are often in collaboration with

local partners such as the Marquette University College of Engineering, the City of Milwaukee, The Water Council, and the University of Wisconsin–Milwaukee School of Freshwater Sciences, among others.

Providing a safe and reliable water supply is particularly challenging for most megacities (which are usually defined as metropolitan areas with a population of more than 10 million people). It is also a key determinant of regional success. Unlike many megacities, though, the Chicago megacity is blessed with abundant freshwater supplies, thanks to its location along Lake Michigan.

As a result, water is very tightly intertwined with the region's history, identity, and economy. Drawing on these themes, conference participants explored a variety of important water issues involving the Great Lakes—including collaboration, water wars, water challenges, and water improvements.

Randy Conner, water commissioner of the City of Chicago, and Milwaukee Water Works superintendent Jennifer Gonda discussed the challenges that governments in the region face to fund improvements to decaying and, in some cases, dangerous elements of water infrastructure systems, including lead laterals. Conner and Gonda discussed how the Chicago megacity could drive a revolution of "smarter" infrastructure and innovative water use practices to better serve its citizens and to ensure a stable supply of clean water far into the future.

Providing a safe and reliable water supply is particularly challenging for most megacities. . . . It is also a key determinant of regional success.

Speakers generally agreed that greater collaboration across the Chicago megacity would be beneficial. One step toward more collaboration, of course, involves building stronger relationships among the people who are involved. Bringing people at the heart of water issues together at the conference gave participants opportunities both formally and informally to enhance such relationships. For example, Conner and Gonda could be seen having a lengthy one-on-one conversation in the Zilber Forum after the program ended.

Speaking to a perceived gap between scientific advances and their incorporation into policy decisions, Prof. Sandra McLellan of the UWM School of Freshwater Sciences identified the need for appropriate resources and support for communities in the region to learn from each other's efforts.

Multiple threats to Great Lakes water quality

Another conference panel analyzed various threats to Great Lakes water quality, including invasive species, runoff from diffuse agricultural and urban sources, and climate change. Those challenges—and policy responses to them—will shape the face of the region over the next century.

Molly Flanagan, vice president for policy of the Chicago-based Alliance for the Great Lakes, discussed a proposal in Washington, D.C., to remove the federal Environmental Protection Agency's oversight of ballast dumping by ocean-going ships when they are in the Great Lakes. Ballast dumping has been the way some harmful invasive species have entered the lakes. Giving the United States Coast Guard sole oversight would harm the fight against such invasions, she said.

Egan amplified Flanagan's concerns. The Great Lakes "are perilously close to losing Clean Water Act protection," Egan said. The Clean Water Act has worked remarkably well for the Great Lakes, he said, but it took court action to get the Environmental Protection Agency to acknowledge that ballast water "is indeed a pollutant, every bit as much as anything that comes out of a smokestack or a pipe." Ballast water is a big reason why there are more than 180 non-native species in the lake. It only took one of them, the quagga mussel, to make major changes in the lake's ecology, Egan said.

Egan was dismissive of the idea of the Coast Guard's taking over the monitoring of water issues. The Coast Guard is "interested in . . . what's in the water" only "if it's a sailor," he said. "They're looking out for the safety of people, not the ecology of the lakes."

The United States Senate rejected the proposal to eliminate the EPA's supervision of ballast water a few days after the conference.

"The conference laid the groundwork for the Chicago megacity's stakeholders, including its citizens, to chart a new course toward innovative water management and cooperative water stewardship in the years to come."

David Striffling

The Paris-based Organisation for Economic Cooperation and Development (OECD) has characterized the Chicago megacity as home to the leading water-related economic cluster in the United States. At the Law School's conference, a panel discussion on the Great Lakes as a tool for regional economic development included descriptions by advocates from Milwaukee and Chicago not only of the advantages of the nation's top water technology cluster's location near an abundant supply of water but also of the need to use the water "wisely and carefully," as Dean Amhaus, president and CEO of The Water Council, based in Milwaukee, put it.

