

MARQUETTE LAWYER

MARQUETTE UNIVERSITY LAW SCHOOL MAGAZINE FALL 2015

JUNIOR JUDGES OR
JUDICIAL ASSISTANTS?
The Role of Law Clerks

ALSO INSIDE:
Franklin, Morse, Myers,
Ranney, Williams, Zimmer



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Of Foxes, Hedgehogs, and Marquette Law School

It has become an accepted truism in academia that there are two fundamental intellectual styles: the fox and the hedgehog. The ancient Greek poet Archilochus observed that “the fox knows many things, but the hedgehog knows one big thing.” Following Sir Isaiah Berlin’s famous interpretation of the line, we have come to believe that intellectual pursuits (and careers) are characterized by either a singular, coherent, abiding focus or a collection of approaches and ideas that are seemingly unconnected, eclectic, and even disorganized. The notion has transcended traditional disciplinary boundaries and been adopted



Daniel J. Myers joined Marquette University as provost on July 1, 2015. *Marquette Lawyer* invited Provost Myers to introduce himself.

by scholars in fields ranging from the most interpretive and humanistic to the most basic of the sciences and even to the most practical technical disciplines. Indeed, I first considered my own orientation across this divide after reading biologist Stephen Jay Gould’s treatise, *The Hedgehog, the Fox, and the Magister’s Pox*, in the wake of being accused of dilettantism by my long-suffering Ph.D. advisor. As a sociologist who dabbled in game theory, economics, pure mathematics,

psychology, computer science, and even a little sociology in the course of creating my dissertation, I did not find it difficult to recognize myself as a fox. Happily, the fox orientation has proved to be invaluable as an academic administrator, where one is required, often on an hourly basis, to shift cultures and vocabularies.

While hedgehogs and foxes sometimes cast aspersions toward one another of being either myopic or unfocused, they usually are content to ignore one another and go about their pursuits (or pursuit, in the case of the pure hedgehog) without worrying about the failings of the other. At times, however, some can recognize the value of both styles: the fox can bring in novel insights from flitting around the disciplines, while the hedgehog uses those outsights to bear down on the fundamental problem monopolizing its gaze.

In turn, the foxes help transmit the advances achieved by their hedgehog friends, helping produce new applications of those ideas, both in other disciplines and practical settings.

This distinction applies not just to individual academicians but also to academic organizations (departments, schools, colleges, centers, and institutes). Research centers, for example, may be more hedgehog-like if they are constructed to focus attention on a specific problem and are populated with scholars from a subdiscipline who are concatenating their resources to get better leverage over that problem. Or, they can be more fox-like if they organize themselves as a purposely multidisciplinary entity, either bringing foxes in touch with hedgehogs or attempting to produce a fox functionality by linking a disparate collection of hedgehogs.

Law schools, like most academic divisions, have a natural tendency to operate more like hedgehogs than foxes, and this tendency is reinforced by an administrative structure that sets the law school in a somewhat peripheral functional location at a university. They often have separate financial arrangements, student bodies, faculties, physical facilities, and even separate grading systems and academic calendars that are not shared with the rest of the university. Given these presses, it is incumbent on law schools to resist and to find ways of becoming more vulpine in their activities and reach.

In my short time at Marquette University, I have quickly come to recognize and appreciate an explicit attempt on the part of our law school to nurture that impulse. Its Public Policy Initiative—exemplified by the “On the Issues” series—has made it, without question, “Milwaukee’s public square.” Its lecture series reaches across not just policy and political divides but also disciplinary chasms, particularly as related to the urban condition. And its ongoing voter poll is interdisciplinary by definition, producing data of the highest quality, used both by scholars and journalists. These activities not only benefit those outside the university, but they make us a better Marquette and make the Law School a richer experience for its students and faculty.

Daniel J. Myers
Provost

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Editor: Alan J. Borsuk

Design: Douglas Frohmader,
Andy Haas Schneider

Copy editor: Amy Bauman

Photography: John Nienhuis,
Mike Gryniwicz

Cover art by Robert Neubecker

Please send address changes to:
Marquette University Law School
Office of Alumni Relations
Eckstein Hall, P.O. Box 1881
Milwaukee, WI 53201-1881

Phone: (414) 288-7090

Fax: (414) 288-6403

law.marquette.edu

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Poll Finds Support for Regional Cooperation in the Chicago Megacity

A recent story in the *Milwaukee Journal Sentinel* described the limitations of seeing meteors in the night sky if you're in a place with a lot of background light. The story added, "In images of Earth at night from space, hardly a single dark pixel exists between Gary, Ind., and Milwaukee."

The tri-state region may look like one city from space, but at ground level it is divided into hundreds of political units that often do not work cooperatively with each other. Yet important interconnections do exist in the region that some call the Chicago megacity, and important questions about the best way to build the future of the region are receiving serious attention.

Marquette Law School is playing a valuable role as a crossroads for considering those questions. In 2012, the Law School hosted a conference, "Milwaukee's Future in the Chicago Megacity," following the release of a report from the Paris-based Organisation for Economic Co-operation and Development (OECD), which assessed strengths, weaknesses, and challenges facing the tri-state region. The overall theme of the report was that more cooperation on economic development issues would enhance growth in what has been a slow-growing region.

In July 2015, the Law School followed up with an extensive Marquette Law School Poll assessing public opinion in the 21 counties of Indiana, Illinois, and Wisconsin that form the megacity. A conference, "Public Attitudes in the Chicago Megacity: Who are we, and what are the possibilities?," cosponsored by the *Milwaukee Journal Sentinel*, described and offered perspective on the poll results. The poll, the first of its kind, found that substantial majorities in each of the three states want to see political leaders make it a priority to act in the best interest of the region, and not just in the interests of their immediate area.

Moving into specific policy areas, Charles Franklin, professor of law and public policy and director of the Marquette Law School Poll, said that the poll showed strong support for regional approaches to licensing of professionals in many occupations and to planning transportation work. But there was less support for placing regional above local concerns when it comes to attracting businesses or promoting tourism. Franklin said one important finding was that sentiment on a large number of questions didn't vary much from one state to



Karen Freeman-Wilson, mayor of Gary, Indiana, joined Milwaukee Mayor Tom Barrett and Racine Mayor John Dickert in a panel discussion during a July 2015 conference at Marquette Law School.

another. Important differences, he said, fell along partisan and economic lines, rather than geographic lines.

In one of two panel discussions at the conference following Franklin's discussion with Mike Gousha, distinguished fellow in law and public policy, Karen Freeman-Wilson, mayor of Gary, expressed skepticism about the level of support for regional cooperation shown in poll results.

"I thought people were being a little aspirational in their [poll] answers," she said to David Haynes of the *Milwaukee Journal Sentinel*, who moderated a conference panel. She characterized the expressions of support for regional development as "wholly inconsistent with what I have experienced as mayor." For example, she said that, both among residents of Gary and in other parts of northwestern Indiana, she had found resistance to thinking about what was good for the region, rather than just for an individual community, when it came to improving passenger rail service.

The *Chicago Tribune* ran an editorial after the conference, calling for greater regional cooperation among "the many government officials and business recruiters along the shore of Lake Michigan," at both the state and local levels. "Because," it said, echoing a comment made by Jeff Joerres, then-CEO of Milwaukee-based ManpowerGroup, at the 2012 conference, "we have a target on our backs from many foreign countries. And they have a faster way of moving." ■

Law Student Argues on Winning Side Before U.S. Court of Appeals for the Armed Forces

For an audience packing the Appellate Courtroom in Marquette Law School's Eckstein Hall, it was a rare chance to see the U.S. Court of Appeals for the Armed Forces at work. For Marquette law student Joshua J. Bryant, it was an even more unusual opportunity—a chance to participate in the process.

Bryant, a third-year law student this past spring (and now an attorney at Meissner Tierney Fisher & Nichols in Milwaukee), appeared as *amicus curiae* under attorney supervision as part of oral arguments in *United States v. Staff Sergeant Joshua K. Plant, USAF*. This was an appeal to the U.S. Court of Appeals for the Armed Forces from a court martial conviction upheld by the Air Force Court of Criminal Appeals. Marquette Law School hosted the argument in April as part of the Armed Forces court's judicial outreach program. The court's program includes the opportunity for a law student to participate in the argument as *amicus curiae*.

Looking back on his appearance before the court, Bryant said it was “an opportunity to step outside of my comfort zone and gain valuable experience.” He said, “Working through the legal issues presented by the case and refining the brief were activities that benefited me immediately in making the transition from student to lawyer. And I know the experience of actually arguing before an appellate court will be of long-term great benefit.”

The defendant, Plant, was convicted in 2012 of aggravated sexual assault, adultery, and child endangerment; he appealed only the child endangerment conviction. His 13-month-old child was sleeping during a party that Plant hosted, but was not actually harmed. Plant's civilian attorney, Philip D. Cave, argued that hosting a party and becoming intoxicated while a child was asleep did not meet the definition of endangerment.

Bryant's argument, which he presented both in a brief and in person before the five-judge panel, supported Plant's appeal. Bryant argued that the explanation of negligence in the military's Manual for Courts-Martial had not been correctly applied to the case and, in particular, that the government had not shown at trial that Plant's alcohol use itself caused endangerment of his son.

U.S. Air Force Captain Thomas J. Alford argued for the government that Plant put his child in “substantial

likelihood” of harm—even if no harm occurred—and would have been unable to respond if the child had been in need. Questions from the panel of judges included where the line should be drawn between bad parenting and endangerment and how to determine whether there had been a “substantial likelihood” of harm to the child.

Three months after the oral arguments, the court ruled, three-to-two, in favor of Plant.

After hearing arguments, the judges fielded questions from the Eckstein Hall audience and provided advice to law students in attendance.

Chief Judge James E. Baker said that lawyers shouldn't try to impersonate Clarence Darrow in court. “Do not be in a race to find your legal voice,” he said. “It will come.”

Judge Scott W. Stucky advised lawyers to say what they need to say and stop, even if time remains. “Sit down, and you'll earn favor in heaven,” he said.

The U.S. Court of Appeals for the Armed Forces is based in Washington, D.C., but holds occasional sessions around the country as part of a public awareness program. Professor Scott Idleman and Adjunct Professor Al Rohmeyer helped bring the court to Eckstein Hall. ■



Joshua J. Bryant

Conference Aims to Educate on the Scourge of Human Trafficking

After losing her college track and field scholarship because of injuries, Shamere McKenzie turned to dancing in an adult nightclub to earn the \$3,000 she needed to continue her education.

At a house party one night, she was offered money to perform a sex act—and she refused until a man she had trusted beat her and threatened to kill her. That night began a nightmare: 18 months of “severe torture,” death threats, and continued forced prostitution, until she finally escaped.

“When someone can actually carry out these actions and beat you to the point you think you’re going to die, you now learn, don’t mess with this person,” McKenzie said.

McKenzie was one of three human trafficking survivors who shared their stories as part of a conference at Marquette University Law School’s Eckstein Hall in March. McKenzie, Rachel Thomas, and Lisa Williams all are working as advocates to raise awareness of human trafficking and help its survivors.

“I want people to understand that this can happen to anyone,” McKenzie said. “Whether you’re in college, whether you’re out of college, traffickers prey upon your vulnerability.”

The conference, titled “Restorative Justice and Human Trafficking—from Wisconsin to the World,” was organized largely through the efforts of retired Distinguished Professor of Law Janine Geske, L’75, a leader in the field of restorative justice. Geske, who recently became a member of Marquette University’s Board of Trustees, acknowledged that

more-aggressive prosecution and tougher sentencing can help crack down on human traffickers and their clients. But she said that’s only one aspect of the solution. Looking at the problem through the lens of restorative justice reveals other concerns.

“If you’re looking through this lens, you’ll say, ‘Wait a minute. Who’s being harmed by what happened, and what are we doing to repair the real harm that occurs in that process?’” Geske said.

Several local and national experts reinforced and expanded upon that message. Martina Vandenberg, president of the Washington, D.C.-based Human Trafficking Pro Bono Legal Center, emphasized the effectiveness of pursuing monetary damages against human traffickers. She also noted that sex trafficking is only part of the problem.

“If we focus only on sex trafficking, we lose sight of the totality of human trafficking,” Vandenberg said. And “if you talk to the nongovernmental organizations around the country that work on human trafficking, the vast majority of their cases are forced labor.”

Bevan K. Baker, commissioner of health for the City of Milwaukee, said social workers have been trained to ask questions that might uncover signs of human trafficking, as part of efforts to identify potential victims early on. “Our focus must be to identify the most vulnerable individuals before the traffickers do,” Baker said.

Baker and other speakers also called for more attention to one way to deter human trafficking: Stem the demand for the victims’ services. No demand, no scourge. But how to do that remains elusive. ■



Participants in the restorative justice conference on human trafficking filled Eckstein Hall's Appellate Courtroom (center) to hear from victims' advocate Shamere McKenzie (left, speaking to the Law School's Mike Gousha) and retired Distinguished Professor of Law Janine Geske (right), conference organizer.

Law School Expands Program in Water Law and Policy



From left: Jeanne Hossenlopp, Marquette University vice president for research and innovation; Michael R. Lovell, president of Marquette University; Dave Strifling, director of the Water Law and Policy Initiative.

Dave Strifling sees himself on the cutting edge of several things: Marquette Law School's role in exploring and increasing understanding of law and policy related to water; Marquette University's increasing engagement in many facets of water issues; and the Milwaukee area's future as a center for water-related economic activity and expertise.

Strifling began work in August as the first director of an expanded Water Law and Policy Initiative at the Law School. He said he accepted the position because it offers a unique platform for involvement in many aspects of water-related issues, both in the Milwaukee area and beyond.

Strifling is especially qualified for the role. He graduated from Marquette in 2000 with a major in civil and environmental engineering and is a licensed engineer. He graduated from Marquette Law School in 2004. He received a master's degree from Harvard Law School in 2010. He was of counsel at Quarles & Brady in Milwaukee before joining the Law School.

"Water's been a big part of my career from the beginning," Strifling said. He lists a wide array of issues related to water, involving the law, regulatory issues, policy decisions, and economic development. "I plan to devote some attention to all of that," he said. Strifling said he is eager to collaborate with others who are involved in water issues. He will also teach courses related to water and the law.

Dean Joseph D. Kearney said that Marquette University's Strategic Innovation Fund and the Law School's Annual Fund are supporting the water initiative. The Strategic Innovation Fund is an initiative of Marquette University's president, Michael R. Lovell, and is being overseen by Jeanne Hossenlopp, a senior faculty member and administrator at Marquette whom President Lovell appointed as vice-president for research and innovation.

"The Law School has been part of the Milwaukee region's water initiative since its creation last decade," Kearney said, "but we are greatly looking forward to expanding our contribution." ■

Considering the Future of Milwaukee's Cultural Assets

The big public policy decisions on building and financing a new basketball arena in downtown Milwaukee have been made, but what about parks, playgrounds, museums, and the zoo? Major decisions about the future of these and many other cultural and recreational assets in the Milwaukee area lie ahead. Steps to keep those assets vibrant may seem necessary or appealing, but they are also going to require substantial spending. How should policy makers navigate the needs versus the costs?

Marquette Law School and the Public Policy Forum, a nonpartisan research organization in Milwaukee, have collaborated to create a web-based tool to help people understand the array of decisions that lie ahead, some of the factors involved in those decisions, and the different methods that might be used to raise money. The self-guided online tool allows people to give their own views on what they want to see and how they want to pay for it.

At an "On the Issues with Mike Gousha" program, Professor Matthew J. Parlow, the Law School's associate dean for academic affairs and a leader in creating the tool, said that the goal was not to do a survey of what people favor or oppose. While those who use the interactive website are offered the option of passing along their ideas to anyone they want, the results will not be tallied. Parlow and Rob Henken, president of the policy forum, said that the goal, rather, is to increase public awareness and knowledge of what lies ahead in setting the future for cultural assets.

The program can be found at simulation.law.marquette.edu/proposals/create/. ■

JUDICIAL ASSISTANTS OR JUNIOR JUDGES?

THE HIRING, UTILIZATION, AND INFLUENCE OF LAW CLERKS



Last academic year, the *Marquette Law Review* published a symposium concerning law clerks, organized by Professor Chad Oldfather of Marquette University Law School and Professor Todd Peppers of Washington and Lee University Law School and Roanoke College. The symposium brought together law professors, political scientists, judges, lawyers, and journalists. The articles, essays, and proceedings span more than 450 pages in the Law Review, which is available online. We present here, with some modifications (and no footnotes), excerpts of the symposium.

The oversized quotes sprinkled throughout the pages come not from the excerpts here but rather from a panel discussion among various judges—specifically, the Hons. David R. Stras of the Minnesota Supreme Court, Diane S. Sykes, L’84, of the U.S. Court of Appeals for the Seventh Circuit, and James A. Wynn, Jr., L’79, of the U.S. Court of Appeals for the Fourth Circuit. Like the articles excerpted below, that discussion appears in the symposium as published in the *Marquette Law Review*.

INTRODUCTION

by Chad Oldfather and Todd E. Peppers

Law clerks have been part of the American judicial system since 1882, when Supreme Court Justice Horace Gray hired a young Harvard Law School graduate named Thomas Russell to serve as his assistant. Justice Gray paid for his law clerks out of his own pocket until Congress authorized funds for the hiring of “stenographic clerks” in 1886. The Gray law clerks, however, were not mere stenographers. Justice Gray assigned them a host of legal and non-legal job duties. His clerks discussed the record and debated the attendant legal issues with Justice Gray prior to oral argument, conducted legal research, and prepared the first draft of opinions. Today all nine Justices of the United States Supreme Court follow the institutional practices established by Justice Gray. Each Justice is entitled to hire four clerks (five, in the case of the Chief Justice), most of whom are recent graduates of elite law schools and serve for a single term. What is more, the practice of hiring newly graduated attorneys to serve as clerks has spread beyond the Supreme Court to become a well-established feature throughout both the federal and state courts.

The institution of the law clerk has generally received little scholarly attention. But it also has never been entirely ignored, and at least some initial reviews of the practice were promising. In 1960, Karl Llewellyn wrote of the rise of the law clerk in almost-excited terms. After noting that Gray had started the practice and Justice Oliver Wendell Holmes, Jr., continued it, Llewellyn opined, “I should be inclined to rate it as [Justice Felix] Frankfurter’s greatest contribution to our law that his vision, energy, and persuasiveness turned this two-judge idiosyncrasy into what shows high possibility of becoming a pervasive American legal institution.” Llewellyn lauded the institution for a variety of reasons, including not only the manpower it provides but also that “the recurring and unceasing impact of a *young* junior in the task is the best medicine yet discovered by man against the hardening of a senior’s mind and imagination,” writing as follows:

“A new model every year” may have little to commend it in the matter of appliances or motorcars or appellate judges, but it has a great deal to offer in the matter of appellate judges’ clerks: there then arrives yearly in the judge’s chambers a reasonable sampling of information and opinion derived from the labors, over the three past years, of an intelligent group of men specializing in the current growth and problems of our law: the faculty which has reared the new apprentice. This is a time-cheap road to stimulus and to useful leads. ▶▶



Llewellyn also praised the impact on the clerks themselves. Having seen the process from the inside, they would be better able to craft a good appellate argument. And the clerks would go into the world knowing how the appellate courts function, and that they function well, and would as a result be able to reassure their colleagues that the process works as it should. The master, the apprentice, and the bar alike would benefit.

Llewellyn's optimism was not universally shared, and already some had suggested that law clerks might not be an unalloyed good. In 1957 a young Arizona attorney named William H. Rehnquist, a former law clerk to Justice Robert Jackson, wrote an article suggesting that ideologically liberal law clerks might be manipulating the review of petitions for certiorari and tricking their more conservative Justices into voting in a more liberal fashion. While Rehnquist backtracked in the face of public challenges raised by other former law clerks (a response orchestrated by Justice Felix Frankfurter), he had opened the door for subsequent critiques.

In the decades that followed, commentators paid increasing attention to the role of law clerks. Most of the early focus was on Supreme Court law clerks, and former clerks themselves contributed to the flurry of new articles by discussing their own clerkship experiences (although usually in the most laudatory and general terms). In subsequent years scholars began to appreciate and assess how lower federal and state courts also heavily relied on these young judicial assistants.

As much of this commentary revealed, Llewellyn's optimism turned out to be misplaced. Some of this may have been a product of larger societal and institutional shifts. Llewellyn had written in 1960, which turned out to mark the beginning of a period of dramatic and sustained growth in the caseloads of the federal courts. Not even a decade later, commentators began to lament the problems caused by swelling dockets. Paul Carrington decried the negative effects of congestion and noted the accompanying temptation for judges to cut corners. Testifying before the Commission on Revision of the Federal Court Appellate System in 1973, Ninth Circuit Judge Ben Cushing Duniway reflected on conditions when he joined that court in 1961:

When I came on the court . . . , I had time to not only read all of the briefs in every case I heard myself, which I still do, and all the motion papers in every motion that I was called upon to pass upon, which I still do, but I could also go back

to the record and I could take the time as I went along to pull books off the shelves and look at them. And then I had time, when I was assigned a case, to write. And occasionally I could do what I call "thinking," which was to put my feet on the desk and look at the ceiling and scratch my head and say, "How should this thing be handled?"

Today the situation is quite different. . . .

Pressed for time, and unable to approach their job as they or their predecessors once had, judges grew to place increasing reliance on their clerks. By 1993 Anthony Kronman, whose book *The Lost Lawyer* otherwise echoed Llewellyn in its emphasis on the value of craft, decried the institution of the law clerk in terms as despairing as Llewellyn's had been hopeful. Kronman charged the rise of the law clerk with responsibility for a number of pathologies. Clerks not only facilitate an increase in the aggregate number of opinions simply by being available as a source of labor; they encourage proliferation by having an incentive to see their judge make a name for himself or herself via separate opinions. Their role as primary authors likewise changes opinions' style in a way that increases length, footnoting, reliance on jargon, and the incorporation of multifactor balancing tests, all of which Kronman characterized as a product of "the combination of hubris and self-doubt that is the mark of the culture of clerks." What is more, he suggested, these changes contribute to pernicious, tectonic shifts in the legal culture. As clerk-written opinions become the norm, judges increasingly come to regard that style of opinion as the ideal:

And as this happens, the older person's virtue of practical wisdom will lose its meaning for judges too and be replaced by other, more youthful traits such as cleverness and dialectical agility, redefining the qualities judges admire in a practitioner of their craft and in the opinions he or she writes. Subtly perhaps, but steadily and effectively, the increasing influence of law clerks and their antiprudential culture thus brings about a shift in judicial values, contributing to the decline of the lawyer-statesman ideal in the minds of judges themselves by making the beginner in the craft of judging the measure of the master's art.

