INSIGHT & PERSPECTIVE

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

Gabriel "Jack" Chin

The Additional Costs of Conviction

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

After decades of obscurity, collateral consequences seem to be moving into the spotlight of the United States legal system. Everyone knows that a conviction may result in imprisonment, fine, probation, or parole. Until relatively recently, even among lawyers, few understood that people with criminal convictions face a network of additional legal effects, known as collateral consequences. This was unfortunate, because collateral consequences affect many areas of life, often more significantly than traditional forms of punishment. Some criminal convictions can lead to loss of civil status; a citizen may lose the right to vote, serve on a jury, or hold office; a non-citizen may be deported or become ineligible to naturalize. A conviction may make a person ineligible for public benefits, such as the ability to live in public housing or hold a driver's license. Criminal convictions affect employment; laws prohibit hiring of people with convictions as peace officers or as employees for the health-care industry. A criminal conviction can also make a person ineligible for a license or a permit necessary to be employed or to do business; it can cause the forfeiture of a pension. Criminal convictions can also affect family relations, such as the ability to have custody of or visitation with one's child. While criminal convictions have serious nonlegal effects, such as stigma or shame, the focus of this article is on legal mandates.


Gabriel "Jack" Chin

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

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

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

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

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

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

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

Relief from Collateral Consequences

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

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

Eliminating Unnecessary Collateral Consequences

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

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

Illustrations by Robert Neubecker

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

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

The Legislative Response

Subjection of new collateral consequences to ex post facto limitations, and even holding that a state or federal constitutional provision requires notice of collateral consequences, by no means completely resolves the problem. As important as those changes may be in individual cases, they are incremental with respect to the system as a whole and to the tens of millions of people validly subject to existing collateral consequences. Even constitutional limitations do not prevent imposition of collateral consequences once the limits have been satisfied. Courts have no authority to rewrite or invalidate otherwise constitutional laws in the name of good policy. Courts work at the margins, at best trimming collateral consequences to the extent that they are unconstitutional, or interpreting laws to avoid constitutional doubts.

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

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

James Sandman

"In Pursuit of a Cause I Really Care About"

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

On becoming a law clerk after graduating law school:

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

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

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

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

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

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

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

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

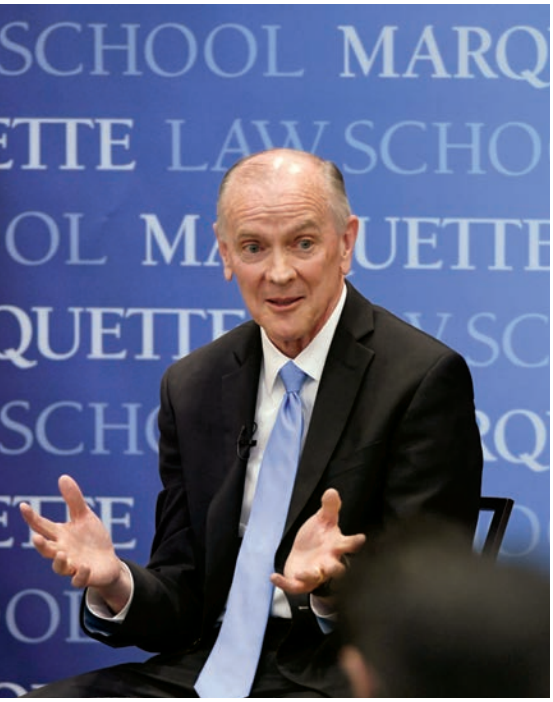
but my colleagues. That's not why I went to law school. I mean, I know how to do that. I knew what the levers were to manage revenue and expense—but I just came to feel a disconnect between what I was doing for a living and my values as a person.

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

In the fall of 2007, when I'd been considering making a career change for some time, I went to the annual pro bono breakfast of the Washington Lawyers' Committee for Civil Rights. The speaker was Michelle Rhee, who had recently become chancellor of the District of Columbia Public Schools. She subsequently became the face of urban public education reform in the United States, but she didn't have a national profile at that point. She gave an electrifying speech. Everybody who was there remembers it. And she left you with the sense that if any person could turn around what was then the worst-performing public school system in the United States, she could.