Bob Schwartz, senior policy advisor to the consulate general of Israel to the Midwest, located in Chicago, underscored that call. Schwartz talked about the world-leading technologies related to water that have been pursued in Israel and about avenues for increasing involvement between Israel and the Midwest on water-related work.

Cooperation or competition? Speakers support some of both

The panelists also discussed the perception that Milwaukee and Chicago are competing, rather than cooperating, for business-development opportunities. Panelists from both areas acknowledged that each municipality will want firms to locate within its boundaries, but they also recognized that larger developments, such as Foxconn, are opportunities for cooperation that could advance the interests of the broader region.

The Law School's Striffling said, "Those regional interests have sometimes been obscured by decisions made with a more local focus. The conference laid the groundwork for the Chicago megacity's stakeholders, including its citizens, to chart a new course toward innovative water management and cooperative water stewardship in the years to come."

Michael R. Lovell, president of Marquette University and a longtime champion of Milwaukee's development into a water hub, recounted to the audience a conversation he had several years ago with the head of Kikkoman Foods, the Japanese company known for its soy sauce. Kikkoman located a plant in Walworth County, southwest of Milwaukee. The Kikkoman leader said the company did this because it believed that, 100 years from now, the population base of the United States would be focused in the Midwest—and because "to make great soy sauce, you need great water."

Lovell said the anecdote underscored how participants in the conference needed to think about protecting the supply and quality of water not only for the near future but also for a century from now. ■

“IF YOU SEE A TURTLE SITTING UP ON A FENCE” AND OTHER THOUGHTS OF THANKS

The annual alumni awards event, in Eckstein Hall on April 26, 2018, was an opportunity for the Marquette University Law School community to honor and thank five outstanding lawyers. But the honorees themselves each saw it as a chance to thank family members, colleagues, friends, and the Law School itself, in a variety of different ways (the remark in the headline above is from Judge James Wynn’s comments). Edited brief excerpts from each award-winner’s remarks appear on this and the following two pages.

William “Bill” McEssy

Lifetime Achievement Award



William H. McEssy

William “Bill” McEssy, L’64, first was a practicing lawyer in Fond du Lac, Wis., and now for more than 35 years has been a business leader in Lake Forest, Ill., as one of the largest McDonald’s franchisees in the country. His civic activities have included longtime leadership of the board of advisors of the University of Saint Mary of the Lake, a leading national seminary in Mundelein, Ill.

Dean Joseph Kearney and I became good friends. I remember once when I met him and he said, “Bill, I think we’re going to build a new law school.” My dad and I had both been in Sensenbrenner Hall. And I said, “Well, I for one will tell you I think it’s about time.” And Joe said, “I think we can get this done in three years.” I said, “Well. . . .”

But this is what Joe and the rest of the faculty and the donors thought. I don’t know if there’s a more beautiful law school in the country. It just is outstanding. So instead of complimenting me, I want to compliment Joe and his team. Putting a building together like this is not easy. Take it from me.

The McDonald’s stores that I own go all the way from Lake Geneva into Illinois. The number of them is slowly getting smaller because the clock keeps going on. But I’m still actively involved in McDonald’s and some other businesses.

When Joe asked me to accept this award, I said, “Joe, I’ll accept the award if I don’t have to retire, because I feel like when you get a lifetime achievement award, you’re trying to tell me to get out of the way and it’s time for somebody else.” But I’m not getting out of the way.

William Griesbach

Alumnus of the Year

William Griesbach, L'79, is chief judge of the United States District Court for the Eastern District of Wisconsin, presiding most often in Green Bay.

I'm particularly honored to share in this award with my classmate and friend Jim Wynn. You know, Jim has contributed a great deal to his adopted "hometown" of Milwaukee and to the Law School. . . . What I can offer is how much my *debt* is to Marquette University and to the Law School.