Kronman's portrayal does not end there. The transformation becomes complete, he suggested, as this new sort of opinion becomes the standard fare of law-school instruction. Because those opinions no longer

“A good judicial law clerk will put you in a position to make an informed judicial choice. I don’t need to be wasting time figuring out what the standard of review is on the case. That’s my clerk’s job—to distill the important facts and summarize the black-letter law. My job is to make an informed judicial choice.”

Judge James A. Wynn, Jr.

reflect the old norms, students do not learn to value those perspectives and approaches, and the wisdom of the past largely slips away. Rather than the wisdom of experience, “[w]hat they see reflected in these opinions, therefore, is essentially an image of themselves, clothed in the trappings of authority.”

Kronman’s is perhaps the most dystopian vision of the impact of the law clerk, but he has hardly been the only critic of the clerk’s growing influence. In the last 30 years, there has been a slow but steady growth in newspaper articles, scholarly essays, and books examining the hiring and utilization of the men and women who help process the business of the courts. Overall, however, the scholarly attention paid to law clerks has been episodic, unsystematic, and primarily limited to the Supreme Court. Three books have covered Supreme Court law clerks in some depth, but beyond that, the scholarly focus has been limited largely to the stray law review article or a brief burst of attention following the publication of a book such as Edward Lazarus’s *Closed Chambers* or an article along the lines of the piece in *Vanity Fair* that followed *Bush v. Gore*. And as has been the case more generally, legal academics and social scientists have conducted their respective explorations of the institution along largely separate tracks.

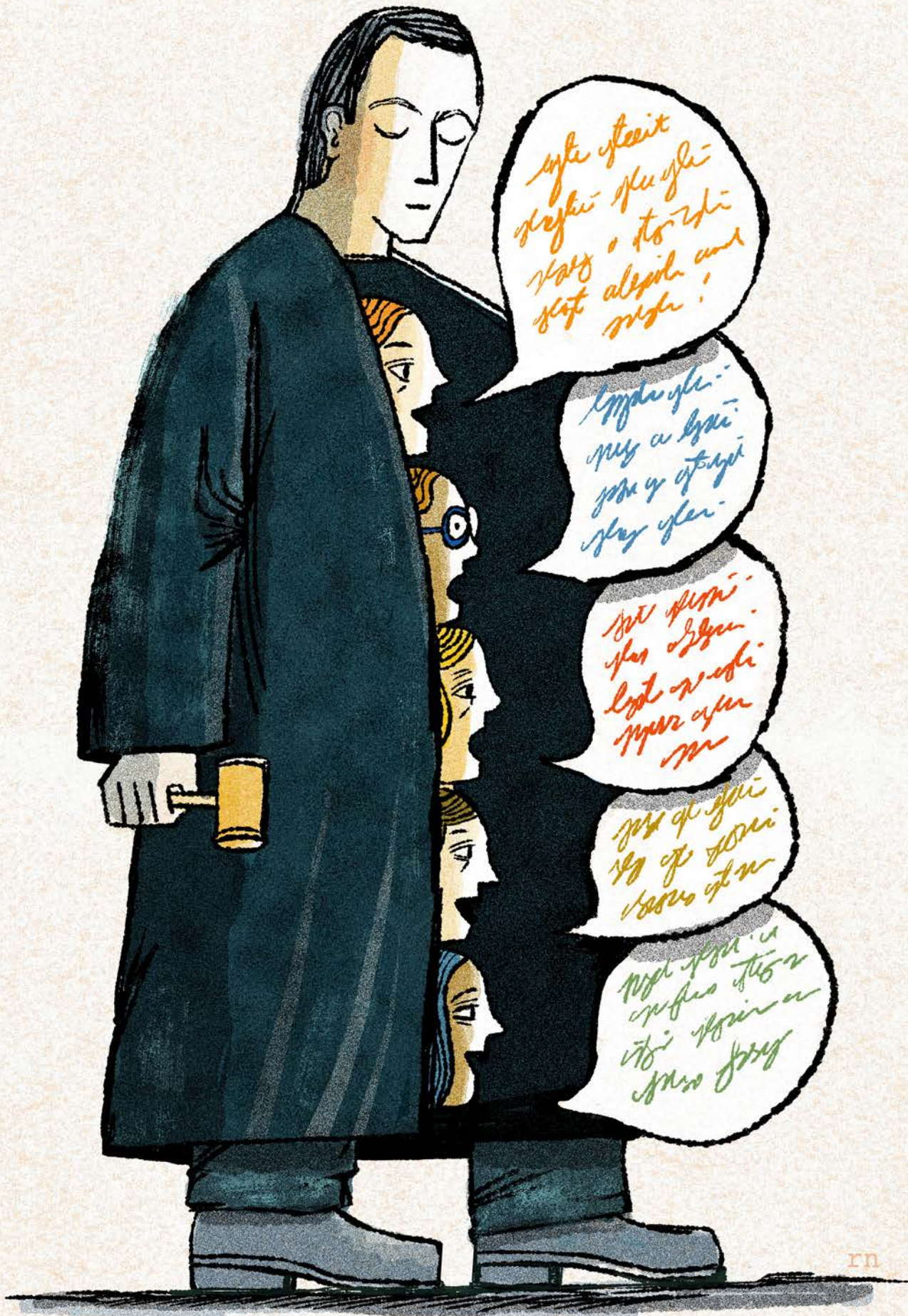
This absence of sustained attention is somewhat striking given that law clerks are, arguably, the elephant in many of the rooms inhabited by lawyers and legal academics. Concerns such as those Kronman raised deserve systematic examination. Should it matter to us, as teachers, that the opinions we ask our students to pay such close attention to may not, in some meaningful sense, be the product of the jurists whose names are attached to them? If part of being an effective lawyer is to know one’s audience, then are we doing our students a disservice by failing to make explicit the fact that clerks are an important part of their audience? As lawyers, how should the role of clerks factor into our reading of

and reliance upon opinions? As academics attempting to understand the characteristics and capabilities of the judiciary, how should we account for the likely opacity of the window that opinions provide into the workings of the courts? Is there a point at which delegation of responsibility to clerks crosses the line from undesirable to unconstitutional? How much do we actually understand about the role of clerks?

Despite the growing interest in law clerks, to our knowledge not a single academic conference has been devoted to the institution of the judicial clerk—until now. In April 2014, Marquette University Law School sponsored a conference in which journalists, state and federal court judges, legal scholars, and social scientists gave formal presentations and participated in informal conversations revolving around such fundamental issues as how law clerks are selected, “who” law clerks are, what job duties law clerks are assigned, and whether law clerks exercise inappropriate levels of influence over the judicial decision-making process. And participants discussed the challenges related to studying law clerks given existing clerkship codes of confidentiality.

What emerged from the conference was not only a rich and diverse dialogue about the evolution of the institutional structures undergirding the hiring and use of law clerks but also a variety of normative questions as to how clerks should be used in a judicial system that has struggled with a dramatic increase in its caseload over the last 50 years. In short, the ultimate question facing the symposium participants was this: Is it a wise practice to allow unelectable and unaccountable men and women largely selected from a small group of elite law schools to wield influence not only over the outcomes of trials and appeals but also over the selection of the doctrines and principles that support the legal justification for these outcomes?

We are delighted to present excerpts from the symposium as published. ▶▶



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EXCERPTS FROM THE SYMPOSIUM

Advice from the Bench (Memo): Clerk Influence on Supreme Court Oral Arguments

by Timothy R. Johnson, David R. Stras, and Ryan C. Black

So far, the data establish that Justice Harry Blackmun generally acted on the advice of his clerks during oral arguments. This alone indicates clerks can directly influence the actions their Justices take. In fact, it may be the best evidence to date, given the timing of the process and the sheer number of suggested questions used by Justice Blackmun. Of course, we cannot make a direct causal claim until we control for other factors that may have affected his behavior.

The next step is to determine if there is any connection among the types of questions Justice Blackmun asked and whether the answers to those questions influenced his opinions. With respect to the types of questions, we analyzed the 94 clerk-written questions Justice Blackmun asked based on Timothy Johnson's taxonomy of possible question types. It allowed us to test whether Justice Blackmun's clerk focused on the type of questions that we would expect a policy-minded, strategic Justice to ask. Justices who exhibit these tendencies tend to ask questions about policy issues, applicable precedents (the key institutional rule Justices follow), and the views of external actors. Justice Blackmun asked the types of questions we would expect a strategic, policy-minded Justice to ask. In fact, more than half of the questions in the sample were about matters of policy (51 of the 94 questions he asked), while just over 10 percent focused on precedent (12 of the 94 questions). Interestingly, he asked many fewer questions about the views of external actors (only 2 questions), but the pattern is similar to what Johnson found for other policy-minded and strategic Justices. The bottom line is that Justice Blackmun's clerks sensed that Justice Blackmun should think about the public policy involved in a case as well as about how a case fit within existing precedent. Justice Blackmun, in turn, asked these types of questions at oral argument.

Johnson is the Morse Alumni Distinguished Teaching Professor of Political Science and Law at the University of Minnesota, Stras is associate justice of the Minnesota Supreme Court, and Black is associate professor of political science at Michigan State University.



Revisiting the Influence of Law Clerks on the U.S. Supreme Court's Agenda-Setting Process

by Ryan C. Black, Christina L. Boyd, and Amanda Bryan

To summarize, we find a substantial level of agreement between what law clerks recommend in the pool memos and how Justices ultimately vote. Indeed, roughly 75 percent of the more than 9,500 votes in our data follow the recommendation made by the law clerk. The influence of law clerks on Justices is neither constant nor random, however. Rather, our analysis suggests that Justices compare the law clerk's recommendation with their own prior belief about a petition's certworthiness. Recommendations that are consistent with those beliefs are substantially more likely to be followed than those that challenge them. Additionally, in the event that a pool clerk recommends granting a petition—an event that occurs about 31 percent of the time in our data—a voting Justice also considers the ideology of the clerk's supervising Justice. When a Justice is ideologically proximate to a clerk's employing Justice, we find that the voting Justice is more than twice as likely to follow that recommendation than when the Justice is ideologically distant. Taken together with the findings from our original study, these results provide strong evidence of the conditional influence that law clerks can have in the Court's agenda-setting process. These clerks are not just spending a lot of time reviewing cert petitions, something that we estimated above to be approximately one-third of their workload, but they are wielding potential influence on their own employing Justices and other Justices while doing so. ▶▶

“To the extent that the proposition is that judges rely too heavily on their law clerks to draft the opinions—that, it seems to me, is a genie we’re not going to put back in the bottle. The caseload is too large and our decisions have to be explained in writing, and no single judge can do it all himself or herself, unless you are in the league of Judge Posner and Judge Easterbrook. The rest of us are mere mortals, and we have to rely on our legal staffs to assist us. The measure of whether that’s a good thing or a bad thing is simply the quality of the work product.”

Judge Diane S. Sykes

Our present findings, coupled with those previously obtained by Black and Boyd, provide what may be very important normative implications of the existence of the institutionalized cert pool. Recall that, from its inception in 1972, the cert pool implored law clerks to author “objective” memos. While our research confirms the standardization of the memos’ formatting, it paints a very different picture regarding the content of the memos, particularly with regard to the conclusions drawn. As we summarize above, grant recommendations are treated differently when coming from a clerk who hails from an ideological ally as opposed to a foe. This may not be surprising, especially given what we know about the strength of the principal–agent relationship between a Justice and his hired clerk.

It does, however, call into question whether the cert pool was, just over a decade after its inception, serving its intended goals. To the extent bias exists in the recommendations, a pool Justice needs to devote additional effort to detect and correct for that bias before she can cast her agenda-setting vote. If this work is being delegated to a Justice’s law clerk, which seems very likely, then we must ask, how much of an efficiency gain is there over simply having one’s own law clerks do an independent review? Interestingly, our results suggest that the answer to this question will depend upon the ideological composition of the Court and, in particular, a Justice’s location on the Court. If a Justice is one of the more extreme members of the Court, then grant recommendations from either proximate or distant chambers are informative—you follow those from allies and do the opposite of those coming from ideologically distant chambers. Paradoxically, however, a Justice in the middle stands to gain far less from either end of the spectrum and, as a result, would likely need to invest

more of her clerk’s time to determine what the most appropriate vote would be. This newly revealed nuance thus opens the door for more empirical and normative scholarship assessing the value and efficiency of the cert pool for all participating members of the Court.

As we have already argued, the activities of law clerks during the U.S. Supreme Court’s agenda-setting process provide an excellent setting for systematically and empirically testing for advisor influence. Although we recognize that Supreme Court law clerks are not precisely analogous to advisors in the executive and legislative branches of the federal government, we believe that, in many ways, the similarities between these staffers outweigh the differences, particularly when examining the existence and conditionality of their influence. These similarities range across the education and experience of the people who fill the jobs, the motivations that drive the employees, and the tasks that they are asked to perform while serving in their staff positions.

Law clerks are regarded as being among the brightest and most talented young legal minds. Modern clerks typically come from the top of their class at an elite law school and often have experience clerking for a federal trial or appellate judge. Similar language has also been used to describe congressional advisors. White House staffers, particularly those who serve close to the President, tend to be more experienced (and older) than congressional and court advisors, but the positions held by all three groups are highly coveted and can lead to uncountable future opportunities—both inside and outside of Washington.

Black is associate professor of political science at Michigan State University, Boyd is assistant professor of political science at the University of Georgia, and Bryan is assistant professor of political science at Loyola University Chicago.

The World of Law Clerks: Tasks, Utilization, Reliance, and Influence

by Stephen L. Wasby

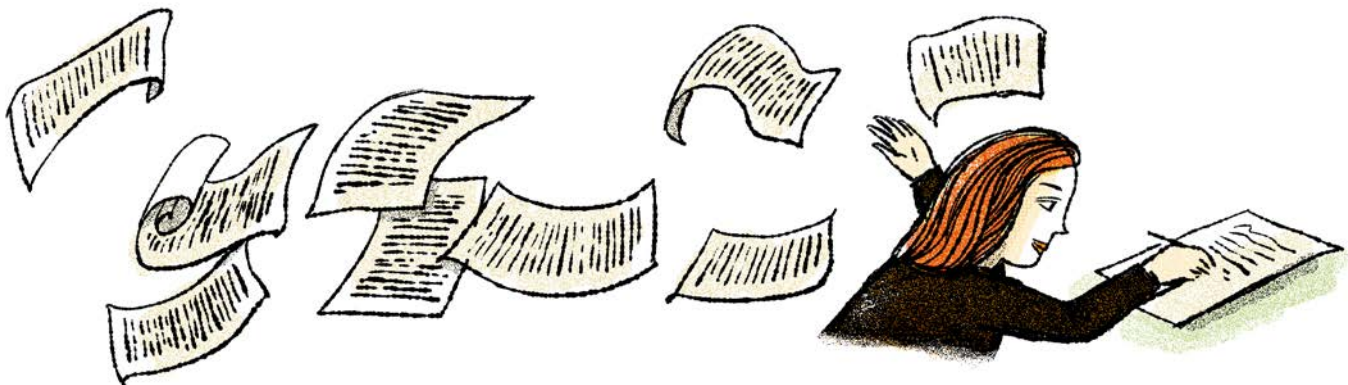
What do we mean by *influence*? The toughest test is that Person *A* exerts influence over another (*B*) only when *A* is able to get *B* to do what *B* would not otherwise have done. One does find instances in which a judge, having decided to vote a certain way in a case, is persuaded by a law clerk to change positions. However, those instances are rare. Judge Goodwin talks of “one case each year” when a clerk’s view prevails over his—when the clerk presses the judge to adopt a position different from the one to which he was initially inclined. And it would appear that the judge may be open to allowing that to happen, in one case a year, but that shows even further that the judge is in control. Perhaps more often, the judge, not being sure how to decide, asks the law clerk which way to move from dead center; in such situations, the law clerk’s influence, if used cautiously, can be determinative. Thus, in a drug case involving a car search that led to a house search, Judge Goodwin wrote to his clerk, “I’m at a crossroad here” as to whether to hold the car search bad and apply the “fruit of the poisonous tree” doctrine or to say the car search was good and probable cause to arrest thus existed.

While there are instances in which the clerk’s view prevails, there are many more instances in which the “recommendation is left in the dust”; after all, the judge is the boss and is fully capable of saying “No” even if saying it more diplomatically. This is part of the larger matter that a law clerk’s submitting work to a judge doesn’t mean the judge will use it. And it must also be remembered that to talk about law clerks’ influence is to assume that law clerks have positions and have recommended their adoption. While certainly some law clerks are quite brash and too certain of their views, more generally law clerks tend to be too deferential. Particularly early in their tenure, they may be reticent to make recommendations, although they become less so toward the end of their clerkship. Indeed, it has

been suggested that law clerks are less valuable to a judge in the early months of a clerkship. They may not come forth with recommendations even when instructed by their judge to do so. Or they may be unable to arrive at a recommendation, as we see when one law clerk admitted to vacillating, writing of the clerk’s shift between alternative positions several times, at which point he “decided to pass the buck to you” while offering opinions on both sides of the issue. It would be interesting to see if clerks who have worked for a few years before their clerkship—an increasing phenomenon, at least at the U.S. Supreme Court—are more sure of themselves and thus more likely to make recommendations than those who clerk under the older “standard model” in which a clerkship directly follows law school. The effects might be similar if someone had served in multiple clerkships, as when someone takes a clerkship on a federal court of appeals after clerking in a state appellate court or a federal district court.

However, if clerks seldom “turn the judge around,” are clerks without influence when they don’t write opinions? The most basic aspect of a clerk’s “influence”—better, the clerk’s *effect*—is that all information provided to the judge is important, and the clerk is having an effect through providing that information, if only by undertaking research assigned by the judge (and not slanting it toward a particular result). And it has already been noted that a bench memo, whether sent to the entire panel or written only for the clerk’s judge, serves to frame issues in a case, certainly an important effect. And it has also been noted that a law clerk’s comments on another panel member’s opinion may have an effect. When a law clerk is charged with drafting an opinion on the basis of the judge’s known position and instructions, the clerk doesn’t determine the result but may be able to persuade the judge to adopt a certain way of reaching the judge’s preferred outcome, and this is particularly important in precedential opinions. ▶▶

Wasby is professor of political science emeritus at the University of Albany–SUNY. He can be contacted at wasb@albany.edu.



“I don’t place a lot of emphasis on writing samples because I feel like law clerks, when they come in, are going to have some work to do on their writing, and I feel like we can work on that. I’d rather have somebody who’s intellectually curious, who spends a lot of time taking hard classes, who has performed well in law school. If they have those attributes, I feel like I can work with their writing, particularly because I rewrite a lot of their work anyway.”

Justice David R. Stras

Law Clerks as Advisors: A Look at the Blackmun Papers

by Zachary Wallander and Sara C. Benesh

We find that it is, in fact, the case that the Justices use the advice provided to them by the law clerks in the cert pool memos. Indeed, even after controlling for all other known determinants of cert (as measured, for the most part, via the cert pool memo), the recommendation to grant cert by the memo clerk influences the Court to grant a petition. Clerks are hand-picked by the Justices and are able advisors. It would be odd if the Justices did not consider their clerks’ input in their decision making. And our measurement strategy of focusing on the cert pool memo to code the known determinants of cert means that what the clerks write matters as well. When the clerks deem a conflict to be real, the Justices are more likely to grant cert. When they discuss the amici and their arguments in the memo, the Court takes more notice of the petition. The clerks learn the types of information desired by the Court, and when they provide it in the memos, it matters. Indeed, it would be odd if the content of the memos did not matter to the Court as well.

But in an addition to the literature, we find that, just as H. W. Perry, Jr., asserted years ago after conducting interviews with Justices and clerks, the Justices are, at least in part, driven by the readiness of a case to be heard by the Court as well. We find, for the first time of which we are aware, some empirical evidence that percolation matters to the Court in that the Court is more likely to grant cert on a petition for which the cert pool memo discusses many lower court judges and the reasoning they used in their cases. In addition, Perry spoke of a desire by the Court to consider a case reasoned well below, and our analysis lends empirical credence to that supposition as well. The more the clerks mention feeder judges who reasoned the case or decided similar cases below, the

more attractive the petition is to the Court, keen as it is on borrowing the reasoning of those lower court judges.

Of course, we need to know more. It might be the case that the Justices obtain information outside the pool memos that we do not consider here. Indeed, it would be unreasonable to think the pool memos are the Justices’ only source of information when making a decision on cert. Lawyers and amici provide briefs making arguments about whether a case should be granted or denied cert, and we expect that the Justices read at least some of them. However, much of this information is summarized in pool memos written by law clerks, and we would not expect the Justices to request them unless they were useful.

....

The Justices of the Supreme Court cannot make decisions alone, nor would it be wise for them to do so. The important and consequential decisions they make to grant cert in the tiny percentage of all cases that are presented to them is necessarily limited by time and resource constraints. Thus, they need information and advice to help them decide which cases are certworthy. Law clerks do this directly by giving recommendations and information, and the institution of the law clerk was designed explicitly with this role in mind. While some may be uncomfortable to find that what the clerks tell the Justices influences the Justices’ decision making, we argue that discomfort should only arise when the carefully and thoughtfully constructed recommendations made by the able law clerk advisor are no longer considered, for that may mean that the Justices use some other, less substantively based shortcut like, perhaps, an ideological reaction to the lower court’s decision. Is not law clerk influence preferable to that?

Wallander is an associate lecturer, and Benesh is an associate professor, both at the University of Wisconsin–Milwaukee.

Law Clerks and the Institutional Design of the Federal Judiciary

by Albert Yoon

If federal judges are indeed relying more on their clerks when writing opinions, there are two possible responses. The bolder response is to ameliorate or reverse this reliance. The second, more modest, response is to accept this reliance as given but propose steps to mitigate any adverse effects.

If the goal is to reduce judges' reliance on clerks, one solution is to promote a culture where judges collectively take a more-active role in writing opinions. Using writing variability as a proxy, some modern-day jurists exhibit this quality: recently retired Justice John Paul Stevens and Judges Richard Posner and Frank Easterbrook, to name a few. Changing this culture, however, may prove difficult, if not impossible. The Constitution does not mandate how judges perform their role (or even the existence of clerks). Not surprisingly, judges do not report or disclose the process by which they write their opinions. Congress or the Chief Justice could provide guidelines for the proper reliance on clerks, but they would merely be advisory. Given their response to proposed changes regarding clerkship hiring, judges may be reluctant to follow recommendations on their use of clerks.

Another solution that may reduce reliance on clerks is to increase what federal judges earn. . . .

The recent trend in judicial salaries actually understates the broader gap between judges and other elite areas of the law. Judicial salaries were once comparable to those of partners at most elite law firms. Over time, the disparity has grown. In 2013, partners at the top 100 law firms—based on *The American Lawyer*—on average earned profits of nearly \$1.5 million. The relative decline in judicial salaries is exacerbated by an even greater decline relative to the elite private bar, prompting alarm from the corporate bar, the American Bar Association, and legal academics. Some scholars, however, are skeptical that judicial pay bears any relation to the quality of judicial decision making.