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

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



James Sandman

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

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

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

Why he left his position with the school system:

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

The Legal Services Corporation:

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

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

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

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

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

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

The need for changing the system:

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

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

James Sandman

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

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

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

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

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

Rebecca S. Eisenberg

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

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

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

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

Before we discard the conventional wisdom, we should consider two

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

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

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

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

Rebecca S. Eisenberg

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

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

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

Rebecca S. Eisenberg

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

Therein lies the Catch-22 for unregulated NGS genetic testing: Insurers won't pay for testing unless the results have validated clinical significance. Drug companies will pay for premarket validation of the relatively small number of mutations that allow them to get targeted therapies approved by the FDA. But beyond these "druggable" mutations, drug companies have less interest in understanding the clinical significance of the much larger universe of variants in genes that play a role in cancer. Because many of these variants are relatively rare, it is not economically feasible to study them in premarket clinical trials on the scale that drug companies typically undertake in pursuit of FDA approval. Studies in much larger populations of patients are necessary to correlate these variants with health outcomes in order to validate their clinical significance, a job better done in observational studies in the course of clinical care. But clinical care won't happen without insurance coverage. In short: Validation requires use in clinical care, use in clinical care requires insurance coverage, and insurance coverage requires validation.

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

"Reasonable and necessary" care under the laws governing Medicare coverage is not necessarily the same thing as "safe" and "effective" care under the laws administered by the FDA. Nonetheless, for the most part, health insurers provide coverage of FDA-approved technologies, although they may require prior authorization when cheaper alternatives are available. Sometimes federal or state law coverage mandates require them to cover these products, and sometimes they are simply avoiding the burden of conducting their own technology assessment by relying on the FDA's determinations.

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

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

Goodwin Liu

An "Unplanned" Career Reaches Legal Heights

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

On his personal background:

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

I think my parents' story is so typical of the general immigrant story. They came to this country without much money, from a place that at the time was not democratic. And immigrants, I think, feel this, not just in the political sphere, but they feel economically as well, that they and their kids are not going to get a fair shake in a society that is not governed by the rule of law. My parents, like many immigrants, came to America because they really believed that this country is dedicated to the rule of law and that people here will be treated fairly and have equal opportunity. They started here with very little, but they had good educations and they worked hard to give their children good opportunities.

On how he became a lawyer:

I always think of my career path as a series of unplanned events. Those of you who are students here should take heart—there's no plan, believe me. It wasn't until after college that I decided to go into law. I had finished college and had applied to medical school and gotten in, and I was given a deferred admission at a very good medical school in California. My parents were so excited that this happened, and then I eventually disappointed them by deciding not to go. But they recovered.

[Liu graduated from Yale Law School in 1998.]

On Justice Ruth Bader Ginsburg, for whom he clerked:

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

On being nominated for a federal appellate judgeship:

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

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

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

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

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

It is one of the biggest challenges that faces not only the legal profession but also society more broadly. During my Supreme Court clerkship, we had lunch with Justice David Souter. He was the attorney general of New Hampshire and became a First Circuit judge and then was elevated. Before that, he was a lawyer in New Hampshire, and he said that when he was coming up in his profession, it was inconceivable in his community that a person who needed a lawyer—for a custody issue, benefits, a divorce, or probate—could not get a lawyer. If people could pay a fee, they would pay; but if they couldn't pay a fee, well, that's fine, too; you just serve them anyway. That made an impression on me. So, as a concluding thought, I'll offer an exhortation to the lawyers and the law students here that doing important work for people who cannot afford legal services is so important. No matter what you do in your career, that has to be one of the things that you do.

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

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

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

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

Mike Gousha

"Knowledge Is Great, but You Need to Listen"

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

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

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

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

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

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

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

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

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

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

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

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

Mike Gousha

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

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

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

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

Speaking of voices and conversations, my second piece of advice would be to have internal conversations about your career, regularly. What am I talking about? We'll call it your annual integrity checkup. Ask yourself some hard questions. "Why am I doing this?" "Do I believe in what I'm doing?" "Does it bring me joy?" And if it doesn't, "Why am I still doing it?" Twelve years ago, I had to take a long, hard look at my own career. From the outside, I'm sure many folks thought I was in a great situation. But I wasn't happy, didn't agree with the direction of our newsroom, and decided I had to leave and find a new job that more closely aligned with my principles and values. I've never regretted that decision for a moment, and you won't either. It's okay to compromise on our preferences. But it's not okay to compromise on our principles. And when our passion and joy are gone, we owe it to ourselves to make a change.

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

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

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

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

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

My niece, Sarah, has a different set of challenges. She teaches English at a high school in an affluent school district in Silicon Valley in California. Sarah runs the drama program. But while high-achieving, it's a district with its own set of challenges: intense academic competition, tremendous peer pressure and cultural expectations, a higher rate of suicide. More than a few of the kids in Sarah's drama program might be considered outsiders and loners. And it's working with those kids that Sarah often finds most rewarding. She helps them find a creative outlet and teaches them how to work together. Often these kids find a new enthusiasm for school, their sense of dread replaced by a sense of belonging. How do we measure that? And yet it's success, just the same. We should take a moment, to acknowledge and celebrate these achievements. Sarah, too, is a game changer, a life changer for her students.

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

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

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

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

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

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

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