I am quite certain that if it were not for Marquette University, I wouldn't be here. And I don't just mean that I wouldn't be on this stage receiving this award. I mean, I wouldn't exist. You see, my parents are both Marquette grads. My mother—who is here tonight—came from California. This California girl came across the country in 1942 to study journalism at age 18 because the editor of the paper where she worked during the summer after her senior year said of Marquette, "They have a good journalism school."

My father was from Menasha, about 80 miles to the north of here, and they met at Marquette in the journalism school. World War II broke out. They got married in between V-E Day and what would have been my father going off to the Pacific theater, but the bombing of Hiroshima and Nagasaki while they were on their honeymoon ended the war. My father finished up his degree here at Marquette, and then he went on to get a Ph.D. in philosophy at the University of Toronto.

The chances of this California girl meeting that Wisconsin boy would have been pretty slim but for Marquette University. And so you can see, I wouldn't have existed, nor would my 11 brothers and sisters have existed.

But it didn't end there. My father came back to Marquette, and he was here for 40 years teaching as a philosophy professor. It made it possible for me to attend Marquette, to gain an appreciation of what an education is, to begin learning the things that matter most in life. That education has continued right up until this day.

I'm left with the sense of the debt I owe to Marquette. But the debt doesn't stop with my existence or my education, because it also involves my own marriage. I met my wife here. She came from El Paso, Texas, to study theology, and that is perhaps the greatest gift I have received from my attendance at Marquette.



The Honorable
William C. Griesbach

James Wynn

Alumnus of the Year

James Wynn, L'79, is a judge of the United States Court of Appeals for the Fourth Circuit, based in Richmond, Va., with his own chambers in Raleigh, N.C.

Something reminded me today as I was standing here: An old Southern politician said, "If you see a turtle sitting up on a fence, you know one thing—he didn't put himself up there." And that's pretty much my story.

I have so many people to whom to be thankful for the life that I've been able to enjoy, the career that I've been able to exercise, the kind of independence and hopefully judicial courage that I seek as a judge.

I want the students and others to hear this. When you're asked, "Why in the world?," know that I asked that my first year here. "Why in the world am I in Wisconsin from North Carolina, especially when it snowed on October the 12th?" But God has been good to me, and I will tell you it has been solely by grace. And to have classmates like the class of 1979 who are so supportive, so continually trying to move to the next level, connecting even more so as we grow older. . . .

I enjoy working with this university. [Wynn is on the board of trustees of Marquette University.] We have a leadership team. The board here is just tremendous. The president is awesome. We are forging ahead. To have a dean of the law school here moving us into the next century and to this future that's before us. . . . I love this university, not only for the scholarship, not only for the leadership, but the spirituality. I just love the Jesuit background.

An important part of this institution is the fact that we are not just out trying to bring in students who will get a good education, but to make them good people and to make them God-fearing people, if I might add that, and I think that's politically quite correct at Marquette.



The Honorable
James A. Wynn, Jr.

Julie Darnieder

Howard B. Eisenberg Service Award

Julie Darnieder, L'78, practiced in Milwaukee in the area of workers' compensation, before focusing her efforts on the foundation and development of the Marquette Volunteer Legal Clinic—in the process, in the words of Dean Joseph D. Kearney upon presenting this award, accomplishing nothing less than “redefining . . . the term ‘Marquette lawyer’ for this generation.”



Julie Johnson Darnieder

The last time I was on this stage for this event was in 2002 when I was president of the Law Alumni Association Board. I was with Dean Howard Eisenberg. It was one of the last times I was with him. He died shortly after that. I was truly fortunate to have worked with him. We launched our efforts for the Milwaukee Volunteer Legal Clinic with his blessings. To be receiving this award in his name means so very much to me.