A third alternative solution to reduce reliance on clerks, one that assumes that judges respond to external factors, is to reduce their caseload demands. The sheer number of cases has compelled the federal judiciary to adopt ways of triaging the docket by relegating more work to court clerks, non-Article III judges, mediation, telephonic hearings, etc. Scholars have characterized this trend as a bureaucratization of the judiciary, which “weaken[s] the judge’s individual sense of responsibility.”

A smaller caseload would allow judges more time for each case, which in turn would allow more time for deliberation and, more importantly, opinion writing.

As a remedial response, the President and Congress could work together to reduce the number of judicial vacancies. As of October 2014, there were 53 vacancies on the district courts and 7 vacancies on the courts of appeals. This current number of vacancies, however troubling, is certainly a well-established phenomenon and actually represents an improvement over prior years, when the number of vacancies in a given year exceeded 100.

Thinking more prospectively, Congress could increase the number of authorized Article III judges, which has lagged behind the growth in federal cases. It may be that identifying judicial understaffing based on case filings understates the problem to the extent that the growing docket discourages prospective litigants from filing suit. The Senate recently considered the Federal Judgeship Act of 2013, which would have created 70 new judgeships (65 district, 5 circuit), recommended by the Judicial Council, but the legislation stalled in the Senate Judiciary Committee without a vote.

Based on recent history, the chances of an increase in judgeships are unlikely. . . .

If it is not possible to change how judges rely on clerks, either through changing judicial culture or by easing the judges' workload demands, then an alternative is to encourage judges to adopt a more-diverse hiring approach. Rather than rely predominantly on the most recent cohort of law graduates, they could hire clerks who have practiced for a few years, or longer, in government, public interest, or the private sector. Older law clerks bring a potentially broader perspective to chambers, informed by their own legal experiences. They may also bring more maturity to chambers, both professionally and personally. ▶▶

Yoon is professor of law at the University of Toronto.



Secret Agents: Using Law Clerks Effectively

by David Stras (Keynote Address)

Where do the law clerks come from? This has changed. In the 1970s, 1980s, and even into the 1990s, the Justices would occasionally take a law clerk from a state supreme court justice, or even from a federal district court judge. That is no longer the case. Usually, a candidate will have clerked for a federal circuit court. And so, the hiring practices have changed. But there are two aspects of law-clerk hiring that I think are particularly interesting. One is the dominance of the elite schools—and you will be blown away by the table that I’m going to display shortly—and the other is the importance of feeder judges. With respect to the dominance of elite law schools, the numbers in Table 1 are from October Term 2003 to October Term 2013, and these are Brian Leiter’s statistics from his website. One hundred and one law clerks came from Harvard, 89 from Yale; the next highest is Stanford, going all the way down to Boalt and Northwestern at 9 apiece. And then there were a number of very good law schools that had 0 or 1.

These law schools—the elite law schools—dominate law clerk hiring. It’s something that you might expect, but these numbers were a surprise to me. I did not think that the elite four, five, or six law schools were this dominant in Supreme Court hiring until I put together this table. It really is striking.

TABLE 1
U.S. Supreme Court Law Clerk Hiring by School
October Term 2003 to October Term 2013

LAW SCHOOL	# OF CLERKS	RATE (% OF GRADS)
Harvard	101	1.7%
Yale	89	4.5%
Stanford	33	1.9%
University of Chicago	25	1.3%
University of Virginia	25	0.7%
Columbia	16	0.4%
NYU	14	0.4%
Michigan	11	0.3%
Georgetown	10	0.1%
Northwestern	9	0.3%
Boalt	9	0.3%

TABLE 2
Top Feeder Judges to the U.S. Supreme Court
1962 to 2002

JUDGE	PERIOD	# OF CLERKS	PER TERM AVERAGE
J. Skelly Wright	1962–1988	31	1.15
J. Michael Luttig	1991–2002	30	2.73
Laurence Silberman	1985–2002	30	1.76
Harry T. Edwards	1980–2002	28	1.27
Alex Kozinski	1985–2002	28	1.59
James L. Oakes	1971–2002	26	0.84
Abner J. Mikva	1979–1994	26	1.50
Stephen F. Williams	1986–2002	21	1.31
J. Harvie Wilkinson	1984–2002	21	1.11
Patricia Wald	1979–1999	19	0.90
Guido Calabresi	1994–2002	17	2.13

Feeder judges—this comes from the Ward and Weiden book, *Sorcerer’s Apprentices*, in which they looked at feeder judges from 1962 to 2002. The dominance of feeder judges has only increased over time. These numbers are also striking. J. Skelly Wright, over 26 years, placed 31 clerks, but that is nothing compared to how well feeder judges have done over the past 20 or so years. Really, feeder judges have become more, not less, important to Supreme Court clerk hiring. But then, maybe in an improper delegation to my law clerk, my law clerk looked at these tables and said to me, “You know what? These numbers on the previous table are really old. They’re like 15 years old—almost 15 years old. So, why don’t you come up with some new numbers?” And so, he went to *Above the Law*, which tracks some of these things, and, without any approval from me, went ahead and put together this table. [laughter] You can see how things happen in my chambers. But I was happy to have the help, because this is a terrific table.

Brett Kavanaugh, J. Harvie Wilkinson, and Merrick Garland are absolutely dominant in sending their clerks to U.S. Supreme Court Justices. And when you look at the per-term average, that's unbelievable. A lot of these judges hire four law clerks, and more often than not, at least three of their law clerks go to the Supreme Court—out of the four that they hire. And sometimes all four do. In one recent term, Tom Griffith had five clerks, including one from a previous year, who clerked at the Supreme Court during a particular term. So these are really, really—compared to the numbers in Table 2—these are striking. And these numbers are from a five-year period. Remember, J. Skelly Wright's numbers were compiled over 26 years; this is happening over a five-year period, and these numbers are almost half as high as the numbers that we saw in the previous table. ▶▶

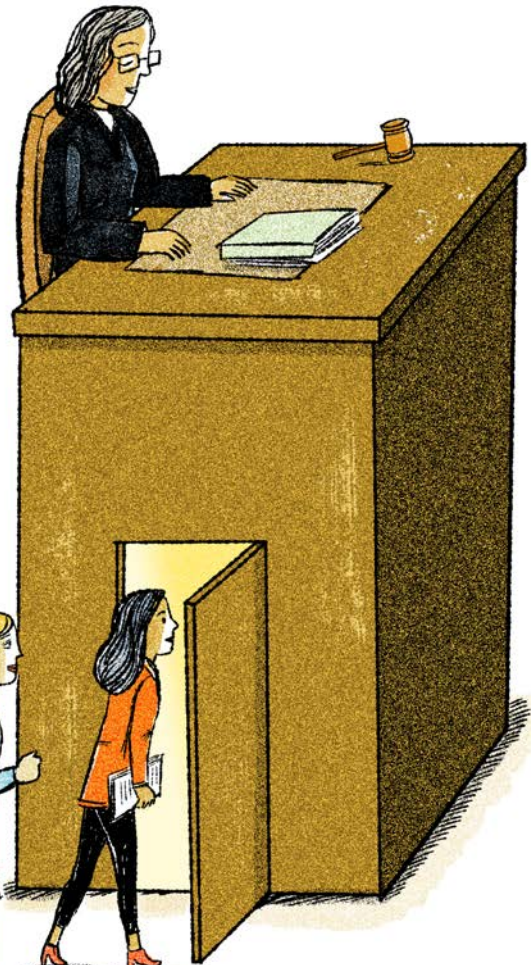
Stras is associate justice of the Minnesota Supreme Court.

“I’m looking to put together a good chambers team each year, and that requires all personality types. There’s a balance to be struck, a kind of interpersonal chemistry. I’m looking for a diversity of background and experience when I assemble my team every term.”

Judge Diane S. Sykes

TABLE 3
Top Feeder Judges to the U.S. Supreme Court
 October Term 2009 to October Term 2013

JUDGE	# OF CLERKS	PER TERM AVERAGE
Brett M. Kavanaugh	16	3.2
J. Harvie Wilkinson	16	3.2
Merrick B. Garland	16	3.2
Jeffrey Sutton	10	2
Alex Kozinski	9	1.8
Robert A. Katzmann	9	1.8
David S. Tatel	8	1.6
Diarmuid O’Scannlain	7	1.4
Thomas B. Griffith	7	1.4
Douglas H. Ginsburg	6	1.2
Neil Gorsuch	6	1.2
Stephen Reinhardt	6	1.2
William A. Fletcher	6	1.2



The Future of Federal Law Clerk Hiring

by Aaron Nielson

The perennial issue of what a law clerk's role ought to be is not going away anytime soon. The more interesting question, however, may not be *what* clerks do but, rather, *how* they are hired. In particular, the market for federal judicial law clerks has been upended. In 2003, the Federal Judges Law Clerk Hiring Plan (the Plan) was instituted to regulate clerkship hiring. The Plan's purpose was to push interviewing back until the fall of a student's 3L year. This was no small goal. Groups of judges for decades have bemoaned the unregulated clerkship market and strove for something better. The Plan—designed to address “market failures”—represented the long-awaited fruit of that striving.

The Plan, however, has fallen apart. Last year, the U.S. Court of Appeals for the D.C. Circuit withdrew from the Plan and began openly interviewing 2L students. After that, everything unraveled quickly, with judges across the country following the D.C. Circuit's lead—that is, if they were not already hiring 2Ls, as many were. Then, on November 4, 2013, the Plan formally collapsed. That day, the federal judiciary's website announced that 2Ls could submit applications through the Online System for Clerkship Application and Review (OSCAR). In short, the unregulated market is back.

For many, this regulatory failure is frustrating. But it was no surprise. Every hiring season it became increasingly obvious that the problems of the unregulated market were reemerging in the “regulated” market, but with a particularly cruel twist. Not only did the unregulated market reassert itself, it did so under cover of darkness, creating real unfairness. To get a clerkship, students were well-served by applying early,

notwithstanding the Plan's rules to the contrary. Naive applicants were often out of luck. No one thought *that* was a good thing. The Plan, accordingly, was abandoned. After all, if there can't be order, there can at least be transparency.

Now that the Plan is gone, what does the future hold? To answer that question, it is essential to understand why the Plan collapsed. This article addresses the Plan's fatal flaw: maintaining collective action is difficult. This key insight of antitrust economics is especially true where large numbers of heterogeneous participants compete against each other in an opaque marketplace—in other words, in a market like the federal judiciary. In such markets, a powerful enforcement mechanism is necessary to preserve collective action, but powerful enforcement mechanisms are not cheap. The Plan failed because its enforcement mechanisms—primarily OSCAR's automated application process, augmented by buy-in from law schools and the anchoring role of the D.C. Circuit—were not sturdy enough to withstand the competitive pressures put on them. And it was no accident that a more-powerful enforcement mechanism was not in place. More powerful mechanisms have been proposed, but they have not been adopted because, from the perspective of judges, they cost too much relative to their benefits.

After explaining this structural reality of the clerkship marketplace, this article sets forth the current state of clerkship hiring and considers the future. Given just how much it would take to create and maintain an effective enforcement mechanism, the prospects of a new plan—and certainly a *successful* new plan—are grim. In particular, to justify the steep cost of an enforcement mechanism that could actually work, the benefits of a new plan would have to go much deeper than simply

“I really believe that law clerk influence depends more on the idiosyncrasies of the judge, and how the judge approaches his or her job, than it does on the law clerk him or herself. There are judges who allow their law clerks to do more of the things that we traditionally think of as things that a judge should do. I don't know how you could possibly measure that, but any sort of study of law clerk influence has to take into account the differences among judge practices because I really think that is the most important variable, even more than reasonable differences among courts—how the judge thinks of his or her role as a judge and what the judge should be doing.”

Justice David R. Stras

bringing order to the market. Those benefits have already been weighed and found wanting.

But there might be other benefits of regulation that have not yet been considered. For example, some data—albeit inconclusive—suggest that women law students on average do less well during the first year of law school but that the divergence dissipates as school continues. If so, then making clerk hiring more dependent on 1L grades will have an asymmetric impact on the gender of clerks—an obvious problem. Similarly, the unregulated market may disproportionately benefit more-prestigious law schools; the earlier hiring occurs, the less data a judge has about an individual applicant, making the “brand” value of the applicant’s school a weightier signal of quality. This, too, may have systemic effects: for instance, if graduates of higher-ranked law schools produce different substantive outcomes as clerks than graduates of lower-ranked schools, which seems implausible, or, perhaps more likely, if it means that clerks are less likely to continue their careers in the communities where they clerk.

Nevertheless, even if these potential unexplored benefits are real, it still would not necessarily follow that a new plan should be created. There may be alternatives to regulation that achieve the same benefits at a lower cost. For instance, the modern trend of hiring more graduates as clerks—as opposed to current students—may solve or at least mitigate the problem of hiring clerks too early. At the same time, modern technology may make the market more transparent, thus discouraging distasteful hiring behavior.

Nielson is associate professor at the J. Reuben Clark Law School, Brigham Young University.

Bonus Babies Escape Golden Handcuffs: How Money Has Transformed the Career Paths of Supreme Court Law Clerks

by Artemus Ward, Christina Dwyer, and Kiranjit Gill

The career paths of former Supreme Court law clerks have been radically transformed in recent years. In 1986, the “Natural Sorting Regime”—where clerks chose among private and public positions with relatively similar salaries—gave way to the “Bonus Baby Regime” characterized by escalating signing bonuses, ramped-up recruiting by select firms, and the rise of specialized appellate and Supreme Court practices. Clerks have flocked to private practice in unprecedented numbers due to both lucrative signing bonuses and a more conservative clerking corps. Taking a position with one of the elite firms that recruit clerks has become the rule, and working in academia, government, or public interest is the rare exception. But the vast majority of clerks leave their first jobs within the first few years after they leave the Court. Those who initially choose private practice leave in equal numbers for another private practice position, a government job, or academia.

At the same time, the job choices of clerks also reflect ideological considerations. Clerks who work for conservative Justices are more likely to enter private practice than are clerks for liberal Justices. Similarly, clerks for liberal Justices are more likely to enter government or public interest jobs. The firms that heavily recruit former clerks do so on partisan lines, with some firms dominated by clerks who worked for conservative Justices and others populated by clerks for liberal Justices. Thus, the new generation of Supreme Court law clerks is composed of liberal and conservative bonus babies eager to don the golden handcuffs of private practice for a couple years before thinking about their next short-term posts either in another firm, government, or the academy. When compared to the humble beginning of the clerkship institution—or even the institution as it existed for most of the past century—the power and status of Supreme Court law clerks have never been higher. ▶▶

Ward is professor of political science at Northern Illinois University (NIU). At the time of the symposium, Dwyer was a law student at William & Mary Law School, and Gill was an undergraduate at NIU.



Taking a Dip in the Supreme Court Clerk Pool: Gender-Based Discrepancies in Clerk Selection

by John J. Szmer, Erin B. Kabeny, and Robert K. Christensen

Following the lead of Justice Horace Gray, the first U.S. Supreme Court law clerks were hired in the 1880s. However, it would take more than 60 years until Justice William Douglas hired Lucile Lomen, the first female law clerk, to serve during the 1944–1945 Term. Even then, it took the combination of several factors to crack the glass ceiling. While he outwardly denied it, Justice Douglas’s personal papers indicated he only considered female candidates because World War II decimated the pool of potential male clerks. Lomen also was an ideal candidate. First, Justice Douglas only hired clerks from the Ninth Circuit, and Lomen graduated from the University of Washington. She distinguished herself as the vice president of the law review, the only Honor Graduate and member of the Order of the Coif, and the author of a well-received note on the Privileges and Immunities Clause. Second, she impressed the right people, including her law school dean as well as two trusted acquaintances of Justice Douglas: Charles Maxey, her undergraduate thesis adviser and the Justice’s fraternity brother, and Vern Countryman, a former Douglas clerk who was in his third year at Washington during Lomen’s first year.

Justice Douglas described Lomen as “very able and very conscientious,” and he apparently considered hiring a woman to serve as a combination law clerk/legal secretary when the Justices were authorized to hire a second clerk in 1950. However, more than two decades passed before Justice Hugo Black hired the second female clerk in 1966. During the interim, a young Ruth Bader Ginsburg was recommended to Justice Felix Frankfurter by a former law professor. Ginsburg had excelled at Harvard Law School, where she made law review, before transferring to Columbia Law School to accommodate her husband’s legal career. There she tied for first in her class. Even with her sterling credentials and a recommendation from a professor known to select clerks for the Justice, Frankfurter still refused to hire Ginsburg. Some suggest he was hesitant to hire a woman with a five-year-old child, while others suggest he was “worried she might wear pants instead of dresses.”

Margaret Corcoran, a graduate of Harvard Law School, was the second female U.S. Supreme Court clerk and was selected by Justice Hugo Black. She was

also the daughter of a former clerk to Justice Oliver Wendell Holmes, Tommy “The Cork” Corcoran. The elder Corcoran was a veteran of the New Deal and a powerful political fixer who even allegedly lobbied Supreme Court Justices *ex parte*. According to Justice Black’s wife, Elizabeth, as well as the accounts of another Black clerk serving that Term, Margaret was more interested in socializing than performing her duties as a law clerk. Stephen Susman, her co-clerk, claimed in an interview to have done all of Margaret’s work in exchange for the “wonderful” social opportunities she provided. Tommy Corcoran was apparently aware of his daughter’s work habits and may have helped her with her brief writing.

Two years later, Martha Alschuler (later Martha Field) clerked for Justice Abe Fortas. Field, now a prominent law professor, was followed by Barbara Underwood, a Thurgood Marshall clerk, in 1971. Underwood later blazed another trail when she was named the Acting U.S. Solicitor General in 2001, the first woman to serve in this capacity.

During the 1972 Term, two women worked as law clerks—the first time more than one woman served in that capacity in the same Term. That year, Justice Douglas set another first when he hired two female clerks—Carol Bruch and Janet Meik. While there were several cracks in the glass ceiling by the early 1970s, not all Justices were comfortable hiring women at that point. Justice William Brennan, a powerful advocate for gender equality under the Constitution, refused to hire Alison Grey as a clerk despite recommendations from two law professors—both former Brennan clerks. Justice Brennan apparently rejected Grey, who had finished first in her class at the University of California Berkeley School of Law, solely because of her sex. In 1973, one of the former Brennan clerks who had recommended Grey tried to convince the Justice to hire Marsha Berzon for the 1974–1975 Term. Again, Justice Brennan categorically refused to hire a woman. This time, however, Stephen Barnett wrote an impassioned letter to Justice Brennan asking him to reconsider. Barnett pointed out that Justice Brennan’s decision not to hire Berzon on account of her sex likely violated the Constitution—in large part due to an interpretation of the Fourteenth Amendment championed by Justice Brennan. Barnett’s arguments persuaded the Justice to hire Berzon. However, he would not hire another female clerk for seven Terms.

Szmer is associate professor of political science at the University of North Carolina at Charlotte, Kabeny is an associate professor of political science at the University of Wisconsin–Milwaukee, and Christensen is associate professor of public administration and policy at the University of Georgia.



Fielding an Excellent Team: Law Clerk Selection and Chambers Structure at the U.S. Supreme Court

by Christopher D. Kromphardt

While we can neither sit in on meetings between a Justice and his clerks nor probe his brain as he considers his strategies, we can analyze how he assembles the team of clerks on which he relies. The makeup of these teams reveals clues about what information he seeks to aid his decision making. Some Justices desire information from disparate and competing sources, pursuing the logic that the fruits of many minds often produce the best answer. Other Justices seek information of a particular ideological nature; this information helps justify voting in their preferred ideological direction and may provide ammunition for persuading other Justices and defusing attacks. Studying the team a Justice assembles provides scholars with a rare glimpse into how he does his work.

This is not the first study on clerk selection, but to my knowledge it is the first to treat selection as the assembly of a team rather than the hiring of individuals. My subject of interest is the team a Justice assembles. Specifically, I will analyze patterns in the ideological characteristics of the Justices' teams from 1969 to 2007. I discuss two theoretical perspectives on clerk hiring—one in which clerks are agents to the Justice as principal and one in which clerks are tapped as sources of information—and derive implications from each perspective that will facilitate interpretation of data on Justice and clerk ideological preferences. These patterns reveal a great deal about the teams of clerks the Justices assemble to accomplish their goals. In general, the

analysis uncovers variance across the Justices and over the Justices' tenures. In particular, the results undermine the notions that a Justice's ideology completely determines the information he seeks and that clerks' ideologies always match those of their Justices.

This study should be of interest beyond the narrow question of how clerks influence their Justices. As I mention above, the teams a Justice assembles provide clues about how he does his work. Information about their clerks should join the Justices' comments and released papers as important sources for learning about the day-to-day job of being a Supreme Court Justice. The study treats Justices as performing an additional role. Scholars are used to looking at Justices as role-players, such as members of a collegial group, yet are unaccustomed to treating them in the role of personnel managers. Finally, the study also serves to illuminate a case of how elites engage in personnel management.

Kromphardt is a Ph.D. candidate in the department of political science at the University of Alabama.

Surgeons or Scribes? The Role of United States Court of Appeals Law Clerks in "Appellate Triage"

by Todd C. Peppers, Michael W. Giles, and
Bridget Tainer-Parkins

Not surprisingly, law school class rank is the most important factor in the selection process. Over 90 percent of the respondents among federal court of appeals judges stated that they considered law school rank, with 66 percent of those respondents reporting that it was either the most important or second most important factor that they took into account. ▶▶

Placing an applicant's class rank in the context of the quality of the law school attended was an important consideration for the respondents. Ninety-three percent of the judges reported that they took into account the quality of a candidate's law school in selecting clerks, and 58 percent of those judges stated that they ranked it first or second in importance. Given the fact that the majority of courts of appeals judges rely on their clerks to draft opinions, it is logical to assume that these judges also place a premium on law clerks with research and writing skills—this assumption is borne out by the data. Over 80 percent of the respondents stated that they look for applicants with law review membership, and roughly 36 percent consider it first or second in importance. Moreover, approximately 74 percent of the judges responded that they weigh the quality of the writing sample—with 17 percent ranking it as first or second in importance. In short, academic success at a good law school, combined with law review membership (our “performance factors”), ranks amongst the most important selection criteria for courts of appeals judges. These findings mirror the responses given by federal district court judges in our earlier research.

Court of Appeals Judge Patricia M. Wald has written as follows:

The judge-clerk relationship is the most intense and mutually dependent one I know of outside of marriage, parenthood, or a love affair. . . . Judges talk about it being a “good” or “bad” year, not just in terms of results they have achieved, or in the importance of matters before the court, but also in terms of teamwork and the dynamics of work within their chambers.

Her observation is borne out in the value that judges place on the applicant's personality. Our findings indicate that candidates are not selected merely on their academic achievements in law school, but that considerable weight is also given to an applicant's personality. Eighty-two percent of the respondents reported that a candidate's personality is relevant to their decision-making process, with 25 percent of the judges ranking it as first or second in importance; in other words, the respondents consider it almost as important as law review membership. We found similar emphasis placed on personality in our earlier work on the selection criteria used by federal district court judges.

