

Of Reason, Experience, and Politics

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

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

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

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

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

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

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

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

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