All along the way, the clinic has been a group effort, a village if you will—from the initial group who invented this wheel (and that's what it felt like much of the time), many of whom are still engaged, including the support of Acting Dean Janine Geske and now Dean Kearney, to our community partners who have embraced us, to the volunteer lawyers who never had to be recruited and who have stepped up always, to the clients who trusted us with some of their great challenges, and finally to our truly awesome students who have embraced this project for the past 16 years—many of whom are now on our attorney roster and continuing to serve. I would like to think that in some way we have contributed to their making as Marquette lawyers.

I am so proud of what this has become, thanks in large part to Dean Kearney's strategic vision in fully embracing the clinic, and of our law school staff: Angela Schultz, Katie Mertz, Mindy Schroeder, and others have advanced our efforts in just amazing ways.

Jessica Kumke

Charles W. Mentkowski Sports Law Alumna of the Year Award

Jessica Kumke, L'08, is associate athletic director for compliance and enrollment services, University of Wisconsin–Milwaukee.



Jessica A. Kumke

I want to thank the awards committee for recognizing me with this honor. And, specifically, I want to recognize Professor Paul Anderson, director of the National Sports Law Institute. I wouldn't be up here without him. He pushed me a lot in law school and encouraged me to do the things I didn't think I really could do. His support meant everything to me and is part of the reason that I give back to the program now. It's kind of nice now to be able to give that assistance to other students in any way I can, so I want to thank him for that.

And I want to thank my family who are here tonight: my mom and dad, brother and sister-in-law, my niece and nephew, and my Aunt Virginia who made the 11-hour drive from Nebraska with a six-year-old and a four-year-old to be here. You guys have also always supported me with everything, even if it meant moving me from a town of 400 people in rural Nebraska to the big city of Milwaukee. I appreciate everything that you guys have done. And, yes, you moved me two times up here, once for law school, and then back again for the job at UWM.

CLASS NOTES



Michael J. Gonring



Ted A. Warpinski



Christine E. Woleske



Brian C. Randall



Craig A. Pintens



Andrea B. Niesen

74 **William C. Gleisner III** was elected chair of the Wisconsin Judicial Council. He has been a member for the past 10 years.

82 **Michael J. Gonring** received the 2018 John H. Pickering Award of Achievement from the American Bar Association in recognition of his "significant contributions to improving justice for all." Gonring recently stepped down as executive director of the Legal Aid Society of Milwaukee.

84 **Jill M. Rappis** was recognized as one of Chicago's Notable Women of Healthcare by *Crain's Chicago Business*. She is regional senior vice president and general counsel of Loyola University Medical Center. Her recent work includes leadership in Loyola Medicine's acquisition of MacNeal Hospital in Berwyn, Ill.

85 **Michael J. Marcil** received the NCAA Division II Conference Commissioners Association's 2018 Award of Merit. The award is for individuals who have made exceptional contributions to the NCAA Division II membership and its student-athlete experience. Marcil now teaches in the sports management program at Bellevue (Nebraska) University.

87 **Ted A. Warpinski** and his colleagues at Friebert, Finerty & St. John have joined the firm of Davis & Kuelthau in Milwaukee. His practice includes environmental nuisance claims and toxic tort litigation, contract and property disputes, insurance coverage litigation, and enforcement actions.

94 **Nina M. Jones** has been named development director for Congregation Shalom in Fox Point, Wis.

Suzanne D. Strater is now a career law clerk to Judge Amy St. Eve at the U.S. Court of Appeals for the Seventh Circuit in Chicago.

Christine E. Woleske, previously executive vice president and chief operating officer, has been named president/CEO of Bellin Health System in Green Bay, Wis.

98 **Troy D. Cross** has been elected as a judge of the circuit court in Columbia County, Wis. He served as an assistant district attorney in the county for 19 years.

99 **Brian C. Randall** is among the former Friebert, Finerty & St. John attorneys who are now part of Davis & Kuelthau in Milwaukee. His practice includes zoning, land use, licensing, ordinance changes, and local government bids and contracts.