Of course, it is likely that an applicant's personality is not assessed by a judge until he or she interviews a candidate (although considerations of personality may be addressed in letters of recommendation). If judges, however, do not have direct or indirect measures of an applicant's personality until the interview, then an argument could be made that class rank, quality of law school, and writing skills may be the most important criteria in determining which applicants will be given interviews, and the importance of personality (or “chamber fit”) is more critical when the judge makes his or her final selections for the short list of candidates. Accordingly, the wise candidate should recognize that a glittering résumé may not be sufficient in seizing the brass ring of a federal clerkship.

When we surveyed federal district court judges, we were surprised to find that more emphasis was not placed on the letters of recommendation written on behalf of clerkship candidates. While 69 percent of the judges in that early survey reported that they considered letters of recommendation, only 11 percent of them ranked the letters as the first or second factor of importance. . . .

In recent years, it has been argued that a clerkship applicant's ideology is an important factor considered by Supreme Court Justices, and, therefore, also by the feeder court judges who are supplying qualified applicants to the Supreme Court. While we did not find political ideology to be an important factor in selecting district court law clerks, we included ideology in our list of selection criteria contained in the present survey, given the role that some courts of appeals judges play in supplying law clerks to the Supreme Court. The courts of appeals judges who responded to the survey, however, stated that a candidate's political ideology was the least important factor in picking law clerks. This finding ran counter to our expectations and led us to speculate about the level of judicial candor reflected in our completed surveys. Simply put, we believe that there is too much ideological matching between courts of appeals judges and their law clerks to be the result of chance or applicants applying to like-minded jurists.

Peppers is visiting professor at Washington and Lee University Law School and the Henry H. and Trudye H. Fowler Associate Professor of Public Affairs at Roanoke College, Giles is the Fuller E. Callaway Professor of Political Science at Emory University, and Tainer-Parkins is a member of the Virginia bar.

“I’m in a private building in Raleigh. There are no other federal employees around me, so most of my day-to-day contact is with my clerks and my staff. That means my clerk needs to be the kind of person who can get along with the other folks in my chambers. They have to be able to smile, and have a good personality, or they won’t work for me. I’m not going to be in an environment with a bunch of people that don’t talk to each other.”

Judge James A. Wynn, Jr.

Hiring Supreme Court Law Clerks: Probing the Ideological Linkage Between Judges and Justices

by Lawrence Baum

Why did Supreme Court Justices become more inclined to draw their law clerks from judges who shared the Justices’ general ideological positions in the 1990s, and why have they maintained that stronger inclination since then? The most intriguing possibility is the growth in ideological polarization among political elites in the United States.

The term *polarization* has been used to refer to multiple phenomena. One is “sorting,” in which ideological differences become more fully aligned with other differences between people, especially political party identifications and affiliations. Considerable sorting of liberals into the Democratic Party and conservatives into the Republican Party has taken place in the mass public, and a great deal of sorting has occurred among people in government and other people who are involved in politics. In Congress, the sorting began in the 1950s and 1960s, and it is now complete: in the Congresses of 2009–2010 and 2011–2012, in both the House and Senate, every Democrat had a more liberal voting record than every Republican. Similarly, since the retirement of Justice John Paul Stevens in 2010, the Supreme Court for the first time has had ideological blocs that follow party lines (based on the party of the appointing president) perfectly. To the extent that partisan divisions reinforce ideological divisions, the Court’s liberal and conservative Justices are separated from each other to a greater extent than in the past.

In itself, partisan sorting could not explain the strengthened ideological linkage between judges and Justices in the selection of law clerks. More relevant is another type of polarization: growth in the strength of people’s identifications with one ideological side and in their antipathy toward the other side. This second type has been called “affective polarization.”

It is uncertain whether affective ideological polarization has occurred in the mass public, but there are clear signs of it among political elites. One reason is that, with the two parties more ideologically distinct, partisan loyalties and interests reinforce ideological disagreements. In any event, there is now an extraordinary degree of enmity and distrust between conservatives and liberals. Justice Antonin Scalia has described one result:

It’s a nasty time. When I was first in Washington, and even in my early years on this Court, I used to go to a lot of dinner parties at which there were people from both sides. Democrats, Republicans. Katharine Graham used to have dinner parties that really were quite representative of Washington. It doesn’t happen anymore.

This development is reflected in, and reinforced by, the establishment of new ideologically based institutions. In the mass media, television networks and websites cater separately to liberals and conservatives. In the legal profession, the Federalist Society and (more recently) the American Constitution Society provide separate homes for conservative and liberal law students, lawyers, and even judges.

If the thinking of Justices, judges, and prospective law clerks has changed as a result of affective polarization, the result would be to strengthen the ideological linkage between judges and Justices in the selection of law clerks in multiple ways. For one thing, law students who have stronger identifications with one ideological side would give greater weight to the ideological positions of lower court judges when they seek clerkships. Justices would also have reason to worry more about the danger of hiring clerks who seek to advance their own ideological agendas, so they would have a stronger incentive to seek clerks who share the Justices’ own views.

Further, if judges have stronger ideological identities than they did in the past, they too give greater weight to ideology in the selection of clerks. In combination with clerks’ own choices about where to apply for clerkships, ▶▶

this change in behavior makes a judge's identity a better indicator of clerks' ideological positions for Justices who care about those positions.

Especially intriguing is the possibility that Justices' own perspectives have changed. If Justices have become more conscious of ideology, they have stronger incentives to choose law clerks who share their ideological positions. In turn, they have more reason to draw clerks from the lower court judges whose own ideological positions provide information about clerks' positions. Former U.S. Court of Appeals Judge J. Michael Luttig has argued that these changes have indeed occurred, ascribing them to what he calls politicization of the courts. Justices would also have more interest in rewarding ideologically similar lower court judges by choosing their clerks. Finally, the Justices might be more likely to develop acquaintanceships with judges and accord respect to them on the basis of ideological compatibility.

Baum is professor emeritus of political science, The Ohio State University.

Diversity and Supreme Court Law Clerks

by Tony Mauro

I have embarked on an updated survey of the demographics of the law clerks of the Roberts Court. At the time of the publication deadline for this issue of *Marquette Law Review*, I had not finished the tally.

I can report some general findings, however, from looking at the clerks for the last few years.

The percentage of clerks who are women has gone from about one-quarter to one-third. Of the 342 law clerks employed by the Justices of the Roberts Court, 111 were female. Fifty-seven percent of the clerks hired by the four female Justices who served during the Roberts Court were male, while 72 percent of the clerks hired by male Justices were male.

But the number of minority clerks, especially those who are not of Asian heritage, still appears to be low.

Another trend of interest: an uptick in the hiring of

clerks who have had law firm, executive branch, and other experiences before coming to the Court. The typical sequence had been law school, followed by an appeals court clerkship, and then followed immediately by clerking at the Supreme Court, without any work experience in between.

Ever since the 1998 articles, members of Congress have routinely asked about the demographics of the law clerks during annual or nearly annual Supreme Court budget hearings.

The reflexive answer from the Justices has typically been some variation of "I can't afford to take a risk. My clerks need to hit the ground running." That somehow is supposed to explain why the Justices draw from the ranks of white males from Harvard or Yale when hiring clerks. It implies, inappropriately, that hiring minorities is risky business.

Even if one were to credit the "risky business" excuse, the books about Supreme Court clerks through history by Todd Peppers and Artemus Ward have shown that Justices have taken risks with white males for a long time. Southern Justices often favored graduates of Southern law schools, and some Justices would hire sons of friends, sight unseen. Sometimes they worked out; sometimes not. But the Court did not crumble, and the Justices were able to do their work.

It could be argued that the job of Supreme Court law clerk has become more important and more intense in recent decades, even though the Court's caseload has significantly decreased. So the "hit the ground running" factor may well be more prominent in the minds of current Justices than in the more relaxed past.

But again, it is hard to view that as a credible reason for not hiring minority law clerks. I still believe that Justices could set the tone and set the criteria in such a way that their feeder judges and friends would seek out and find a much broader palette of candidates who could be highly effective clerks and bring new perspectives and backgrounds to the important tasks that face them.

Mauro is Supreme Court correspondent for the *National Law Journal*.

"Probably much to the chagrin of Judge Posner, I greatly value having a career clerk. Maybe that comes from my military background, but I just believe in having an 'Executive Officer' in the office—somebody with institutional knowledge whom I can count on."

Judge James A. Wynn, Jr.

Justice Brennan and His Law Clerks

by Stephen Wermiel

Justice Brennan always considered his law clerks to be his strategic partners in the Court in a number of important ways. Throughout his tenure, Justice Brennan took a pragmatic approach to the job of Justice, believing that the goal was to try to work with his colleagues to get a majority for an opinion, preferably one that reflected his view. This approach led to the famous story of how Justice Brennan would meet with his clerks for the first time and taunt them by asking what the most important principle of constitutional law was. When they seemed stumped, he would hold up his hand with five fingers and say, “It takes five votes to do anything around here. That is the most important principle of constitutional law.” Clerks for Justice Brennan got to experience this side of their Justice and the Court in different ways. It was Justice Brennan’s longstanding practice to encourage his clerks to interact with those of other Justices and to serve as his emissaries. When Justice Brennan found himself with a narrow five–four or six–three decision to write, where it was essential in his view to ascertain the common ground that would hold that majority together, he would often dispatch his law clerks to chambers of the swing or deciding Justice to determine what that colleague’s concerns were. The law clerks gained valuable lessons in investigation and negotiation, both important skills for lawyers. They would determine what concerns another Justice had about a case and then, whenever possible, steer Justice Brennan’s opinion in that direction to retain a majority. This was not always an easy task, but it was a talent for which the Brennan law clerks became well known over the years, and one that was not part of the experience of many other clerks to other Justices.

The Brennan office manual also suggests that by the 1980s, the Brennan law clerks joined him in strategic thinking about opinion assignments. Under the Court’s procedures, the Chief Justice assigns who will write the majority opinion when he is in the majority, but if the Chief Justice is in dissent, then the most senior Justice in the majority makes the assignment. Beginning in 1976, after Justice William O. Douglas retired, Brennan was the most senior Justice until he retired in 1990. As the leader of a liberal wing on a Court that grew increasingly conservative during that period, he often found himself in dissent, but when he was in the majority in a five–four case, the opinion assignment would often be his. “WJB relies a great deal on clerks to make the ‘correct’ assignments,” the manual written by the law clerks asserts.

The manual described different factors the clerks should consider, such as sharing good opinion assignments with the other liberal Justices and combating Justice Brennan’s tendency to want to keep the best opinions for himself.

Wermiel is professor of practice in constitutional law, American University Washington College of Law.

Supreme Court Clerks as Judicial Actors and as Sources

by Scott Armstrong

If the day ever returns where a President can appoint Justices with broader interests and more creative decision-making processes, I hope that future clerks can make the kind of contributions to their Justices that *The Brethren* clerks made during their service. Indeed, I would hope that they would also take seriously the need to clarify the past two decades of the Court’s inner workings. There have been no detailed accounts of the dynamics that produced the cases which chose the 43rd President of the United States, abolished limits on campaign contributions, restricted the ability of cities to control handguns, permitted same-sex marriage, upheld national health care, broadened religious freedom to include corporations, diluted the Justice Department’s ability to enforce election law fairness, struck down a ban on protests near abortion clinics, let stand Texas restrictions on voting without IDs, and other important issues.

Without candid firsthand accounts that thoughtfully explain the Court’s recent Terms, the public is left with the shallowest of partisan portrayals. When *The Brethren* explained the Court’s handling of the Nixon tapes case, many readers were shocked by the secret infighting that had produced the decision. Today’s college students who read *The Brethren* as their first exposure to the Court’s internal deliberations have a much different reaction. They marvel at how principled the *Brethren* Court seems compared to the contemporary Supreme Court’s presumed raw political wrangling. The public view of the individual Justices is once again as poorly informed as it has ever been, relying most often on caricatures based on their political backgrounds, their religions, their voting patterns, or superficial courtroom patterns of conduct.

It is my hope that once again Justices and their clerks will find that they, too, have an obligation to assure that the Court’s processes and dynamics are better understood, and that they will once again share that information in a candid and serious manner. ▶▶

Armstrong is a journalist and coauthor, with Bob Woodward, of *The Brethren: Inside the Supreme Court* (1979).



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A Truth About Career Law Clerks

by Joseph D. Kearney

I want to begin by thanking my colleague, Chad Oldfather, and also Todd Peppers, for organizing this conference. It is an impressive feat, and I would be grateful, as dean, even if it did not present me an opportunity to unburden myself of a point that has been bothering me for some time.

Let me begin that unburdening with an apology of sorts—or a refusal to give one, depending on how you look at it. It is best presented, perhaps, in a brief story. A number of years ago, one of my friends, a nationally acclaimed law professor, asked me, “If you were a Supreme Court Justice, how would you select your law clerks?” My response was that, whatever else might be the case, I would not hand the matter over, even for screening purposes, to some panel of former clerks, professors, or judges. I may have briefly elaborated on the basis for my view, which included that judges were, after all, appointed to make decisions. My colleague was a bit taken aback, as I recall; he expressed surprise that my answer had included a moralistic component of sorts, whereas his interest in asking the question was to figure out the most *efficient* way of going about the matter. I made no apology for relying, in part, on values other than efficiency.

The same is true today. My interest in the topic of law clerk selection has scarcely lessened during the intervening 20 years. To be sure, it has become less personal or at any rate less self-interested, as somewhere soon after that conversation I received a Supreme Court clerkship, and I would never again be in the business of seeking a clerkship. At the same time, as a law professor and, for more than a decade now, dean of a law school, I have had an intense interest in helping our students secure clerkships. And I admit to being frustrated at times because it seems to me that judges are placing too high a premium on efficiency.

Let me be more specific. The rise in the incidence of career law clerks—or even just long-term ones—is one that troubles me and, I respectfully submit, *should* trouble

others in the profession, including judges. I say this with some embarrassment, not because I was ever a career law clerk, but because I have known both some very good judges with career law clerks and some very good career law clerks. In fact, I benefited personally, some 25 years ago, as a one-year law clerk for a judge of the U.S. Court of Appeals for the Ninth Circuit, from the counsel and assistance that I sought and received from a career law clerk to another Ninth Circuit judge in the same building. He was quite helpful to me during the year.

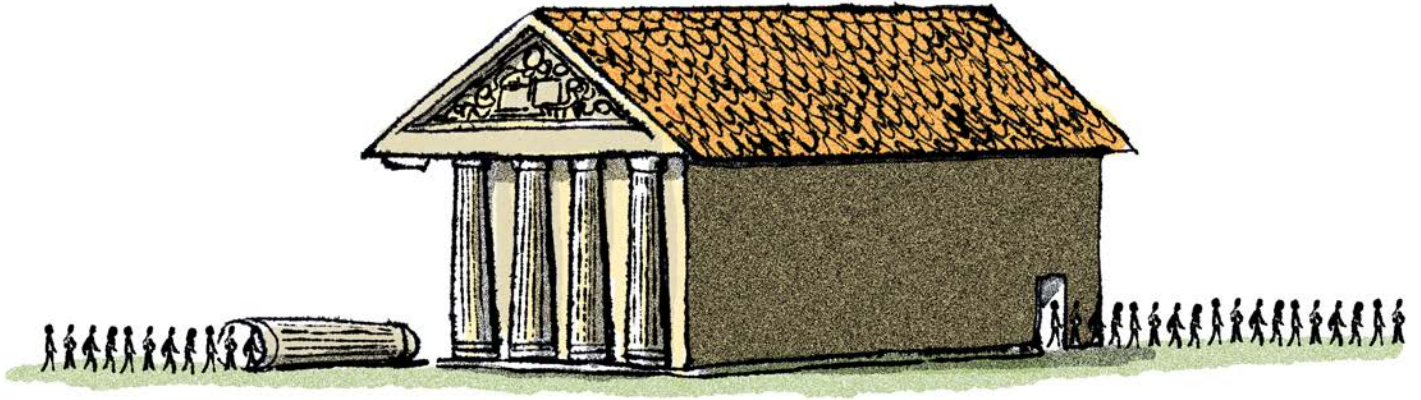
So perhaps my remarks will come off even as hypocritical, given this experience of mine (and my disclosure of it), but I do not think so. After all, I have never been a judge and never hired career law clerks. Thus, the more likely problem for my assessment is that it will seem naive or inexperienced. I am willing to run that risk. After all, I served as a law clerk for two different judges, I have worked as an appellate lawyer, and my work as a law professor has included study of the courts. I do not include my work as dean in that catalogue because I appreciate that it does not add much on this particular experience or expertise front. In all events, I do not claim here to have, with respect to career law clerks, “the Truth” (with a definite article and a capital *T*), but I do offer something that seems to me “a truth.”

And that small-*t* truth, in my estimation, is that the profession and the larger society are not receiving a net benefit from the rise in the incidence of career law clerks, as my impression is (in fact, I have no doubt concerning the general incidence, even though I do not have precise data). Or, at a minimum, the truth is that the cost side of the cost/benefit equation of this phenomenon is significant. We can stipulate that an experienced clerk enables a judge to discharge his or her work more efficiently. We can agree as well that in some important respects a law clerk early in a clerkship is less valuable to the judge than at some later point.

Yet none of this seems to me enough. To the latter point: It is possible to gain the benefits of some experience without hiring people for an indefinite term. My impression long was that federal appellate judges typically would hire law clerks for a one-year term but ►►

“The rise in the incidence of career law clerks—or even just long-term ones—is one that troubles me and, I respectfully submit, should trouble others in the profession, including judges.”

Joseph D. Kearney



federal trial judges would appoint clerks to serve *two* years. The sorts of things that a district court law clerk does, it has seemed to me, resemble somewhat less the work of a student in law school than do the duties of the appellate clerk, so the difference helps justify the varying approaches.

Some of my unhappiness has to do with the awkwardness of the matter. I recall a few years ago attending a bar association event here in Milwaukee. The longtime law clerk to a longtime federal judge was receiving an award. I had no objection to the award (and little standing even if I had had one)—about which I am glad because the same organization gave me an award the day before this conference. Nor did the award on its face seem embarrassing from my perspective. Organizations give awards for any variety of reasons, and bar associations surely do well to include less-prominent individuals in their bestowal. Yet it was, well, awkward when, in accepting the award, the law clerk commended the judge—itself an appropriate thing—not just for hiring the clerk or being a great boss generally but also, more specifically, for getting out of the way so that the clerk and others in the chambers could get the work done. My concern was not that the statement was untrue; my concern was that it was *true*—both that the judge had so proceeded and that the law clerk thought this to be an appropriate and praiseworthy approach.

Yet my concern encompasses more than embarrassment for others. In my estimation, there is a professional service aspect of a judge's work with law clerks that necessarily suffers to the extent that a judge works with a career law clerk. Indeed, to *that* extent, this aspect of the work ceases to exist, by definition. The career law clerk is not being groomed for some other service to the society; he or she will represent no clients in that court or any other; such clerks will do nothing *as lawyers* except to serve as law clerks. By contrast, the clerk who has worked at the judge's elbow for a

year or two will take that training to the next position in the legal profession, likely as a practicing lawyer and sometimes eventually as a judge. The profession and the common good will be advanced.

This is not the totality of the contribution that limiting the length of tenure of law clerks can make. There is such a thing as new learning in the law—new techniques, new decisions, even new laws. One would rather imagine that at least the best students coming from at least some law schools are at least exposed to such newness—not that they have become experts in the process. This seems to me another reason that a failure to make room for new law school graduates reduces the social good. We cannot doubt, at any rate, that the views of the longtime law clerk and the judge will converge over the course of time, a phenomenon that itself has costs.

I do not wish to suggest that judges can serve the purpose of developing new lawyers only by hiring new law graduates as clerks. I certainly have appreciated the value of judicial internship programs, both generally and in the case of Marquette Law School. Indeed, I am seeking to be especially careful here because, while I am disappointed by the law clerk hiring practices of some judges in Wisconsin, some of these same judges are among the many who contribute to Marquette University Law School and the future of the legal profession by accepting into their chambers and their professional lives—and the lives of their law clerks—one or more Marquette law students each semester doing a part-time internship. For all this, I am very grateful.

On the career law clerk front, I may have the bottom line wrong, and I have already suggested that I am not in possession of “the Truth” on this point. Nor have I indulged myself in some of the broader musings possible. For example, when I think about the whole judicial staff phenomenon, I recall the early-nineteenth-century judges and Justices who rode a circuit, slept in a tavern, and held court wherever they could find

the space (also sometimes in a tavern). They ran their courts and did justice, in the process requiring the presence only of a clerk of court, as I understand it (because the presence of a clerk helps turn the “judge” into the “court”). I am not sure that we’ve gotten more or better justice proportionate to the increased expense and bother since those days. Yet this would not be a good point for me to make, or at least to dwell upon. The typical law school dean—even one, such as I, who continues to teach—has enough assistant and associate deans that he is glad not to find himself ever face-to-face with the comparatively lonely law school dean of a century ago. More generally, the growth of administrative apparatus has scarcely been confined to the judiciary or the academy. More personally yet, there is also the fact that I am hardly confident that I would have secured a Supreme Court clerkship if the Justices were not entitled to *four* law clerks. (One of my co-clerks for Justice Antonin Scalia and I used to contend with one another for the ironic honor of claiming to have been the “fourth clerk”—the last one hired.)

To continue with points that I avoid, but to return to my specific topic of career law clerks, I also do not offer some of the stronger criticism occasionally leveled at the use of these clerks—such as that the phenomenon amounts in some instances at the federal level to an improper delegation of Article III power or that, similarly at the state level, over-empowered law clerks can be said to be exercising an authority that the people did not confer on them, by election or otherwise. I think such criticism to be fair commentary, but I do not know how persuasive it is, and I do not adopt it here. And no doubt there is more nuance to the situation than I have been able to sketch out: for example, in the event that a secretarial position has been replaced by an additional law clerk (as is the case in some judicial chambers of the past 20 years), some of my critique is inapposite (though not all of it).

I appreciate as well that, at the federal level, the problem already has been addressed, *to an extent*, by the 2007 policy change that prohibits federal judges from having more than one career law clerk (subject to grandfathering) and that limits term clerks to serving no more than four years. The “to an extent” phrase, however, is an important qualifier, not only because there are many judges outside the federal system but also because even one career law clerk per federal judge would seem a system posing many—though not all—of the problems that prompt my concern and remarks.

I note as well that the policy change, as I understand it, was driven by budgetary concerns—another point that I do not adopt for myself.

At the same time, I do not wish to be *too* agreeable here. Thus, I want to withdraw my earlier stipulation that an experienced clerk enables a judge to discharge his or her work more efficiently. Certainly, that *can* be the case. Yet it seems to me that the culture of the chambers of a judge with career law clerks suffers from not having the hunger or energy that a newly minted lawyer can bring. In this regard, career law clerks can introduce *inefficiency*.

Nonetheless, at the end of the day, my purpose is not to criticize but perhaps to engender some self-reflection or even further conversation. I have, so far as I can recall, never criticized a single judge for a specific law clerk hiring decision—i.e., the decision to hire or not to hire a particular person—and, if I ever have, I was wrong to do so. The question as to who is a good fit with a particular judge is an individual one, even idiosyncratic in its nature, and it is committed to someone other than me. I appreciate as well that there may be more to be said in defense of the phenomenon of career law clerks. For example, such clerks may be especially helpful to federal judges who have assumed senior status and who nonetheless perform valuable judicial work. Of course, to say this is not to say that these benefits outweigh the costs, some of which this essay has identified.

In all events, I think that we should worry about a system in which a law clerk serves for a judge’s career (or even much of it). At the trial level, this seems to me to reflect the “judge as case manager” philosophy that has affected other aspects of our judicial system, often negatively. I have previously spoken to that in critiquing the “culture of default” that I think to have begun to develop in the Wisconsin courts in recent decades—that is, the culture in which trial judges have been more willing to enter default judgments and less willing to vacate them than is appropriate in a system favoring resolution of cases on the merits. Judges are more than managers: they are teachers, for both the larger world and those who work with them, and many of them are missing out on important teaching opportunities by excessive reliance on law clerks who will be, outside of the judges’ chambers, for the duration of their careers mute and inglorious. In my respectful estimation, our legal system is the poorer for it. ■

Kearney is dean and professor of law at Marquette University.

Downturn on the Home Front

Marquette Law School Poll Shows That Scott Walker's Supporters in Wisconsin Were Not Very Enthusiased About His Presidential Bid

By Charles Franklin



Charles Franklin

In November 2014, Scott Walker was reelected governor of Wisconsin, his third victory in four years. Four months later, Walker surged into first place in Iowa GOP presidential polling and was consistently in the top three in national Republican polling through early August. Yet by September 2015, his national poll numbers had fallen to 2 percent or less, and he suspended his presidential campaign on September 21, only the second of 17 candidates to do so. Returning to Wisconsin, Walker said he wanted to look forward to his next three years as governor and spend his time traveling the state promoting his ideas.

How did this sequence of electoral victory followed by national surge and subsequent collapse play out with the voters of Wisconsin? How did the national sequence of rise and fall compare with the trajectory in Wisconsin? The Marquette Law School Poll allows us to shed some light on this topic.

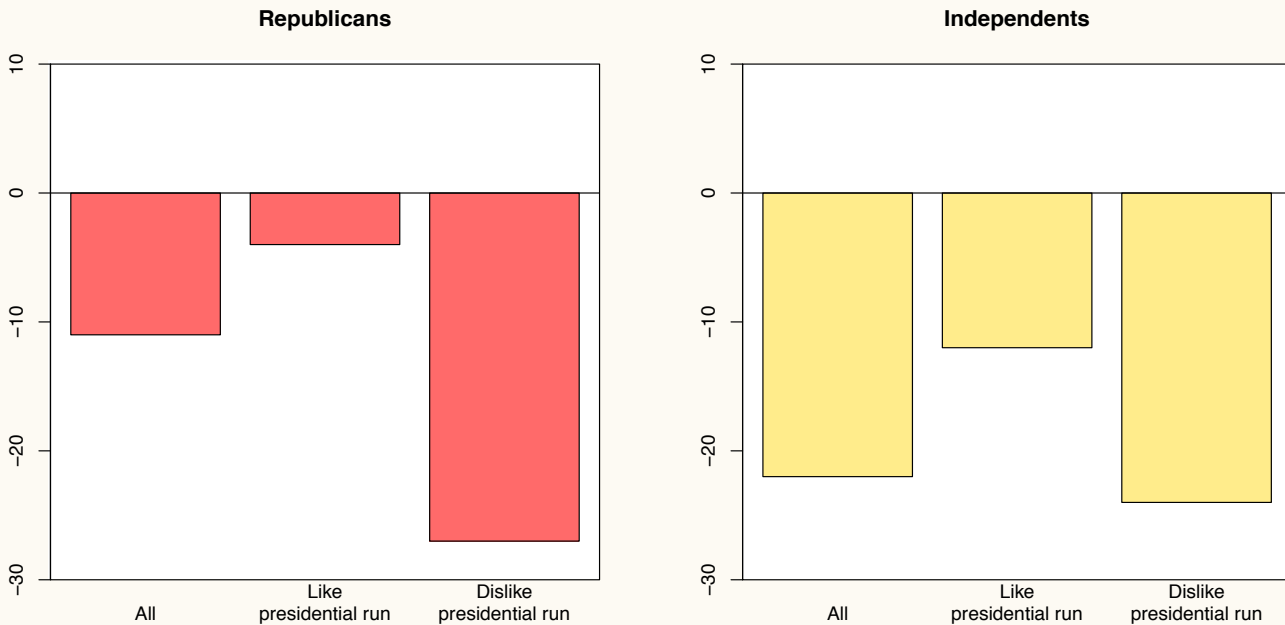
Walker as governor, 2012–2014

The 2014 campaign culminated in a third gubernatorial victory for Walker, with votes of 52 percent in 2010, 53 percent in the 2012 recall, and 52 percent in 2014. The consistent pattern of votes illustrates the polarized nature of Wisconsin politics detailed by Craig Gilbert, as Lubar Fellow for Public Policy Research, in the fall 2014 *Marquette Lawyer*. Voters in Wisconsin have been largely evenly divided and have exhibited little evidence of changing views of politics in recent years. The partisan divide has been especially clear. In 2010, Republicans gave Walker 95 percent of their votes while Democrats gave him just 9 percent of theirs. This very large gap nevertheless managed to widen in 2014, with 96 percent of Republicans and only 6 percent of Democrats voting for Walker.

This stability of support is further illustrated by data from the Marquette Law School Poll showing that, between January 2012 and October 2014, Walker's job approval never fell below 46 percent or rose above 52 percent. Likewise, disapproval of

his handling of his job as governor never fell below 42 percent or rose above 51 percent. The pooled surveys of 23,516 respondents put Walker's approval at 49.3 percent and disapproval at 46.2 percent. As with the gubernatorial elections, approval in the polls was sharply structured by partisanship: Republicans and independents who lean Republican (hereafter "Republicans") gave the governor an 88 percent approval rating and 10 percent disapproval in the pooled 2012–2014 surveys, while Democrats and independents who lean Democrat (hereafter "Democrats") provided 15 percent approval and 81 percent disapproval. During this period, Republicans made up 43 percent of registered voters while Democrats formed 47 percent. The pure independents, who lean toward neither party, comprised only 9 percent of the electorate but could swing the balance between the more numerous partisans. In this period, these pure independents gave Walker a 47 percent approval rating and 39 percent disapproval.

Change in Walker Approval as Governor, 2014–2015



Favorable views of Gov. Scott Walker have declined among both Republicans and independents in Wisconsin, but the declines have been stronger among those who didn't like Walker's running for president. These graphs show the percentage point declines in favorable opinions of Walker between fall 2014 (based on combined totals from four Marquette Law School Polls) and 2015 (based on three such polls). Favorability toward Walker among Democrats barely changed.

These data help explain how Walker managed to win three hard-fought elections by consistent, though narrow, margins: Partisans were intensely loyal in their votes and in their approval or disapproval of the governor, while independents were won to his side.

Level of support for Walker's presidential bid

Analyses of Walker's rise and fall as a presidential candidate have focused on statements he made, his poor performance in the first two debates among Republican candidates, and the way he ran his campaign. But analysis of the Marquette Law School Poll results, with a Wisconsin-only perspective, focuses on whether people supported the general idea of Walker's running for president.

As the likelihood of a Walker presidential bid loomed, Wisconsin voters were unsurprisingly divided in their views, but Republican voters were perhaps surprisingly tepid in their initial support for a run for the top office. When first asked in October 2013 if they would like to see Walker run for president, 30 percent of poll respondents said they would, while 66 percent said they would not. As expected,

only a handful (12 percent) of Democrats supported a presidential candidacy, but, more surprisingly, just 52 percent of Republicans favored such a national bid, while 43 percent opposed it. What about independents, who at the time gave Walker a 51–39 percent job approval rating? Only 24 percent favored a presidential effort, while 71 percent did not.

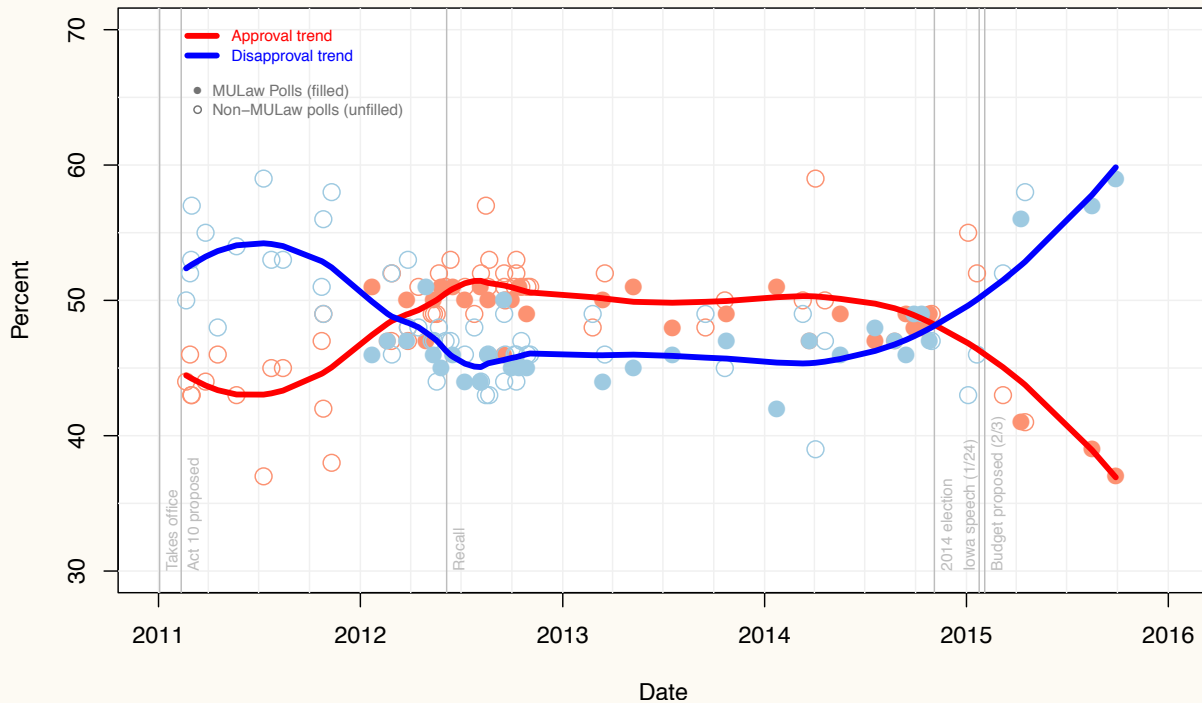
By comparison, at that time 39 percent favored a presidential race by U.S. Representative Paul Ryan, with 53 percent opposed, and among Republicans 64 percent favored a Ryan run, as did 34 percent of independents and 19 percent of Democrats.

Over the course of 2014 and 2015, there was a modest upturn in support for a Walker-for-president campaign. Between 26 and 31 percent supported a run in 2014, while 33 to 34 percent supported the effort in 2015. But among Republicans, support rose from an average of 49 percent in 2014 to 61 percent in 2015. Even in 2015, however, 35 percent of Republicans were not pleased by the presidential effort.

Independents presented the opposite trend. In 2014, 25 percent of independents liked the idea of a presidential race while 62 percent did not, but that slipped to 17 percent support and 73 percent opposition in all 2015 polling. ▶▶

Scott Walker Job Approval in Wisconsin

Every public poll. Latest: Sept. 28, 2015



Among these two groups, which had expressed strong support for Walker in his gubernatorial elections and in approval of his handling of his job as governor, support for the presidential bid was at best moderate—well below the levels of support shown in questions about approval of Walker as governor or whether people wanted to vote for him for that office. In the case of independents, the presidential run was solidly unpopular.

2015: Trouble on the home front

Reaction to Walker's much-reduced presence in Wisconsin in much of 2015 may have been a factor underlying downturns in support within the state for his candidacy. Wisconsin voters had reservations that any governor could run for president and also do the job of governor, with 30 percent saying this was possible, but 66 percent saying it was not. More telling perhaps is that among Republicans, while 48 percent said a governor could do both, 49 percent said this was not possible. Independents were even more dubious, with only 17 percent saying it was possible to do both. This skepticism set a significant bar for Walker to overcome in convincing voters he was continuing to devote his time to Wisconsin.

In April, during the difficult biennial state budget debate but while Walker was rising in national polls, the governor's job approval at home dropped sharply.

From a 49–47 percent approval split in late October 2014 (just before his reelection), his approval rating slipped to 41–56 in April and declined further to 39–57 in August and 37–59 in September (the last of these being after his withdrawal from the presidential campaign). The downturn was clearest among independents. In the combined four Marquette polls taken in September and October 2014, independents gave Walker a 43 percent approval and 44 percent disapproval rating. In the three 2015 polls combined, approval among independents fell to 21 percent, a drop of 22 points, while disapproval rose to 69 percent, an increase of 25 points. And among Republicans? In the two months before the 2014 election, approval of Walker stood at 89 percent with disapproval at 9 percent. This shifted to 78 percent approval and 19 percent disapproval in the three 2015 polls, a decline of 11 points in approval and an increase of 10 points in disapproval. Democrats changed little, from an 11–87 split in 2014 to 10–88 in 2015, a shift of just one point each way. Thus, most of the change in Walker's overall approval rating was driven by a sharp drop among independents and a significant drop among Republicans.

How did preferences about the presidential run affect these changing approval ratings? Among independents who supported a run for the presidency, approval as governor in 2014 stood at 61 percent, but in 2015 it had fallen to

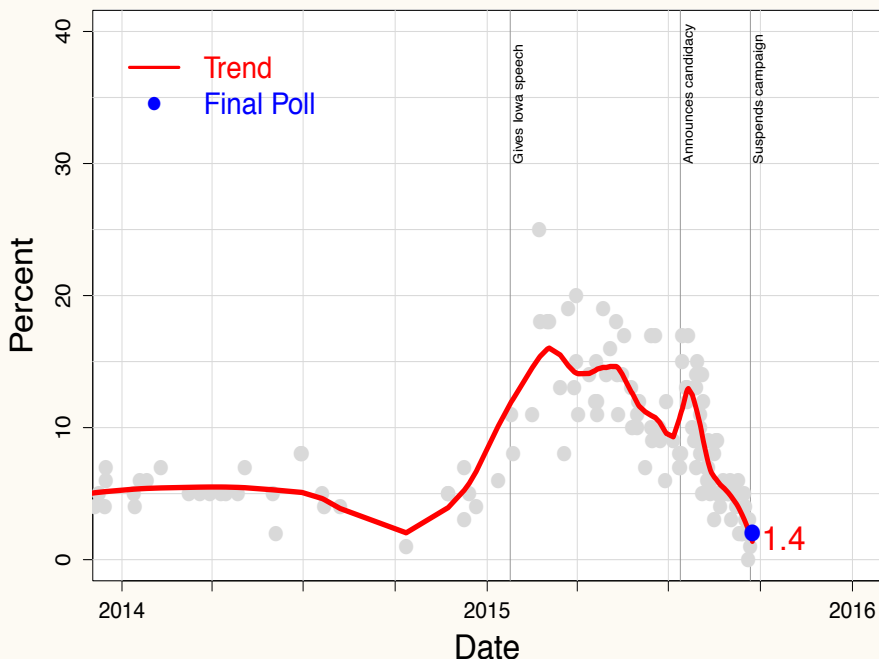
49 percent. That fall, among independents happy with the bid for higher office, is not attributable to dissatisfaction with the presidential race. Among those independents who did not want Walker to run for president, approval in 2014 was 38 percent, which fell to 14 percent in 2015. Thus, among independents pleased with the race, approval fell 12 points, while among those unhappy with the race it fell twice as much, 24 points.

Among Republicans pleased with the presidential bid, approval as governor in 2014 stood at 96 percent, with just 3 percent disapproving. In 2015, the same group gave a 92 percent approval and 6 percent disapproval, a fall of just 4 percent in approval. In contrast, among Republicans in 2014 who did not wish Walker to pursue the presidency, approval was at 81 percent and disapproval at 17 percent in 2014, falling in 2015 to 54 percent approval and 42 percent disapproval in 2015, a drop of 27 points in approval.

Thus the decline in approval of Walker's handling of his job as governor is seen among both independents and Republicans, but the decline is especially sharp among those in both groups who wished he had not sought the White House. By contrast, the decline was more modest among those pleased with the attempt at national office. Democrats, already extremely disapproving of Walker, played little role in the changes in approval seen in 2015.

Scott Walker in National Presidential Polls

Latest: Sept. 30, 2015



Looking forward

Where does this leave the outlook for the future? Walker's image and support have clearly suffered significant blows during 2015. As of late September, 37 percent approve of the job he is doing as governor, 34 percent are pleased that he ran for president, 35 percent say he cares about people like them, and 35 percent say they would like to see him run for a third term as governor in 2018. His support among Republicans is down while that among independents is down dramatically.

But Walker has been down in Wisconsin polling before. While the Marquette Law School Poll did not begin until January 2012, in 2011 there were 14 statewide polls by a mix of academic, independent, and partisan pollsters. During that most tumultuous year, Walker's approval averaged 44 percent while his disapproval averaged 53 percent. Two polls then put his approval at 37 and 38 percent, equaling his current low marks in the Marquette polls of 2015. Yet in 2012, during and after the recall campaign, Walker's approval rose to an average of 50 percent, with disapproval averaging 46 percent (the averages are the same whether looking at all public polls or at Marquette polls alone in 2012).

While Walker's average support in 2011 did not fall as far as his 2015 lows, his 2012 recovery demonstrates that it is possible to win voters back, at least enough to secure an electoral majority. In 2015, the losses of support are significant among Republicans, a group likely to respond positively to efforts by Walker to win back their loyalty. Among independents, the challenge is greater, with a larger fall in support and without the partisan affinity of GOP partisans. But with more than three years remaining in his term, Walker has time to attempt a recovery of public support. How well that plays out is not something the current polling data can answer. ■

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

Wisconsin's Legal Giants

Key Figures, Some Almost Forgotten Now, Shaped the Law in Wisconsin and Beyond

Joseph A. Ranney is serving as Marquette Law School's Adrian P. Schoone Visiting Fellow in Wisconsin Law. He is using the occasion to write a book examining the role that states have played in the evolution of American law, with a particular focus on the contributions made by Wisconsin. In a series of posts this year to the Marquette Law School Faculty Blog, Ranney offered some reflections growing out of the project—Schoone Fellowship Field Notes, as he termed them. We include four of those posts here.



Joseph A. Ranney

Has Wisconsin Produced Any Great Judges?

What makes a great judge? Who are the great state judges? Thousands of judges have helped build the edifice that is American state law. Only a few have received great acclaim. What are the elements of judicial greatness, and has Wisconsin produced any great judges? Let me consider the matter, excluding any current or recent judges.

Roscoe Pound's "top ten" list of great American judges in *The Formative Era of American Law* (1938) is the most famous pass at the question, but Pound did little musing on the criteria of judicial greatness. Judge Richard Posner made a more ambitious effort to address the question in his *Cardozo: A Study in Reputation* (1990), focusing on both quantitative measures (number of decisions, books, and articles written and number of times cited by other jurists) and more-elusive qualitative measures (e.g., whether a judge has a long-range vision of the law and, if so, her tenacity in pursuing that vision and her ability to persuade her colleagues to follow it).

Years of poring through American state case law and historical literature have led me to several conclusions. First, although it is not easy to articulate what makes a judge great, it is not difficult to spot the judges who qualify. They all wrote well, had strong views, were unusually good at bringing their colleagues around to those views (some in more dominating ways, some in gentler ways), and often took their case to the public outside the courtroom. Above all, they were persistent.

Second, some great judges have been duly recognized as such—for example, Benjamin Cardozo and James Kent

(New York), Thomas Cooley (Michigan), and Roger Traynor (California). But others have languished in comparative obscurity, including John Dillon (Iowa), Joseph Lumpkin (Georgia), Richmond Pearson (North Carolina), George Robertson (Kentucky), Rousseau Burch (Kansas)—and John Winslow of Wisconsin. These judges deserve to be better known than they are. One of my goals in the Schoone project is to make that happen for Winslow.

Who were the greatest Wisconsin judges?

The *Yale Biographical Dictionary of American Law* (2009), the most recent anthology, places three Wisconsin judges in the pantheon: Luther Dixon, Edward Ryan, and Shirley Abrahamson. Do they deserve that status? Ryan's was a "lifetime achievement" greatness: he made his mark through a 40-year career as a constitution-maker, lawyer, and politician. Ryan accomplished important things: his decision in the *Potter Law Case* (1874), upholding the state's right to regulate railroads and other large corporations, is arguably the most important decision that the Wisconsin Supreme Court ever issued. But his time on the court was short (six years) and was a coda to his life's work. Dixon's most important work came in dissent; he left a real stamp on the law but not a giant one. Abrahamson's career is not yet done, and it seems too early to evaluate her place in history.

The case for John Winslow.

Winslow's story will be more fully told in the book that will come out of the Schoone Fellowship, but here is the short case for his greatness. Life instilled in him an unusual sensitivity to outside points of view, reinforced by the fact that, as a Democrat in a predominantly



Group portrait of the Wisconsin Supreme Court in 1903, the year in which a constitutional amendment approved expansion of the court from five to seven justices. Seen here (left to right) are Joshua E. Dodge, John B. Winslow, John B. Cassoday, Roujet D. Marshall, and Robert G. Siebecker. The portraits of former justices hang on the wall behind them. The location was the former state capitol. *Wisconsin Historical Society*

Republican state at a time when judicial elections were still partisan, he repeatedly had to struggle for reelection even though he commanded universal respect. Winslow's outsider sympathies manifested early: as a circuit judge in the 1880s, he interpreted an election law liberally in order to give Wisconsin women a meaningful right to vote in school elections, but he was overruled by the Supreme Court.

During the early years of the Progressive Era, signs surfaced, most notably in *State ex rel. Zillmer v. Kreuzberg* (1902), that Winslow and his colleagues would use substantive due process with a free hand against reform laws. But as Progressive criticism of the courts grew, Winslow fashioned himself as an honest broker between the two camps. His opinion in *Nunnemacher v. State* (1906) was a model of creative draftsmanship, clothing a decision in favor of the state's new inheritance tax in language highly deferential to conservative sensibilities. After Winslow became chief justice of the Wisconsin Supreme Court in late 1907, he lectured and wrote extensively, explaining to Progressives the importance of judicial conservatism to preservation of social stability and individual liberties, and explaining to conservatives the importance of a flexible, socially adaptive constitutionalism.