Congratulations to the following Marquette lawyers named among the *Milwaukee Business Journal's* "Women of Influence" for 2018:

Danielle Bergner, L'05, J. Jeffers & Co.

Madeleine Lubar, L'80, Community Volunteer

Rachel Monaco-Wilcox, L'04, LOTUS Legal Clinic

01 **Craig A. Pintens** has been named athletic director at Loyola Marymount University, Los Angeles. He was senior associate athletic director at the University of Oregon for the prior seven years.

03 **Andrea B. Niesen** was selected as a 2017 Attorney of the Year by *Minnesota Lawyer*. A civil litigation attorney at Klampe, Delehanty & Pasternak in Rochester, Minn., she was recognized for her amicus work influencing state appellate decisions relating to the care of mentally ill and disabled individuals.

Ryan E. Ruzziconi was appointed to the Board of Trustees of Children's Hospital of Michigan Foundation. The foundation has provided more than \$42 million in grant funding, making it Michigan's largest funder dedicated solely to children's health and wellness.

04 **William V. Gruber** was appointed this past June to serve as a judge of the Jefferson County Circuit Court. He served as Watertown city attorney for the prior five and a half years.

SHARE SUGGESTIONS FOR CLASS NOTES WITH CHRISTINE.WV@MARQUETTE.EDU.

We are especially interested in accomplishments that do not recur annually. Personal matters such as weddings and birth or adoption announcements are welcome. We update postings of class notes weekly at law.marquette.edu.

Employment data for recent classes are available at law.marquette.edu/career-planning/welcome.



JANET PROTASIEWICZ, L'88

A PEOPLE PERSON of the First Order

Growing up on Milwaukee's south side, Janet Protasiewicz was interested in politics. Fortunately, living nearby was a major figure in American politics, Clement Zablocki, a longtime member of Congress who chaired the House Foreign Affairs Committee.

Protasiewicz wasn't shy. One day, she was passing Zablocki's house, and he was outside gardening. Then 18, she approached him and said she wanted to work for him. She had no experience in office work, but he said no one had ever asked him for a job in that way. He hired her for a summer position in his small office on Lincoln Avenue, where she answered the phone and helped constituents. Soon, the two other people who worked in the office switched over to working for Zablocki's reelection campaign, and Protasiewicz, who was then attending the University of Wisconsin–Milwaukee (UWM), staffed the office solo.

"I learned so much from the experience," she says. One thing she learned was that a large proportion of political leaders were lawyers. Protasiewicz also had a big interest in American history, and she observed that many of the great leaders of the country had been lawyers.

So she decided she was going to go to law school. After studying early American history and graduating from UWM, Protasiewicz enrolled in Marquette Law School. "Coming to law school here was one of the best decisions I ever made," she says. "Marquette Law School has been really, really good to me." She has reciprocated with her energetic involvement, currently serving as immediate past president of the Law School's alumni association board.

At first, she wasn't sure what direction she wanted to pursue as a lawyer, but two things changed that. "I took a trial advocacy class, and I just loved it," she says. And she did an internship in a business setting and decided that wasn't for her.

After completing law school, Protasiewicz joined the Milwaukee County District Attorney's office. That was in 1988.

She worked as a prosecutor in the office until 2014, handling a wide range of cases and duties, from involvement in heart-warming adoptions of children to trials of violent criminals. "It was invaluable time," she says. She developed great respect for her colleagues' professionalism and commitment to do what was ethically, as well as legally, right. And the people in the DA's office and the court system "were like your family."

So why did she leave? Because she wanted to be the one on the bench, making the decisions. In 2014, Protasiewicz was elected to be a judge of the Milwaukee County Circuit Court.

"The job is harder than it looks," she says. "There are some really hard calls. What some of the people involved in cases have endured is amazing." But she likes the work. Her duties have included parts of the court dealing with drug cases, domestic violence and child abuse, and misdemeanors. Most recently, she has been on the bench in felony drug court.