Winslow's colleague Roujet Marshall, a devout constitutional originalist, was a worthy opponent, but over time Winslow's more flexible view proved better suited to the times, and it prevailed. In one of Winslow's last major cases, *State v. Lange Canning Co.* (1916), he

persuaded his colleagues to usher in an era of openness to government by administrative agency. Winslow's contribution to Wisconsin's Progressive legacy is less well known than Robert LaFollette's, but I hope to show in the forthcoming book that it is equally important.

Lighting Out for the Territories

Territorial judges: an overlooked force in American law.

As Willard Hurst observed, during the past 150 years, lawyers have been implementers rather than creators of law. We whose days are spent staring at a screen and poring over paperwork sometimes wish we could take a way-back machine to the days of legal creationism, if only for a little while. Yet an important group of creators—judges appointed from Washington, starting in the 1780s, to establish the law in America's far-flung, largely unsettled new territories—are nearly forgotten today. Territorial judges were often, in the words of the French observer Achille Murat, “the refuse of other tribunals” or seekers after sinecures, and if they are remembered at all, it is as much for their escapades as for their jurisprudence. But some of the territorial judges, including Wisconsin's James Doty, stand out in American political and legal history, and the vital contributions they made to institutionalizing American law are often overlooked. The book being written under the Schoone Fellowship's auspices will attempt to remedy that. ▶▶



Portrait of James Doty, whose career included service as judge and as governor of the Wisconsin Territory.
Wisconsin Historical Society

How did territorial judges help institutionalize law?

Many territorial judges were the first agents of the American legal system to appear in their new jurisdictions. Most of them faced populations that until recently had operated under French or Spanish law and were hostile to change. In long-settled areas such as Louisiana, careful negotiation of a blended system was required. Newer frontier areas, such as Doty's Wisconsin, wanted no formal law at all. Frontier judges had to travel among widely scattered settlements—often an adventure in itself—and establish courthouses, create or prop up local law-enforcement systems, and, perhaps most importantly, instill basic respect for American law and authority. The latter task was often difficult. During his first year as a judge, Doty encountered open resistance requiring a physical confrontation to subdue. Other frontier judges, including Andrew Jackson in 1790s Tennessee, also had to meet and pass physical tests of authority.

Territorial judges also had to create a body of legal precedent. They had more tools to do so than is commonly realized: early territorial decisions show that in addition to Blackstone, copies of English reports and treatises and even some American reports were available on the frontier. But for many judges, precedent was based on half-remembered legal mentoring they had received in the East. Some, such as Alabama's Harry Toulmin, filled the gap by publishing treatises and practice manuals of their own; a few, including Doty, kept journals of their decisions to pass on to successors.

Judges' political and cultural adventures.

It was common for territorial judges to plunge into politics. That was partly a function of their statutory role: the Northwest and Southwest Ordinances conferred legislative functions on judges during the first stage of territorial status. It was also a matter of necessity: men with formal education and administrative and organizational skills were rare on the frontier and

were needed to help develop economic and cultural structures as well as legal ones.

Some judges made a permanent imprint on their states' early history. Doty became a champion of Indian rights and authored the first dictionary of the Sioux language; he became a major land developer and served as a territorial governor and congressman from Wisconsin after his time as a judge ended. After Jackson defeated the Creeks in the Red Stick War (1813–1814), Toulmin helped adjust Indian relations and smooth the way for white settlement and Alabama statehood (1819). Augustus Woodward designed Detroit's modern street plan and helped found the University of Michigan, and Henry Brackenridge of Louisiana and Florida published a number of books on philosophy and travel.

Brackenridge in a sense was a second-generation territorial judge. His father, Hugh Brackenridge, helped found Pittsburgh and, as a member of Pennsylvania's supreme court in the 1790s, participated in the court's efforts to extend the state's judicial system to central and western Pennsylvania, then in the process of settlement. A later generation would produce another great territorial judge, James Wickersham, who brought stability to gold-rush-era Alaska by clarifying and enforcing mining laws and laws governing relations between whites and Alaska Natives. After his judicial service ended, Wickersham represented Alaska in Congress and helped it create a post-gold-rush economy and gain full territorial status.

The territorial legacy.

Territorial judges' legacy to American law is subterranean but real. Most territorial judges tried to implant existing American law rather than change it. Doty was one of the few exceptions: he believed strongly that American criminal law should not be applied to intramural Indian disputes. In 1830 he tried to advance that belief by overturning a verdict of murder against Menominee Chief Oshkosh for killing another Indian under circumstances where tribal law permitted the killing, but Doty's decision changed no judicial minds and effectively ended his chances of reappointment when his term expired.

State supreme court decisions quickly superseded territorial decisions, which are seldom cited today.

But the seeds of American legal authority and court systems that the territorial judges planted were vital. Without them, the task of building American law west of the Appalachians, and of settling the western lands generally, would have been considerably more difficult and precarious than it was.

Wisconsin: The Final Firework in the Antislavery Legal Movement

Putting Wisconsin's antislavery heritage in perspective.

Wisconsin takes great pride in its antislavery heritage, particularly the Northwest Ordinance (1787), which ensured that Wisconsin would be a free state, and the *Booth Cases* (1854, 1859), in which Wisconsin stood alone in defying the federal government's attempt to turn Northerners into slavecatchers. This pride is justified but needs perspective. When Wisconsin arrived on the American stage as a new state (1848), American slavery was two centuries old, and the legal reaction against slavery had been underway for 70 years. The *Booth Cases* were important, but they were merely the final fireworks in the drama of American law and slavery.

Slavery: a legal dilemma in both North and South.

Slavery in the South raised many legal questions. Should the law limit masters' power over their slaves? Should it limit masters' power to free their slaves? Should slaves be given any measure of liberty and basic rights? These questions produced complex, often-conflicting statutes and case law that provide a revealing picture of the antebellum South.

But slavery also affected the North, which produced a lesser-known but equally rich body of antislavery law. Slavery did not magically disappear in the North. Most Northern states, beginning with Pennsylvania in 1780, enacted gradual emancipation statutes designed to protect owners' property rights in the current generation of slaves. As a result, the last slaves did not disappear from census rolls of Northern states until the 1850s.

Sojourn and fugitive cases.

With gradual-emancipation laws in place, Northern lawmakers' attention turned to two issues: the treatment of fugitive slaves and the less well-known "sojourn" issue of whether slaves traveling with their masters became free when they entered free states. During the early nineteenth century, courts in all sections held that slaves entering free states became free if their master intended to stay on free soil indefinitely. But in *Commonwealth v. Aves* (1836), Massachusetts' chief justice, Lemuel Shaw, broke new ground, holding that slaves became free the minute they stepped on free soil. Other Northern courts came over to Shaw's side. Many Southern courts, most notably Missouri's in *Dred Scott v. Emerson* (1852), responded by moving in the other direction: no amount of time spent on free soil could confer freedom. No sojourn cases ever arose in Wisconsin, which was far from the South and from most slaveholders' routes of travel, but Wisconsin was given a chance to make its mark in the fugitive-law controversy. It made the most of the opportunity.

In the 1820s, Pennsylvania and some New England states enacted personal-liberty laws requiring that fugitives be given a hearing with full procedural due process in order to determine whether they should be returned south. In *Prigg v. Pennsylvania* (1842), the U.S. Supreme Court overturned these laws, holding that they were preempted by more-summary federal hearing procedures. Many Northern states reacted to *Prigg* by enacting new laws prohibiting their citizens and officials from assisting in slave recapture. In 1850, Congress responded by passing a new Fugitive Slave Act that required Northerners to assist federal officials in recapture efforts upon demand.

The law galvanized Northern antislavery opinion: antislavery lawyers asked Northern judges to declare the 1850 Act unconstitutional, but in *Sims's Case* (1851), Chief Justice Shaw, the author of *Aves*, defined how far judges would go. Shaw emphasized his personal distaste for the law but held that deference to federal authority was paramount: the Supreme Court had said in *Prigg* that, in fugitive matters, states must follow federal authority, and he would do so. ▶▶



Orsamus Cole (1819–1903) served as a Wisconsin Supreme Court justice (1855–1880) and chief justice (1880–1892). Cole was elected to the court in 1855 in large part because of his position on the Fugitive Slave Act, which led to his ruling in the *Booth Cases*.
Wisconsin Historical Society

Wisconsin was the only state to break ranks. The story of the *Booth Cases* is well known: In 1854 the Wisconsin Supreme Court, invoking states' rights, held that it was not bound by *Prigg* and that the 1850 federal act was unconstitutional. The *Booth* decision attracted abolitionist encomiums and even grudging respect in the South: Georgia senator Robert Toombs excoriated Wisconsin as "the youngest of our sisters, who got rotten before she was ripe," but at the same time grudgingly complimented the state's fidelity to a concept of states' rights that the South was finding increasingly useful as war approached.

The *Booth Cases* were both less and more than is commonly realized. When the U.S. Supreme Court reversed the *Booth* decision in 1859, the Wisconsin Supreme Court refused to accept the reversal, but Chief Justice Luther Dixon's dissent caused many Wisconsinites to pause and reflect. That turned out to be a turning point in the Wisconsin states' rights movement. Nevertheless, *Booth* inspired other antislavery judges: Ohio's supreme court missed joining Wisconsin by one vote (*In re Bushnell*, 1858), and Maine's court joined Wisconsin on the eve of the Civil War (*In re Opinion of the Justices*, 1861).

The spirit of *Booth* also produced a final states' rights fireworks display after the Civil War. The war's decision in favor of union and federal supremacy did not change Wisconsin Justice Byron Paine's devotion to states' rights. In a series of postwar cases, most famously *Whiton v. Chicago & Northwestern Railroad Co.* (1870) and *In re Tarble* (1870), Paine persuaded his colleagues to contest federal removal statutes and assert the power to issue habeas corpus writs against federal officials. The U.S. Supreme Court's reversals of *Whiton* and *Tarble* (1872) definitively established the high court's position as the final authority on federal constitutional questions. The *Booth Cases* thus performed a crucial, albeit ironic and unintentional, role in cementing the fundamental change in the federal-state balance of power that the war had wrought.

A Rebellion of Giants: Dixon, Ryan, and Taming the Railroads in the Gilded Age



Luther Dixon (1825–1891)
at age 40.
Wisconsin Historical Society



Edward Ryan (1810–1880)
at age 65.
Wisconsin Historical Society

Eastern jurists such as John Marshall, James Kent, Oliver Wendell Holmes, Jr., and Benjamin Cardozo have received the lion's share of attention from law professors and historians over the years. Two fellow giants from the Midwest, Michigan's Thomas Cooley and Iowa's John Dillon, have been relegated to comparative obscurity.

Cooley and Dillon played a central role in shaping the contours of modern American constitutional law. They forged their philosophies in the heat of two critical judicial debates over the role of railroads in American society. Two Wisconsin justices, Luther Dixon and Edward Ryan, were also leaders in those debates, and their contributions to American constitutional law deserve to be better known.

Government railroad subsidies.

When railroads first appeared in the 1830s, many states and municipalities, including the states of Illinois and Michigan, built their own railroads or gave generous subsidies to private builders. The subsidies usually consisted of bonds or promissory notes in return for which they received railroad stock. States and municipalities hoped that returns on the stock would help pay their bond and promissory-note obligations. The railroads generally sold the bonds and notes to eastern and British financiers in return for cash that could be used to meet building and operating expenses.

Disaster ensued in 1837 when a depression bankrupted many roads and left many states and municipalities saddled with huge debts to the financiers, debts backed only by now-worthless railroad stock. Some states and municipalities tried to escape their predicament by arguing that their subsidies were unconstitutional, but most courts held that the subsidies were permissible (and the related obligations to financiers were enforceable) because railroads served a public purpose. History repeated itself when a new depression arrived in 1857. Wisconsin

municipalities argued that they should be excused from their debts because their subsidies violated the state constitution, but the Wisconsin Supreme Court held that the subsidies were legal.

Shortly after the Civil War, Cooley, Dillon, and Dixon led a revolt against the prevailing rule. In 1868, Cooley published his *Constitutional Limitations*, perhaps the most influential treatise of the late nineteenth century. In it, he conceded the rule that governments can spend to promote the public interest but suggested the concept applied only to protection of individual liberty and property, not to community interests. In *Hanson v. Vernon* (1869), Iowa's Dillon applied Cooley's concept: he confirmed that past obligations must be honored but held that because most railroads were private corporations, subsidies did not serve a public purpose. Cooley and his Michigan colleagues followed Dillon's lead in *People v. Township Board of Salem* (1870).

The same year, in *Whiting v. Sheboygan & Fond du Lac Railroad Co.* (1870), Dixon also joined the revolt—but on his own terms. Dixon did not want to repudiate the Wisconsin court's earlier decisions, so he attempted to draw a line between subsidies of purely private companies (not allowed) and of railroads that were subject to rate controls and other forms of government regulation. Dixon's colleague Byron Paine, who dissented, reflected the continuing sentiment of most American judges. Paine argued that railroads "have done more to . . . promote the general comfort and prosperity of the country . . . than all other mere physical causes combined" and that that, without more, was sufficient to create a public interest and justify subsidies. Dixon recognized that the line between public and private interest was indistinct when it came to railroads, but he concluded that a line must be drawn: "Thus far shalt thou go, and no further."

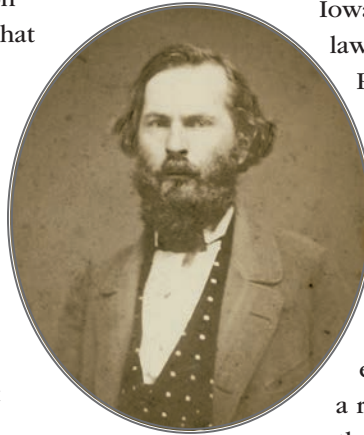
Whiting had enduring importance: Dixon was perhaps the first American judge to suggest that government subsidies carried with them a correlative right of governmental regulation. Other courts criticized *Whiting*, but the link that Dixon forged between governmental subsidy and control gradually took hold. It was the only enduring legacy of the Midwestern judicial revolt against subsidies.

The Granger laws.

The movement for more government control of railroads was already underway when *Whiting* was decided. Upper Mississippi Valley states (Wisconsin, Minnesota, Iowa, and Illinois) enjoyed a railroad boom after the Civil War, but rate increases and perceived rate discrimination led to political revolt in those states. In 1871, Illinois enacted the nation's first "Granger law," regulating railroad shipping rates and practices. Legislators reasoned that corporations that accepted state authorization to operate must also accept the limitations the states imposed on their operations.

Iowa and Minnesota also enacted Granger laws, and in 1874 Wisconsin enacted the Potter Law, the last but strongest of the region's Granger laws. One national railroad expert denounced the Potter Law as "the most ignorant, arbitrary and wholly unjustifiable law to be found in the history of railroad legislation." The Potter Law set maximum freight and passenger rates and allowed no exceptions even if the rates prevented a railroad from making a profit. When the Granger laws were challenged as unconstitutional, the Illinois Supreme Court struck down the first version of that state's law for lack of an exception provision, and the Potter Law's supporters feared the Wisconsin Supreme Court might do the same.

But in the *Potter Law Case* (1874), Ryan upheld the law in ringing terms. He dismissed the railroads' claim that the law would ruin them: "[T]hese wild terms," he said, "are as applicable to [the law] as the term murder is to the surgeon's wholesome use of the knife, to save life, not to take it." Ryan also dismissed concerns about lack of an exception provision, hinting that the court would carve out exceptions in the future if that proved necessary. Three years later, in *Munn v. Illinois* and a series of related cases (1877), the U.S. Supreme Court upheld all of the Midwestern Granger laws, using reasoning very similar to Ryan's. Debate would continue in legislatures and courtrooms over the details of corporate regulation, but Ryan had irrevocably established that states, as granters of corporate charters, have near-absolute power to set reasonable conditions for corporate operations. ■



Byron Paine (1827–1871).
Wisconsin Historical Society

Stephen J. Morse

The Perils and Promise of Law and Neuroscience

Stephen J. Morse delivered Marquette Law School's annual George and Margaret Barrock Lecture on Criminal Law this past academic year. Morse is at the University of Pennsylvania, serving as the Ferdinand Wakeman Hubbell Professor in the law school and professor of psychology and law in psychiatry at the school of medicine. He also is associate director at the Penn Center for Neuroscience and Society. "Criminal Law and Common Sense: An Essay on the Perils and Promise of Neuroscience," an expanded version of Morse's Barrock Lecture, will be published in the first issue of Volume 99 of the *Marquette Law Review*. This excerpt is from the beginning of the article.



Stephen J. Morse

has stood the test of time as the product of human trial and error. We common lawyers like to think that it is impossible to produce an *ex ante* watertight criminal code. As is well known, the Model Penal Code, an enterprise produced by the best and the brightest, has been subjected to intense criticism, and even states that have been heavily influenced by it have made substantial changes. Instead, common lawyers believe that the bottom-up, "organic" methodology of the common law process in interaction with penal codes will ultimately produce reasonably coherent and just, but not perfect, criminal law.

The criminal law is a thoroughly folk-psychological enterprise. Doctrine and practice implicitly assume that human beings are agents, creatures who act intentionally for reasons, who can be guided by

The criminal law—a beautiful, albeit sometimes ramshackle, institution devoted to blaming and punishing culpable agents—has been developing for well over half a millennium to help us live together. It is the product of an immense number of judicial decisions and penal statutes, and it

reasons, and who in adulthood are capable of sufficient rationality to ground full responsibility unless an excusing condition obtains. We all take this "standard picture" for granted because it is the foundation not just of law, but also of interpersonal relations generally, including how we explain ourselves to others and to ourselves.

The law's concept of the person and responsibility has been under assault throughout the modern scientific era, but in the last few decades dazzling technological innovations and discoveries in some sciences, especially the new neuroscience and to a lesser extent genetics, have put unprecedented pressure on the standard picture. For example, in a 2002 editorial published in *The Economist*, the following warning was given: "Genetics may yet threaten privacy, kill autonomy, make society homogeneous and gut the concept of human nature. But neuroscience could do all of these things first." Consider the following statement from a widely noticed chapter by neuroscientists Joshua Greene of Harvard and Jonathan Cohen of Princeton, which I quote at length to give the full flavor of the claim being made:

[A]s more and more scientific facts come in, providing increasingly vivid illustrations of what the human mind is really like, more and more people will develop moral intuitions that are at odds with our current social practices. . . .

Neuroscience has a special role to play in this process for the following reason. As long as the mind remains a black box, there will always be a donkey on which to pin dualist and libertarian intuitions. . . . What neuroscience does, and will continue to do at an accelerated pace, is elucidate the “when”, “where” and “how” of the mechanical processes that cause behavior. It is one thing to deny that human decision-making is purely mechanical when your opponent offers only a general, philosophical argument. It is quite another to hold your ground when your opponent can make detailed predictions about how these mechanical processes work, complete with images of the brain structures involved and equations that describe their function.

. . . .

At some further point . . . , [p]eople may grow up completely used to the idea that every decision is a thoroughly mechanical process, the outcome of which is completely determined by the results of prior mechanical processes. What will such people think as they sit in their jury boxes? . . . Will jurors of the future wonder whether the defendant . . . *could have done otherwise*? Whether he really *deserves* to be punished . . . ? We submit that these questions, which seem so important today, will lose their grip in an age when the mechanical nature of human decision-making is fully appreciated. The law will continue to punish misdeeds, as it must for practical reasons, but the idea of distinguishing the truly, deeply guilty from those who are merely victims of neuronal circumstances will, we submit, seem pointless.

This is not the familiar metaphysical claim that determinism is incompatible with responsibility, about which I will say more below. It is a far more radical claim that denies the conception of personhood and action that underlies not only criminal responsibility

but the coherence of law as a normative institution. It thus completely conflicts with our common sense. As the eminent philosopher of mind and action, Jerry Fodor, has written:

[W]e have . . . no decisive reason to doubt that very many commonsense belief/desire explanations are—literally—true.

Which is just as well, because if commonsense intentional psychology really were to collapse, that would be, beyond comparison, the greatest intellectual catastrophe in the history of our species; if we're that wrong about the mind, then that's the wrongest we've ever been about anything. The collapse of the supernatural, for example, didn't compare; theism never came close to being as intimately involved in our thought and our practice . . . as belief/desire explanation is. Nothing except, perhaps, our commonsense physics—our intuitive commitment to a world of observer-independent, middle-sized objects—comes as near our cognitive core as intentional explanation does. We'll be in deep, deep trouble if we have to give it up.

I'm dubious . . . that we *can* give it up; that our intellects are so constituted that doing without it (. . . really doing without it; not just loose philosophical talk) is a biologically viable option. But be of good cheer; everything is going to be all right.

The central thesis of this article is that Fodor is correct and that our commonsense understanding of agency and responsibility and the legitimacy of criminal justice generally are not imperiled by contemporary discoveries in the various sciences, including neuroscience and genetics. These sciences will not revolutionize criminal law, at least not anytime soon, and at most they may make modest contributions to legal doctrine, practice, and policy.

I first address the criminal law's motivation and the motivation of some advocates to turn to science >>

“Many advocates think that neuroscience may not revolutionize criminal justice, but neuroscience will demonstrate that many more offenders should be excused and do not deserve the harsh punishments imposed by the United States criminal justice system.”

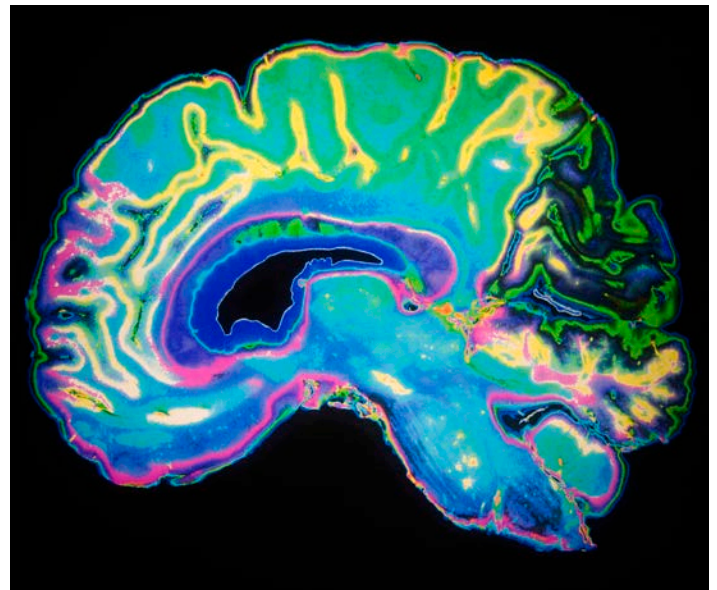
to solve the very hard normative problems that law addresses. The next part discusses how I think the law should respond to the metaphysical issues that underpin our concepts of action and responsibility. Then the article considers the law’s psychology and its concepts of the person and responsibility. Next, I describe the general relation of neuroscience to law, which I characterize as the issue of “translation.” The following part canvasses various distractions, especially determinism and the notion that causation is per se an excusing condition, that have bedeviled clear thinking about the relation of scientific, causal accounts of behavior to responsibility. Next, I examine the limits of neurolaw and then consider why neuroscience does not pose a genuinely radical challenge to the law’s concepts of the person and responsibility. The penultimate part makes a case for cautious optimism about the contribution that neuroscience may make to criminal law in the near and intermediate term. A brief conclusion follows. Throughout, common sense is my guiding star.