What did a high-ranking congressman see in an 18-year-old who approached him for a job while he was gardening? Let's assume Zablocki saw someone who would step forward to connect with people and serve her community.

That's exactly what Protasiewicz has done.

She remains a people person and networker of the first order. "The most important thing I have is the people who surround me and help me every day," she said upon being honored by the *Wisconsin Law Journal* earlier this year as one of the state's "women in the law." The list of the people surrounding her starts with her husband, Gregory Sell, who is also an attorney, and includes her extended family, friends, work associates, and others involved in the large number of community groups—Rotary, the Red Cross, Professional Dimensions, Tempo, and more—in which she is an active participant.

The investiture ceremony in 2014 when she became a judge drew one of the largest gatherings in memory for such an event. The reason is simple: Janet Protasiewicz herself. ■



WILLIAM R. DREW, L'66

Alderman, Commissioner, Director —ALWAYS A LEADER

My grandmother used to have a saying when something happened that was not really planned,” Bill Drew says. “She would call it the finger of God.”

Drew says he didn’t have a plan for what he would do after completing Marquette Law School in 1966. So let’s assume it was the finger of God that pointed him to a long and distinguished career in public service in Milwaukee.

Or maybe we shouldn’t entirely dismiss the human element in setting the course of Drew’s life. He had an active interest in politics while an undergraduate at Marquette University and during several years of work after graduation, including a job in dorm administration for Marquette, before he entered law school. During that period, he was chair of the Young Democrats organization in Wisconsin, where he got involved in campaigns and came to know some of the most famous names in mid-twentieth-century Wisconsin politics.

After Drew graduated from the Law School, he contacted then-U.S. senator William Proxmire in hopes that Proxmire could help him get a job in Washington. That led to Proxmire’s hiring him as legal counsel in his Capitol Hill office.

After two years in Washington, Drew returned to Milwaukee, where—this is one of those things that Drew hadn’t planned on—then-mayor Henry Maier recruited him to run for alderman from a district that covered much of downtown, the Marquette campus, and the Merrill Park area to the west of the campus. Drew won and rose quickly within the Milwaukee Common Council. From 1972 to 1974, he was president of that body.

In 1974, another unplanned turn: There was a vacancy in the position of commissioner of the city’s Department of City Development. Maier asked Drew to help with the search for a successor. When someone whom Maier wanted for the job turned it down, the mayor told Drew, “I guess you’ll have to do it.”

Drew resigned as alderman and began 14 years of leading the city’s involvement in a wide range of projects. Some examples: He played important roles in the launch of the Grand Avenue Mall in downtown Milwaukee, the construction of the Bradley Center sports arena, the development of the Summerfest grounds, and local work under federal programs aimed at improving housing and neighborhoods in Milwaukee.

“Those were exciting days for me,” Drew says. “Every day was different.” He was involved in many complicated real estate transactions and setting up public-private partnerships for development projects. He oversaw compliance with requirements of federal programs. “I used my law degree on a regular basis,” Drew says.

In 1988, Maier left office after 28 years, and Drew left the city development position and joined the law firm known today as O’Neil, Cannon, Hollman, DeJong & Laing. But when Thomas Ament was elected Milwaukee County executive in 1992, Ament asked Drew to head the county’s Department of Administration.

Another unexpected turn: The county was launching work on creating a research park, west of the medical complex in Wauwatosa, to attract new businesses. When the head of the effort retired, Ament asked Drew to step in. Drew was director of the research park until 2013, as it went from being largely undeveloped land without infrastructure to a well-developed home to enterprises with about 5,000 jobs.

Drew and his wife, Mary Cannon, continue to live in Milwaukee, and he continues to be of counsel with the law firm.