Neuroexuberance

Advances in neuroimaging since the early 1990s have been the source of the exuberance. Two in particular stand out: the discovery of functional magnetic resonance imaging, fMRI, which allows noninvasive measurement of neural functioning, and the availability of ever-higher-resolution scanners, known colloquially as “magnets” because they use powerful magnetic fields to collect the data that are ultimately expressed in the colorful brain images that appear in the scientific and popular media. Bedazzled by the technology and the many impressive findings, however, too many legal scholars and advocates have made claims for the relevance of the new neuroscience to law that are unsupported by the data or that are conceptually confused. I have termed this tendency “brain overclaim syndrome (BOS)” and have recommended “cognitive jurotherapy (CJ)” as the appropriate therapy.

Everyone understands that legal issues are normative, addressing how we should regulate our lives in a complex society. How do we live together? What are the duties we owe each other? For violations of those duties, when is the state justified in imposing the most afflictive—but sometimes justified—exercises of state power, criminal blame, and punishment? When should we do this, to whom, and how much?

Virtually every legal issue is contested—consider criminal responsibility, for example—and there is always room for debate about policy, doctrine, and adjudication. In a recent book, Professor Robin Feldman has argued that law lacks the courage forthrightly to address the difficult normative issues that it faces. The law therefore adopts what Feldman terms an “internalizing” and an “externalizing” strategy for using science to try to avoid the difficulties. In the internalizing strategy, the law adopts scientific criteria as legal criteria. A futuristic example might be using neural criteria for criminal responsibility. In the externalizing strategy, the law turns to scientific or clinical experts to make the decision. An example would be using forensic clinicians to decide whether



a criminal defendant is competent to stand trial and then simply rubber-stamping the clinician's opinion. Neither strategy is successful because each avoids facing the hard questions and impedes legal evolution and progress. Professor Feldman concludes, and I agree, that the law does not err by using science too little, as is commonly claimed. Rather, it errs by using it too much, because the law is insecure about its resources and capacities to do justice.

A fascinating question is why so many enthusiasts seem to have extravagant expectations about the contribution of neuroscience to law, especially criminal law. Here is my speculation about the source. Many people intensely dislike the concept and practice of retributive justice, thinking that they are prescientific and harsh. Their hope is that the new neuroscience will convince the law at last that determinism is true, no offender is genuinely responsible, and the only logical conclusion is that the law should adopt a consequentially based prediction/prevention system of social control guided by the knowledge of the neuroscientist-kings who will finally have supplanted the platonic philosopher-kings. Then, they believe, criminal justice will be kinder, fairer, and more rational. They do not recognize, however, that most

of the draconian innovations in criminal law that have led to so much incarceration, such as recidivist enhancements, mandatory minimum sentences, and the crack/powder cocaine sentencing disparities, were all driven by consequential concerns for deterrence and incapacitation. Moreover, as C. S. Lewis recognized long ago, such a scheme is disrespectful and dehumanizing. Finally, there is nothing inherently harsh about retributivism. It is a theory of justice that may be applied toughly or tenderly.

On a more modest level, many advocates think that neuroscience may not revolutionize criminal justice, but neuroscience will demonstrate that many more offenders should be excused and do not deserve the harsh punishments imposed by the United States criminal justice system. Four decades ago, our criminal justice system would have been using psychodynamic psychology for the same purpose. More recently, genetics has been employed in a similar manner. The impulse, however, is clear: jettison desert, or at least mitigate judgments of desert. As will be shown below, however, these advocates often adopt an untenable theory of mitigation or excuse that quickly collapses into the nihilistic conclusion that no one is really criminally responsible. ■

Michael J. Zimmer, L'67

You Never Know Where Your Career Will Take You

This past spring, Michael J. Zimmer, L'67, delivered remarks at an end-of-year dinner as the *Marquette Law Review* marked the completion of its work on Volume 98. Zimmer had served as editor-in-chief of Volume 50 of the *Law Review*. At the time of these remarks, he served as professor of law at Loyola University Chicago. Professor Zimmer passed away this fall.

Thanks for inviting me back. Forty-eight years ago, in this very room here in the University Club, I was hosting the banquet celebrating Volume 50 of the *Marquette Law Review*.

I want to talk about four points: my time at the Law School, my excellent legal education, a message to the rising 3L members of the Law Review, and my words of so-called wisdom for the graduating 3Ls.

First: My time at the Law School. The 1960s were tumultuous, and some of that tumult came into the Law School. Our increasingly long hair—I had some

then—and our informal attire were not well received by the powers that be. One faculty member called me “Shirtman” because I no longer wore a coat and tie to class. More serious was the involvement of some of my classmates in the civil rights movement in Milwaukee. My classmate, law review member, friend, ▶▶



and now-deceased judge of the U.S. Court of Appeals for the Seventh Circuit, Terry Evans, helped organize law students to be involved in a “teach-in” as part of a boycott over the race segregation of the Milwaukee Public Schools. The administration of the Law School posted a notice on *the* law school bulletin board, saying that involvement in the boycott would raise issues with the character and fitness committee of the bar. Needless to say, that notice had the indirect effect of bolstering my class in joining in the boycott.

My second point: My excellent legal education. Most of us have insecurities, and one way they show themselves is self-doubt about whether we can compete out there in the real world. Out in that world I discovered that I could compete with the graduates of those “fancy pants” law schools.

First-year faculty, excellent if not without some idiosyncratic behaviors that we laughed at over beers in our favorite bars (bars that I fear no longer exist), included Dean Seitz and Professors Aiken, Ghiardi, and Winters. A special shout-out for Bob O’Connell, who passed last year. He taught us Contracts, but, just as importantly, he helped us develop sensitivity to our individual senses of justice—liberal or conservative, Republican or Democrat. After the first year, Leo “the Lion” Leary terrified all of us, but I found behind that gruff exterior a warm and funny person when he was advisor and I was editor-in-chief.

Classmates taught me much of what I learned about law, lawyering, and living a happy life. I am sure that is still true for all of you. My law school friends are still my friends, and I look forward to brunch tomorrow with some of them. We will yet again have the chance to laugh over life in the law school trenches. I hope that you and your classmates are still caring enough to cross that great divide between 2L and 3L classes so that you happily help each other, as when, for example, a 2L lends class notes to a 3L whose notes went missing. Now, I suppose, this happens when someone’s laptop crashes or gets drowned by Starbucks just as exams approach.

More seriously, I know that the Law School was excellent then and is much better now. Don’t believe the naysayers that law students are not “practice ready.” I know that you are better prepared than any class that preceded you.

My third point is directed at the rising 3L members: Give it your all! It is worth it because the best is yet to come. I know that, at some point this past year, you wondered if the grunt work you were expected to do was worth it. It is! Developing our research and writing skills is surely important. Having our writing edited by others and, in turn, editing the work of others really are the way most of us learn how to write.

“Thinking like a lawyer” has been described many times and ways. My hard work as a 2L helped me make big leaps when I was a 3L. For me, deep and broad thinking is the most important skill that law review helps develop. I am also convinced that seeing a problem and potential solutions for it from many different facets—like appreciating a fine diamond—is the essence of “thinking like a lawyer.” When solving a problem, particularly a legal problem, the lawyer who thinks the deepest is much more likely not only to win for her client but also to solve the problem in the most socially useful way.

Finally, my fourth point, for the graduating 3Ls: Congratulations! Light at the end of the law school tunnel is at hand and, if you stay in Wisconsin, without even the bar exam speed bump that most law graduates face everywhere else. As an aside, it is for me heartening that recently, instead of bashing the diploma privilege, there is some initial talk elsewhere about channeling Wisconsin instead, and seriously studying whether the bar exam adds anything useful other than income for the bar review courses.

Back to you 3Ls, I want to start with an anecdote. A few years ago, I had the wonderful experience of “co-teaching” comparative constitutional law with Justice Ruth Bader Ginsburg in Loyola University’s summer program in Rome. As you might imagine, this was a tremendous experience for me and the students.

“*Look for work that interests you—that advances your values—and is work that needs to be done to make the world a better place.*”

I want to focus on a talk given by her husband, Professor Marty Ginsburg. In fact, this talk channels his “You Never Know How Things Will Turn Out.” Marty first described how future Justices Sandra Day O’Connor and Ginsburg, who were first in their classes at Stanford and Columbia, could not get law jobs because they were women. That discrimination was lamentable. But, Marty went on to say, what would have happened if there had been no sex discrimination back then? To quote Marty, these two would be “fat, wealthy, and retired sitting on a Florida beach,” just like the men who were second in their respective law school classes.

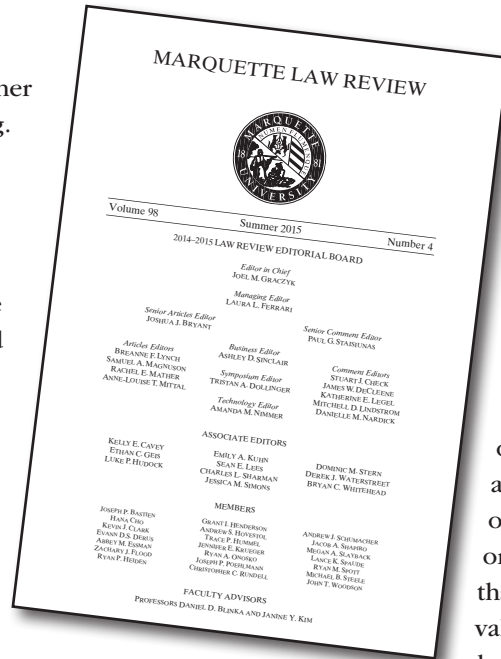
Where would they be now if they had not been the victims of discrimination? So you never know.

Getting your first law job after graduating is a tremendous challenge, but it won’t be your last. When I started practice, my senior partner told me, “Mike, this is a place where you can stay your whole life.” I doubt that that is said any more, but, if someone said it, no one would believe it. Like much of life, the practice of law is now much more volatile than it was back in the dim mists of the past.

That being true, what is the first thing you do when you land that first job after graduation? Update your résumé. Your job may not last, no matter how hard and effectively you work. So, like a Boy Scout, be prepared. Other opportunities will present themselves, and you need to be ready. Keep your head up for those opportunities, so you don’t miss them. Many of my lawyer friends have ended up taking career paths they did not even know existed, or maybe didn’t exist, when they were in law school.

How do you evaluate these opportunities? For me, the key to professional happiness is to do work that is interesting—work that is important—and to do it with good people. Don’t squander all the resources that you, your family, the Law School, and our culture have invested in you by being unhappy in your work.

That is, of course, easy to say, but how do you discover what will make you happy? Luck plays a part, but good luck is the result of hard work, so that you are more likely to be at the right place at the right time



when that opportunity seems to appear out of nowhere. To be ready, you must whistle past the graveyard of insecurity and self-doubt. You are well prepared to make important decisions.

How do you evaluate the opportunities that present themselves? It sounds loopy, but don’t just ask what you want out of life: rather, figure out what life is asking from you. Valuing just what others value is taking a great chance on being unhappy. Look for work that interests you—that advances your values—and is work that needs to be done to make the world a better place.

Here is my litmus test: Imagine you have kids. About what kind of work, and with whom, would you be happy to talk to your kids when you got home from work? Don’t expect the answer to be that the work you do must be world smashing; it can go largely unnoticed by the world at large but still move the world and humankind in it in good directions. For example, small-town lawyers can be very happy—involved in everything, contributing to a healthy society—even though they know that making it to the top 0.1 percent of the wealthy is very unlikely.

Let me show you, from some examples of the students I have been fortunate enough to teach, that you never know what can happen to make you happy and productive. I started teaching at the University of South Carolina. A student complained that he should not be required to take Torts because he only wanted to do transactional work, not litigation. Years later, he became the chief judge of the Fourth Circuit. Somewhere in between there was a tremendous change of career path. When I was teaching at Seton Hall, a student was upset because the constitutional criminal procedure materials—the Fourth and Fifth Amendments—no longer were taught in the basic Constitutional Law course, and he only wanted to be a prosecutor and then a white-collar defense lawyer. Years later, I discovered he had become the CEO of Lexis/Nexis . . . another big change in career path. Finally, there is my former student, Chris Christie. Who knows where his career path will take him?

I want to finish with a final example. At a reception for new American Law Institute members, someone

came up who looked vaguely familiar. After all these years teaching, this happens a lot. She told me she that she had been a Con Law student of mine at Seton Hall, had clerked for a federal judge, then practiced at a big firm in New Jersey, and, finally, went “in house” at a pharmaceutical company. Then, she decided that her personal and professional happiness required her to address her gender identity. She took steps to express that identity in her

personal and professional life. Kevin revealed herself as Christine. She now heads a public interest firm dealing with sexual identity. If Christine has children, I am sure she is proud to tell them the story of her personal and professional life that led her to happiness

Thank you. Congratulations for continuing the excellence of the Law Review, started long before me. I hope that it continues forever. Best of luck for the future happiness of all of you, personally and professionally. ■

Joseph D. Kearney

The Wisconsin Supreme Court: Can We Help?

This past summer, Dean Joseph D. Kearney delivered the keynote address at the Western District of Wisconsin Bar Association’s annual meeting.



Let me begin by thanking Matt Duchemin for the invitation and introduction. It is always good to see a former student become a leader in the legal profession.

In the interests of time, I want to get right into my topic, with only the briefest prefatory

comment. I spoke to this group early in my deanship (a long time ago, that would be). On that occasion I thought that I should apologize—that is, that one speaking to a federal court bar association about the state supreme court should justify this. Not so today. For has not the U.S. District Court for the Western District of Wisconsin recently become where one expects to go even for legal *decisions* about our state supreme court? That wry comment aside, be assured that I am not here to critique the pending litigation.

I am here to talk about the Wisconsin Supreme Court. It needs our help. I do not mean that the court is not functioning. Most fundamentally, it grants petitions for review, and it issues opinions. To be sure, it does these things better, or more persuasively, in some instances than others. But such an eternal truth

might be noted also of speeches (keynote addresses, even). Besides, for the proposition that the court is functioning reasonably well, let me note that every one of the seven justices this year has had a Marquette law student as an intern in his or her chambers. We are immensely grateful for this frequent contribution by each of the justices to legal education. In short, much at the Wisconsin Supreme Court, without occasioning headlines, is proceeding in an appropriate course.

Yet it is not to go out on a limb to say that the court needs help. No one can reasonably maintain that today’s court enjoys the basic collegiality that not only is a happy incident to, but is an important enabling component of, a law-declaring appellate court. And the effects of this go beyond particular cases.

Let me pause to note that perhaps a dearth of collegiality has existed for some time. I have noticed the justices’ practice in dissent of routinely referring to an opinion of the court as that of “the majority.” I think it essentially disrespectful for a dissent routinely to refer to an opinion speaking for four (or even six) justices as that of the “majority.” It is an opinion of *the court*. The constant characterization in a concurrence or dissent of the court’s opinion as a mere “majority” opinion is to imply mere policy preferences or a force of will by the court, as opposed to a declaration of the law. In some brief research a year ago, I was surprised to discover that this rhetoric seems to be something of

“*Let’s be clear first as to what the bar’s proposal is. It is, again, that the Wisconsin Constitution be amended so that supreme court justices would serve 16-year terms with no possibility of reelection.*”

a longstanding practice at the court. My own respectful but strong suggestion is that members of the court should drop the practice. That would be self-help.

Before I turn to ways that we might help, permit me another observation, equally applicable to the Wisconsin Court of Appeals. There are times it can be unexpectedly difficult to tell whether something *is* an opinion of the court. I am referring to instances where apparently someone was assigned to write for the court and ended up not only not commanding four votes but also confronted with a separate writing that *did* get four votes. The solution is clear: We now have an opinion of the court—just not the one expected in the initial assignment. In these circumstances, the work of the court should be presented as such—which means in part, by general American tradition (and logic), it should come first. And yet on occasion—including at least one this term—it is not so. The opinion by the assigned justice (now at best a concurrence) comes first—referred to as the “lead” opinion—while the *court’s* opinion—labeled a “concurrence”—follows. With good will and good communication, this is an easily eliminated phenomenon.

But all that is for the court to do on its own (or not). What about us? Can we help? I suggest that we can—and that we recently have been shown the way. Let me commend to your attention the recommendation of the board of governors of the state bar that we—the people of Wisconsin—should amend Article VII of the Wisconsin Constitution so that justices of the Wisconsin Supreme Court may be elected to a single, 16-year term. The term would not be renewable: that is, beyond the current justices on the court (who would be eligible, along with everyone else meeting the qualification requirements, to stand in a future election for a 16-year term), no one would ever again stand for

reelection to the Wisconsin Supreme Court. I think this to be nothing short of a visionary proposal. I hope that I can give you a bit of a sense of why this is.

Before I unpack the merits, two things. First, I speak primarily as a lawyer in this state. I make no official recommendation for Marquette University Law School. Second, I had nothing to do with the proposal. To the contrary, upon first hearing of the effort by the state bar to come up with a reform proposal, I smiled to myself. I was not derisive, but I thought this to be a bit of a fool’s errand for the lawyers involved. Too many reformers focus on unworkable solutions. Sometimes that involves restricting election spending, despite the First Amendment as interpreted. Other times it means eliminating judicial elections in Wisconsin. Such longstanding public policy is never going to be reversed in this state, and no time or capital should be spent on that front. But I did not give the lawyers involved enough credit. They avoided all this.

It is appropriate to mention who these lawyers are. It was a small working group, or task force, commissioned by the state bar president and chaired by Joseph Troy, former Outagamie County Circuit Court judge and currently a practicing lawyer. The other members, also practicing lawyers, were Christine Bremer Muggli of Wausau, Cathy Rottier of Madison, and Tom Shriner of Milwaukee. By intention (as I understand it), two of the members appointed were generally considered more conservative and the other two more liberal, and their practices collectively cover a wide range.

Let’s be clear first as to what the bar’s proposal is. It is, again, that the Wisconsin Constitution be amended so that supreme court justices would serve 16-year terms with no possibility of reelection. That is it. Everything else stays the same. Justices are elected, ▶▶

and, in the event of a vacancy, the governor appoints someone to serve until an election can be held in the usual way: that is, in the spring, in a nonpartisan election, when no other such election is scheduled (so only one justice may be elected in any given year), all as we now know it.

So what recommends the proposal? A great deal, as suggested in the task force's report, which is thorough but short enough to be read—and compelling enough to have been endorsed by the board of governors, a year and a half or so ago, by a 37–4 vote. To begin, the proposal is elegant—even brilliant—in its simplicity. It makes a change appropriate to important ends—and no more change than that.

Let's get to those substantive ends. Most fundamentally, the proposal ensures that justices will not become political candidates for reelection. Once elected, justices will be free to focus fully on the law and the court's vital role under the Wisconsin Constitution. They will not need to seek support for reelection from individuals and groups with identifiable political perspectives and economic interests. As one task force member has stated, "You can just spend your time being a judge." Imagine that, I would append to that statement.

I myself think that there will especially be benefit to the appearance of justice in criminal cases. One of the great ironies about judicial elections these days is that the opposing forces are much motivated by tort law—and so, of course, the critiques are whether a candidate will be tough on . . . tortfeasors? No, of course not: rather, on *crime*. In addition to the distasteful form, these critiques help create the sense that a justice facing reelection may reasonably be, in reviewing criminal cases, as concerned about electoral fortunes as with the law. So there will be value in adopting the proposal even if none of these cases come out differently. For (and this is true more generally than criminal cases) the proposal would eliminate the perception that any of the justices' decisions are at all affected by an interest in reelection. That perception exists; I say with neither embarrassment nor pride that



I have it myself on occasion. The assertion could never be made again.

There is other important benefit. The proposal should tamp down substantially the negative advertising that has come to dominate any number of Wisconsin Supreme Court races. The advertising that accompanies many races demeans not just the incumbent justice or opponent but also the office. The reason for the decrease under the proposal is elementary. Elections will involve candidates, none of

whom has ever served on the court or, at most, a candidate who has served only a short time following an appointment to fill a vacancy. Either way, the campaigns are much less likely to generate negative attack ads that distort a justice's record on the court.

By contrast, what do we gain from the current reelection system? The possibility of change, one might say—but only in theory, as the task force has explained. In the past 98 years, only one previously elected justice has actually lost a reelection (Chief Justice Currie in 1967).

So our present system gives us expensive, degrading, polarizing reelection races, which may distort decisions and almost always end with the reelection of the incumbent justice. How much better, it seems, to extend the term of the incumbent but avoid the distorting and ugly reelection process.

The single extended term also will promote collegiality on the court. For it will eliminate the possibility that justices will publicly or privately oppose a colleague's reelection. Let no one doubt that this has been the source of much of the court's well-publicized problems in recent years.

Much more might be said in favor of this proposal, but that should give you a sense of it, and the task force's report is available. There are things that may be said against it as well, as there always will be in devising public policy, and perhaps you will account the costs and benefits of the proposal differently from the task force, the board of governors, or me. But the matter deserves your engagement, and I want to turn briefly to something rather apart from the merits.

Specifically, *can* this proposal be enacted? Some say “No.” The primary reason is that it is a nonpolitical proposal that must make it through a political process—in particular, passage by two successive Wisconsin legislatures and then approval by the voters. I appreciate the challenges, but I believe that it can be enacted.

Fundamentally, the proposal is a good idea. That still matters a great deal in this world. Part of this is that the proposal is ideologically neutral. And it maintains Wisconsin’s tradition of nonpartisan election of supreme court justices but reduces the frequency of often politically charged and costly elections. Both those outside the court, and those within, will have considerably less reason to act in ways that reduce confidence in the highest judicial tribunal of this great state.

But let me conclude by emphasizing another aspect of it. The proposal comes from the bar—people uniquely concerned with the Wisconsin

Supreme Court and judicial process more generally but who spend all their time in the real world. That gives me not just pride but hope. The hope is that many other practicing lawyers will recognize the great opportunity that four leaders of the bar and, subsequently, the state bar board of governors have presented to us. We *can* help, to answer the question with which I began.

And so we should. When I speak to graduating Marquette lawyers, I tell them that they will determine the course of the future, by their undertakings as members of the legal profession—the profession to which civil society turns to do its deals, to right its wrongs, and to protect its freedoms. This profession is old, it is honorable, and, for a time, it is ours. We in this generation of the profession find ourselves in a position to help bestow a great gift upon ourselves and our fellow Wisconsin citizens and to bequeath it to those who come after us. I hope that we will seize the opportunity. Thank you. ■

Phoebe W. Williams, L’81

Milwaukee Bar Association’s Lifetime Achievement Award

Phoebe W. Williams, L’81, associate professor emerita at Marquette Law School, received the Milwaukee Bar Association’s 2015 Lifetime Achievement Award, presented by Maxine A. White, L’85. Professor Williams delivered the following acceptance remarks.



Thank you, Chief Judge White, for that very warm and gracious introduction—and thank you to the directors and members of the Milwaukee Bar Association for recognizing the work that I have done. Receiving the MBA Lifetime Achievement Award is a very special achievement for me.

I have many people to thank for

contributing to the achievements you considered when deciding I am worthy of this award. I will mention only a few of them.

First, I must share with you how grateful I am for parents who were exemplars of the principles that hard work, serving others, and justice matter. As a child growing up in Memphis, Tennessee—which was at the time a very racially segregated society—I learned very early that sometimes laws and customs could be unjust and unfair. Nevertheless, Mom and Dad pursued their careers as educators with hope, enthusiasm, and optimism. They never mentioned to me that they received unequal pay, or were denied equal educational facilities, until I questioned them.

As an academic, I researched and wrote about the impact of the Supreme Court’s decision in *Brown* ▶▶

“*Your programs and mission suggest to me you share some of the same goals that black women’s professional organizations pursued over a hundred years ago. The motto of the black women’s club organization is ‘We should lift as we climb.’*”

v. Board of Education. When reflecting on that decision, I realized I was almost eight when the Court decided *Brown*. Dad explained the importance of the Court’s decision to me. We both hoped things would change. As an eight-year-old, I expected our circumstances would improve immediately. I expected that I could visit museums, libraries, and parks reserved for white citizens only. But “all deliberate speed” did not produce the response I expected.

As we waited—as courageous attorneys, like those encouraged by the MBA to pursue justice, litigated cases—my parents taught me the value of pursuing goals with perseverance and hope under all circumstances. They also taught me about the value of service. Mom shared her talents as a pianist with our churches, schools, and organizations for over seven decades. Today at 93, she still plays her keyboard for residents at her assisted living facility. Before his death, Dad served as a high school principal for 17 years. Members of the community displayed their appreciation for the service he offered their children by naming a park after him.

Now I am also grateful for the support I have received from friends and colleagues. A law school friendship led to my first opportunity to clerk at a law firm. Later I was hired by that firm.

While attending Marquette Law School as a student, a faculty member encouraged me to consider a career in legal education. Another faculty member submitted an article that I prepared with a firm partner to the *Marquette Law Review*, and I had my first legal publication.

After I joined the Marquette faculty, colleagues read drafts of articles I prepared; they reviewed exams. Administrators and staff provided research assistance. Over the years, the Marquette faculty, administration, and staff have become extensions of my family. Some of them are here today, and I want

to thank them for all they have done to make my journey as an academic so wonderful. I have had the best job imaginable. Also, while he is not here today, I do want to thank Joseph Kearney, who is dean of our law school. Whenever I approached Joe with ideas and projects, he enthusiastically supported me.

I am grateful to the students whom I have taught over the years. Their critiques and compliments helped me hone my skills. Many of them shared their professional goals with me. And I was happy that they gave me opportunities to help them achieve those goals. They endured my lengthy six-page, single-spaced exams with grace—a special thank you to former students who are with me today to share this honor.

My family has been especially supportive over the years. Due to illness, my husband is not able to join me today. However, I want you to know that he has supported me in many ways, always voicing confidence in my abilities.

Joining me today is my cousin, Montee Boulware. We have traveled the world together. There is nothing like having a lifelong playmate who reminds you to have fun and enjoy life.

Chief Judge White and I have enjoyed a friendship for over four decades that I truly treasure. I am especially grateful that she has always shared her strength of character with me by reminding me of my own.

And thank you again, members of the MBA. Your programs and mission suggest to me you share some of the same goals that black women’s professional organizations pursued over a hundred years ago. The motto of the black women’s club organization is “We should lift as we climb.”

Members of the MBA, you have certainly “lifted me” with this award.

Thank you. ■

CLASS | NOTES

1948

Raymond E. Gieringer is a principal with CETS Tech, a company that sells, and offers consultation and operational support for, Phytotrons. These are chambers that provide controlled environmental conditions for growing plants and have been extensively used for research on how various environmental factors affect plant growth and development. Gieringer is a retired circuit court judge.

1965



Wylie A. Aitken was recently approved in a unanimous vote by the city council in Anaheim, Calif., as the lead negotiator to represent

Anaheim in stadium lease negotiations with the Los Angeles Angels of Anaheim baseball team.

1970



Bernard F. Diederich had two articles in the Federal Bar Association's July magazine, *The Federal Lawyer*. The articles were "Air Ambulance, Rescuer

or Rescuer?" and "The ICC (Interstate Commerce Commission) from A to Z."



Thomas P. Krukowski has joined Whyte Hirschboeck Dudek in Milwaukee as a member of the firm's human resources law

practice group. In the employment and labor law field since law school, he has concentrated his practice on the legal and regulatory issues of concern to employers.

1971

David L. Jorling, who is now retired, is serving on the board of the Oregon Rail Heritage Foundation. The foundation operates a rail museum and maintenance facility in Portland.

1983

Paul T. Dacier has been appointed by Massachusetts Governor Charlie Baker to the statewide Judicial Nominating Commission. The commission is a nonpartisan body composed of 21 distinguished volunteers, appointed from a cross-section of the commonwealth's diverse population. It screens applications for judges and clerk-magistrate positions.

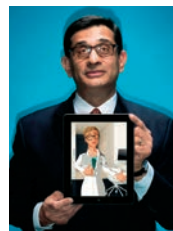
1985



Maxine A. White has been selected by the Wisconsin Supreme Court to serve as chief judge of the state's First Judicial Administrative

District, comprising the Milwaukee County Circuit Court.

1988



Navroz ("Norrie") J. Daroga was the subject of a recent feature in *Milwaukee Magazine* regarding the company he cofounded, Geppetto Avatars.



Lynn M. Halbrooks has joined Holland & Knight as a partner in its Washington, D.C., and Northern Virginia offices. She served as the acting

inspector general for the U.S. Department of Defense from 2011 to 2013.

SUGGESTIONS FOR CLASS NOTES may be emailed to christine.wv@marquette.edu.

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



1989



Jack A. Enea, of Whyte Hirschboeck Dudek, Milwaukee, has joined the board of trustees of the Boys and Girls Club of Greater Milwaukee.

John T. Schomisch is now a member of the firm, Stellpflug Law, in Appleton, Wis.

1990

Arthur T. Phillips has been become special counsel with the employee benefits & executive compensation practice group at Foley & Lardner, Milwaukee.

1995

Bradley J. Kalscheur has been named to the board of Goodwill Industries of Southeastern Wisconsin. He is a partner in the wealth planning services practice group at Michael Best & Friedrich in Milwaukee.

Andrew T. Phillips, who specializes in assisting local governments, school districts, and businesses, is now a member of von Briesen & Roper, Milwaukee. Previously with the Mequon law firm of Phillips Borowski, he also has served as general counsel for the Wisconsin Counties Association for the past decade.

John B. Rhode was elected Langlade County Circuit Court Judge (Wis.). He had been with the Antigo office of Sommer, Olk & Payant since graduating from law school.

1996

Deborah A. Krukowski has joined Whyte Hirschboeck Dudek in Milwaukee as a member of the firm's human resources law practice group.

1998

Peter M. Kimball served as a U.S. administrative law judge in San Juan, Puerto Rico, before returning this past June to the Social Security Administration's office in Minneapolis as an administrative law judge in the disability hearing office.

1999



Mary T. Wagner, assistant district attorney in Sheboygan County, Wis., has recently been added to the team of official bloggers of a multimedia company called "Growing Bolder," which targets an over-50 audience with messages of hope and inspiration.

2001



Michael Maxwell was elected to the Waukesha County Circuit Court. He previously was a Chapter 7 trustee in the Eastern District of Wisconsin and in private practice in Delafield, Wis.

Katherine Maloney Perhach was recently featured in a story in the *Milwaukee Journal Sentinel* describing her role as managing partner at Quarles & Brady.

2002



Semhar Araia is launching a new leadership, diversity, diaspora consulting firm, Semai Consulting, in the Washington D.C. area. Founder of the Diaspora African Women's Network (DAWN), she has been an adjunct professor at the George Washington University Elliott School for International Affairs and an honoree of the White House Champion of Change award and is involved in the implementation of the Eritrea-Ethiopia peace agreement.

Patrick C. Henneger has joined the firm of von Briesen & Roper, Milwaukee, where he focuses on representing and advising local governments on employment issues—in particular, public records and open meetings, state and federal family medical leave acts, the Americans with Disabilities Act, workers compensation, and unemployment law.

The following Marquette lawyers have joined the law firm of Ogletree, Deakins, Nash, Smoak & Stewart:

Timothy G. Costello, L'80

Robert J. Bartel, L'81

Kevin J. Kinney, L'82

Mark A. Johnson, L'92

Dean F. Kelley, L'98

Brian M. Radloff, L'00

Timothy C. Kamin, L'01

Keith E. Kopplin, L'05



A Distinguished Career, Definitely Not in Politics

Grant Langley shrugs off questions about his political views. He doesn't discuss that with people; he doesn't get involved in politics.

In fact, that's central to how he came to be the city attorney of Milwaukee. Except for a brief stint in private practice, Langley went straight from Marquette Law School in 1970 to a position as an assistant Milwaukee city attorney in 1971. Real estate, labor negotiations, zoning, claims against the city—the range of legal work for a municipality, especially one the size of Milwaukee, is wide, and Langley says he got great legal experience in the following years.

But, after a dozen years, he had had enough of one thing in the city attorney's office: politics. "I found the office to be highly politicized," he said. The then-city attorney was close to then-mayor Henry W. Maier. Langley felt that this was influencing the office's work.

The city attorney in Milwaukee is elected to four-year terms. Langley decided to run against his boss in the 1984 election. Langley's campaign centered on a theme: "I wanted to eliminate the politics from our legal work." He won with 56 percent of the vote, even as Maier was winning his seventh term in office.

Now it is Langley, in his eighth term, who is the veteran officeholder. His record of accomplishments, large and small, earned Langley the Jefferson B. Fordham Award for Lifetime Achievement, given annually by the American Bar Association Section for State and Government Law and presented in Chicago this past July.

If "no politics" was Langley's first theme as city attorney, his second has been to furnish "the best legal services we could provide," not only to the city government but to the Milwaukee Public Schools and the city pension fund, both of which are also represented by the city attorney's office. To be praised as a fine attorney is a major compliment from Langley, and he says that often about members of his staff.



Langley has led Milwaukee through quite a few major legal matters during his tenure, with some high-impact successes. To name several:

- In 1999, the city reached a "global pension settlement" with unions, retirees, and other parties, resolving many years of litigation. The settlement gave immediate increased benefits to retirees, and long-term stability to the pension fund, which Langley called "the best-funded pension fund in the country." He calls the agreement his most significant accomplishment.
- He oversaw the resolution of a massive number of claims against Milwaukee after cryptosporidium, a parasite that caused hundreds of thousands of illnesses, contaminated the city's water supply in 1993.
- Langley helped end the longstanding "sewer wars" among many local governments, state agencies, and others over pollution, particularly of Lake Michigan, caused by sewage overflows.
- This year, Langley is working for the second time on the complex agreements to build a new basketball arena in downtown Milwaukee. He represented the city in work related to the Bradley Center's construction in the late 1980s.

At 70, Langley has wrestled with whether to run again in 2016. If his wife, Gail, were alive, he is sure he would retire. Sadly, she died in 2009. And now? Langley likes to golf and fish, he reads a lot, and he is close with his two sons, both of whom live in the Milwaukee area. But he loves his work. It's so much of his life—and the new national honor underscores how much he has accomplished.

To run again? It's a tough decision. But it's one he certainly won't make with politics in mind. ■

Old-Fashioned Typing Sparks Success in Corporate Law

It wasn't that long ago when there was no such thing as a personal computer and typewriters were used to produce academic papers and the like. Some people turned their typing skill into paid work, producing clean documents for other people with less time or less skill with typing.

When Kathie Buono was an undergraduate at the University of Dayton in Ohio, she made money typing on weekends. She worked mostly for students at the university's law school.

getting things done. She switched to transactional law, with one of the firm's leaders, the late Patrick Ryan, L'69, as her mentor.

She worked on private equity/venture capital and public company securities. That led to a strong relationship with the private equity arm of M&I bank, and then with Mason Wells, a firm created in a spinoff from M&I. Buono headed up the efforts of 20 to 25 lawyers and others working with Mason Wells. She said she valued the long-term relationships and liked the work itself, especially mergers and acquisitions.

After 28 years at Quarles & Brady, Buono was approached by Briggs & Stratton, a large Milwaukee-area manufacturing firm. The firm's general counsel, Robert Heath, was planning to retire. The chance to do something different and reenergizing appealed to her, so Buono joined Briggs & Stratton in early 2015; she holds the titles of vice president, general counsel, and secretary of the corporation.

So how's it going?

"Great. I love it," Buono said. She left a place with good people and a good work culture, and she joined a place with good people and a good work culture, she said, and she has learned a great deal about the industry she is part of now.

Buono said that Marquette Law School's emphasis on practical applications has served her well. A big reason for this is that Buono herself is a practical person. She said she's not the kind of lawyer who loves the law as an intellectual pursuit. But getting things done well? She's built her career on that, paired with her talent for building relationships.

As a practical person, Buono keeps track of what is going on around her. That is clear in her work. It's even clear from a big interest outside of work. Her husband, John, loves baseball and plays amateur hardball at a level that includes national tournaments. Buono is not a passive fan—she keeps the team's scorebook, logging everything that happens on the field.

Want to know what's happening? Ask Kathie Buono. That's true on a lot of fronts. ■



"I had no vision of going to law school whatsoever," Buono recalled. But she got to know the students and their papers, and she liked both the people and the subject matter.

"The rest is history," she said. She enrolled at Marquette Law School, which, among its advantages, was near a lot of family for Buono, who spent most of her growing-up years in Racine, Wis.

Buono joined Quarles & Brady in Milwaukee after graduation in 1986, starting out as a litigator. But she decided she didn't have the right personality for that—for one thing, there was too much gamesmanship, she said. For another, progress came too slowly. She likes

Three Marquette lawyers practicing in the intellectual property practice group at the Milwaukee office of Michael Best & Friedrich have been made partners: **Alan C. Cheslock, L'08**, who worked at Michael Best as a patent engineer before becoming a lawyer there; **Aaron K. Nodolf, L'08**, whose practice emphasizes acquisition and enforcement of U.S. and foreign patents in mechanical and electromechanical technologies; and **Kevin P. Rizzuto, L'09**, who focuses his practice on helping businesses obtain strategic patent protection for new technologies and navigate existing patents to avoid infringement risks.



Shannon Masson

has joined the law department at ArcelorMittal USA, Chicago, as senior counsel and compliance officer.

She is responsible for

the company's United States ethics and compliance program, as well as for handling a variety of corporate matters.

John T. Reichert was reported in the spring 2015 *Marquette Lawyer* as joining Godfrey & Kahn. He is now a member of Reinhart Boerner Van Deuren, having come aboard the firm's financial institutions practice group.

2003

Eric J. Lalor has been added as a voting shareholder with Boyle Fredrickson, Wisconsin's largest, full-service intellectual property law firm. Lalor has been with the firm since 2007, with a practice focusing on the mechanical arts.

2004



Camilla M. Tubbs

is now the assistant dean for library and technology at the University of Maryland. She joined the faculty in 2012 as deputy director of

the library after holding the positions of head of instructional and faculty services and lecturer in law at the Lillian Goldman Law Library, Yale Law School.

2006



Devan J. Bruea

was recently hired as the director of global tax and regulatory compliance for Spinnaker Support, a leading global provider of third-party software maintenance, based in the Denver, Colo., area.

Donna M. Wittig has joined the Las Vegas office of Akerman LLP, where she practices in the firm's consumer finance litigation & compliance practice group.

2007



Jason E.

Kuwayama was elected as a shareholder in the banking & financial institutions practice group of Godfrey & Kahn's Milwaukee

office. His practice focuses on bank mergers and acquisitions, asset purchases and sales, bank regulation and compliance, and general securities matters.



Nicholas J. Linz

has joined Hager, Dewick & Zuengler, in Green Bay, Wis. His areas of practice include business and civil litigation, employment law,

and landlord/tenant law.

2008

Thomas E. Howard has been reappointed as a member of the mental health law section council of the Illinois State Bar Association.



Steven W. Laabs

has joined the corporate & finance practice group of Whyte Hirschboeck Dudek, Milwaukee, as a member of the corporate transactions

team. His practice focuses on representing companies and business owners in connection with a variety of corporate, commercial finance, and real estate transactions.

2009



Farheen M. Ansari

has accepted a position as an assistant district attorney for Harris County in Houston, Tex. Before moving to Texas, she had a solo

practice in Madison, Wis.

David D. Conway has taken a position as assistant United States attorney in Madison, Wis., following six years at a firm in Washington, D.C.

John G. Long has joined Michael Best & Friedrich's expanding office in Austin, Tex., as senior counsel in the labor and employment relations practice group. He previously operated a Houston-based sports law firm.



Charles Stone has been named associate general counsel of the American Chamber of Commerce in Beijing, China. He is an associate at

Reed Smith, a limited liability partnership registered in England.

2010



Scott M. Butler was named the "2015 Wisconsin Young Lawyer of the Year" by the Young Lawyers Division of the State Bar of

Wisconsin. He is an associate with Fitzpatrick, Skemp & Associates, in La Crosse, Wis.



Sondra L. Norder was honored in June with the "Tomorrow's Leaders" Award from the Catholic Health Association at its annual assembly in Washington, D.C. She is president and CEO of St. Paul Elder Services, Appleton, Wis.



Vintee Sawhney has been named director of medical staff services and medical education at Wheaton Franciscan

Healthcare in Milwaukee.

The following Marquette lawyers were honored by the Milwaukee Bar Association at its 157th Annual Meeting & Luncheon in June 2015:

Lifetime Achievement Award: **Phoebe W. Williams, L'81**

Distinguished Service Award: **Michael F. Hupy, L'72**

Michael McCann Distinguished Public Service Award:

Norman A. Gahn, L'84, and **Mark S. Williams, L'77**

2011



Mary L. Ferwerda has been named executive director of the Milwaukee Justice Center, a collaborative endeavor of the Milwaukee Bar

Association, Marquette University Law School, and Milwaukee County to assist low-income and disadvantaged people who are unable to afford an attorney to represent them in civil court.



Rebecca López was honored as "Young Alumna of the Year" by the Father Danihy Alumni Club, a chapter of Alpha Sigma Nu, the

Jesuit Honor Society. She is an associate in Godfrey & Kahn's labor, employment and immigration law practice group, in Milwaukee.

2012

Grant Erickson is managing partner at Brooks, Kase & Erickson, a general practice law firm in Door County, Wis.

2013

Mitchell D. Lindstrom has joined the business law practice group of the Milwaukee office of Quarles & Brady.

2014

Deborah A. Long has become affiliated with the Law Office of Deanna J. Bowen in Gurnee, Ill.

2015



Jason D. Buckner has joined Brennan Steil in Janesville, Wis., practicing in the areas of business, intellectual

property, litigation, and real estate.

PROFILE: Jack Miller, L'78

Amazing Places, Amazing Adventures—and Some Legal Work, Too

Fortunately, Jack Miller found some time to be interviewed from his home in Alaska—but it had to fit in between his return from nine days of hiking in remote parts of the state's Denali National Park and his departure for three days of climbing in the Chugach Mountains on Alaska's southern coast. Right after the climbing trip? He was leaving for the red salmon fishing season in the western part of the state.

"I've dedicated my life to enjoying the wilderness in Alaska, and it's really worked out well," said Miller. It's a life in which Miller and his wife lived for a few years more than 50 miles from the nearest road; in which he has watched migrating caribou herds so large that they took all day to pass his tent; in which he has had numerous close-up encounters with bears; in which wolves and eagles and, in short, the most breathtaking sights have been parts of many of the Millers' days and parts of their many years.

Miller grew up in Milwaukee's Bay View neighborhood. He starred on the Bay View High School football team; his wife, JoAnn, was captain of the cheerleaders. They got married after his second year in law school and took a summer trip across Canada, having to return to Milwaukee (and law school) before reaching the Alaskan border. "We decided if we were going to look for a job, we were going to look for one only in Alaska," Miller said. Even before he finished law school, a firm in Anchorage offered him a position.

"I stopped being a lawyer after about 11 months," Miller said. The couple moved to a remote spot in the vast Alaskan wilderness, where they homesteaded a property. They had a son and eventually decided to move back to Anchorage. But legal work still took a distant second to involvement with nature. In many years, he did little to no legal work. But he did spend time as a commercial fisherman and hunting guide and in several jobs with the Alaska Department of Fish and Game.



His legal work from the start has primarily involved energy companies. After the enormous Exxon Valdez oil spill in 1989, Miller became one of the lead attorneys for the main contractor working on the cleanup. He has continued to work on large commercial transactions for oil and gas companies, including work around the world.

These days, Miller's wife, JoAnn, doesn't go on his wilderness trips often, but, at 64, Miller remains immersed in Alaska, usually traveling solo. Alaska, he said, is "still an amazing, amazing place." And to be alone in nature is "the most pure way to live in the moment. . . . It's almost the exact opposite of being a lawyer."

In addition to part-time work on commercial transactions, Miller does pro bono work at a clinic associated with a church in Anchorage. It's a largely Hispanic congregation, with many people needing help with immigration matters and debt problems. He finds it rewarding; he said that 2015 will be the third year he works more pro bono hours than billable hours.

The Millers have two sons who live in the Anchorage area. "We'll never be rich, we'll never have a big house, but none of that matters to me," Miller said. "I can't tell you what an amazing life I've had, what a privileged existence I've had." ■

Marquette University Law School, Ray and Kay Eckstein Hall, P.O. Box 1881, Milwaukee, Wisconsin 53201-1881 USA



An Appeals Court in Eckstein Hall

Marquette Law School thanks the U.S. Court of Appeals for the Armed Forces for holding a session in Eckstein Hall in April. After the court heard arguments in a case, the five judges answered questions from the more than 150 students and others in attendance. The visit was coordinated by Professor Scott Idleman and Adjunct Professor Al Rohmeyer. Shown above, from left, are Rohmeyer; Judge Margaret A. Ryan; Judge Charles E. Erdmann; Chief Judge James E. Baker; Joshua Bryant, a student who argued before the court as amicus curiae; Judge Scott W. Stucky; Judge Kevin A. Ohlson; and Idleman. See story on page 5.