Drew has had big roles in big developments shaping the Milwaukee area as it is now and will be in the future. Feel free to credit the finger of God for leading him to the public sector. “That’s where I belonged, I guess,” Drew says with a smile. ■



Sara E. Dill



Nirali N. Shah



Jessica A. Kumke



Brent A. Simerson



Max T. Stephenson



Michael G. Koutnik

05 Sara E. Dill launched a law firm and policy consulting agency, Anethum Global, in Washington, D.C. Her areas of focus include international law, human rights, foreign affairs, cross-border finance, national security, white collar crime, and immigration. She previously was the director of criminal justice standards and policy for the American Bar Association.

06 Jessica D. Poliner, who was previously head of Ingersoll Rand's Thermo King Latin America team, is now vice president and general manager for the company's Transport Solutions Marine, Rail and Air (MRA) business. She is based in Brussels, Belgium.

Chad E. Novak, in Minneapolis, has been named vice president, underwriting counsel, Midwest region, for Alliant National Title Insurance Company.

08 Nirali N. Shah appeared on *Wheel of Fortune* on May 1. Her appearance was filmed in October 2017.

Mauri Hinterlong, an attorney at Gray Reed & McGraw, in Dallas, gave birth to a daughter, Amanda Tyler, on April 8, 2018. Amanda joins her sister, Elizabeth Ottilia, who was born December 11, 2016.

Jessica A. Kumke has been promoted to serve as the University of Wisconsin–Milwaukee's associate athletic director—compliance and enrollment services. She continues her responsibilities for compliance, enrollment services, and sport supervision and is now responsible for the oversight and management of UWM's athletics scholarship budget.

10 Alexander R. Britton has been named general counsel of Zywave, a Milwaukee-based software company offering insurance agency software for management, analytics, HR portals, and marketing to more than 5,000 insurance agencies nationwide.

Brent A. Simerson joined the Milwaukee office of Reinhart Boerner Van Deuren as an associate in its litigation practice. His practice focuses on product, health care, and governmental liability.

13 Max T. Stephenson is president of the Milwaukee Young Lawyers Association. He is an attorney with Gimbel, Reilly, Guerin & Brown, practicing in family law.

Michael G. Koutnik has been promoted to shareholder at Fox, O'Neill & Shannon, Milwaukee, where he is in the firm's transactional and real estate practice.

14 Andrew N. Docter has been named director of business operations and special events for the University of Wisconsin–Milwaukee's athletics department.

16 Jeffrey A. Smith has been named executive vice president of hospital operations and chief operating officer at Cedars-Sinai Medical Center, in Los Angeles. Immediately previously, he was executive vice president and chief operating officer at UMass Memorial Medical Center.

The Wisconsin Law Journal selected seven Marquette lawyers to receive its "Women in the Law" honors for 2018:

Bonnie M. Abramoff, L'85, Abramoff Law Offices

Jesica A. Ballenger, L'10, Milwaukee County District Attorney's Office

Sherry D. Coley, L'03, Davis & Kuelthau

Tiffany L. Highstrom, L'04, Stafford Rosenbaum

Mary Honzik Kliesmet, L'81, Waste Management

Porchia S. Lewand, L'15, Milwaukee County District Attorney's Office

Janet C. Protasiewicz, L'88, Milwaukee County Circuit Court Judge



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COAST TO COAST

Marquette University Law School is proud to call Milwaukee home.

We are equally honored that students who call so many other places home and who are graduates of universities and colleges in such a wide range of places have chosen to enroll here.

The students of the Class of 2021 are a diverse group.

Their permanent homes are in **29 states, from Rhode Island to California, Florida to the state of Washington.** They graduated from 97 universities and colleges in 32 states, the District of Columbia, and abroad. There are as many women as men. Nearly a quarter are from minority groups. They range in age from 20 to 35.

Here is what they have in common.

Their decision that Marquette Law School offers them the personal, practical, and professional education that will help them build a life in the law.